UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DEVELOPING A COMPETITION ADVOCACY MODEL IN THE CONTEXT OF THE INTRODUCTION OF COMPETITION POLICIES IN LATIN AMERICA

Study prepared for the Competition Law and Policy and Consumer Protection Section

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Preface

The basic mandate for UNCTAD's work in the area of competition law and policy is provided by the Conference itself and by the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (adopted by General Assembly resolution 35/63 of December 1980), which constitutes the sole universally applicable multilateral instrument in this area, although it is not a legally binding instrument. In the implementation of this mandate, the UNCTAD secretariat prepares studies on different competition issues, services annual meetings of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy, and undertakes technical assistance, advisory and training activities for developing countries and countries in transition, aimed at assisting them to adopt and effectively implement national competition laws and policies, to establish appropriate institutional mechanisms and procedures, and to participate effectively in the elaboration of international rules in this area.

At the present time, UNCTAD is heavily involved in the preparations for UNCTAD X in February 2000. Moreover, UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy, meeting at its second session (7-9 June 1999), acted as preparatory body for the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, scheduled to meet in September 2000.

In addition to this, the World Trade Organization (WTO), at its Singapore Ministerial Conference (9-13 December 1996), decided to establish a Working Group on the Interaction between Trade and Competition Policy at WTO, and decided, inter alia, that this Group would draw upon work in UNCTAD and the contribution it can make to the understanding of issues. Further, it encouraged cooperation with UNCTAD, to ensure that the development dimension is taken fully into account.

To help fulfil these mandates, the UNCTAD secretariat is issuing a series of papers with the aim of providing a balanced analysis of issues arising in this area, and addressed to governmental officials, officials of international organizations, representatives of intergovernmental organizations, business people, consumers and researchers. While the series would best be read as a whole, each study may also be read by itself, independently of the others.

The main objective of publishing these papers is informative, for background use by delegations, and they are part of the process of capacity-building in the broad areas of competition law and policy and competitiveness in globalizing markets. However, the papers are published under the name of their authors and the views expressed therein do not necessarily reflect those of UNCTAD.

This series of papers has been made possible thanks to voluntary contributions received from the Netherlands and Norway. These contributions are gratefully acknowledged.

Rubens Ricupero
Secretary-General of UNCTAD

Geneva, August 1999

Executive summary

This study is a contribution to the current debate on the introduction of competition policies into Latin American countries where markets have begun to be opened up and deregulated. It tries to identify the policies likely to produce the institutional and cultural changes needed if the processes involved are to be successful, particularly with regard to competition advocacy.

The study is organized around three policy objectives: (i) greater market contestability; (ii) an efficient economy, thanks in particular to lower transaction costs; and (iii) the introduction of a cultural framework that allows competition ideas and goals to become embedded in society and to become part of society's values.

The actual economic circumstances of each country - particularly the level of economic development, the size of the economy, the relative importance of the public and private sectors and the pattern and nature of foreign trade - need to be taken into account. These factors have a major influence on the cost of adjustments and, consequently, on the specific, realistic goals set by competition agencies.

The redefinition of the role of the State is a crucial factor in the economic reorganization that needs to take place. The State should act as the guarantor of clear and transparent rules and as the monitor of conduct that might restrict, or which already restricts, the smooth functioning of competition mechanisms.

Within this general framework, competition agencies will have a decisive role to play. Their success will depend on: (i) their independence, and sufficient political support for them; (ii) the introduction of competition advocacy models that enable entry barriers to be removed and the markets to operate; (iii) the development of market-monitoring mechanisms; (iv) the strengthening of the courts; (v) steps to encourage competition agencies to share their experiences; (vi) recognition and support for the role of private actors; and (vii) the involvement of competition agencies in privatizations.

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Introduction

This study is a contribution to the current debate on the introduction of competition policies into various Latin American countries. It is impossible to begin to discuss the content of policies for the competition regimes in the region without looking at the context in which competition laws have been enacted, which is one of opening up and deregulation. The prevalence of interrelated systems in the form of protectionist policies has given rise to some problems in rising to the challenge of establishing market economies.

That is the basis on which the problem at the heart of this study has been defined. It concerns the promotion and consolidation of an institutional and cultural change in society in a way that helps strengthen the institutions intended to support the new economic system. First and foremost among these institutions is the market itself, which can be accepted and become a reality only if new values and patterns of behaviour are established and the aims of competition policy are reinforced. It is therefore essential to review the characteristic features of more traditional systems, as well as the way in which those aims are interpreted in industrialized countries. The central problem is to determine which of the elements intended to consolidate market principles should be incorporated into competition policy so as to ensure that the policy is effective and that free market principles operate efficiently in the countries which have recently started to open up their economies.

To solve this problem, academics and experts from developed countries were interviewed and a good deal of information was exchanged with the experts running the competition agencies in Latin America. The extensive literature on the key aims of competition policies was reviewed, as were the experiences of implementing them in Eastern Europe and some relevant work in developing countries. The theoretical basis for the main reference points can be found in the classic works on how to set up competition frameworks and in publications dealing with institutional economics, transaction costs, entry barriers and structural reform.

The main aim is therefore to draw up guidelines on what should be included in competition policies in a given setting, in such a way that the introduction of some ideas on competition advocacy will enable the following three policy objectives, which underlie the whole of the text that follows, to be achieved: (1) greater market contestability; (2) a more efficient economy, through lower transaction costs; and (3) a culture in which the principle of competition is firmly established in society, so that consumers and the general public become the main guarantors of this kind of institution in society.

I. COMPONENTS OF THE MODEL

The components and concepts which will serve as the basis for the competition advocacy model are listed below:

- Competition laws as framework laws;
- The cross-cutting nature of competition;
- The position of the competition agency in relation to other State bodies;
- The market as an institution;
- Recent liberalization, structure and size of the markets in Latin American economies as factors in the definition of the objectives for competition regimes;
- The need to change the State's role in the economy;
- The legitimization of institutions in the process of strengthening free market economies;
- Deregulation and free competition;
- Publicizing the objectives of the laws;
- Features of the traditional advocacy model:
    1. Promotional activities concerning the aims and scope of the laws;
    2. Development and dissemination of the theory;
    3. Answering queries and carrying out investigations;
    4. Inclusion in discussions within the Executive;
    5. Preparation of technical reports and advice when laws are being drafted and debated;
    6. Relations with the courts;
    7. Relations with regulatory bodies in specific sectors.

Three basic premises underlie the points listed above. The first concerns competition legislation as a framework law for the economy, and the subsequent need to reconsider the form and extent of State intervention in the economy. The second is the cross-cutting nature of competition policy, which will be accepted by society only if action is taken by the State and the private sector. The third premise, which follows from the first two, is that the use of the proposed advocacy model will not only modify the traditional advocacy model, but will also ultimately make the general public and the consumer the guarantors of the institutions of the economic model put in place.

These are the three basic findings to emerge from the development of this model for competition advocacy in countries with economies which are in the process of being opened up and deregulated, as is the case with most of the economies in Latin America. However, as most of the competition agencies in this region are fairly new, this study offers only starting points rather than conclusions.

II. CONCEPTUAL CONSIDERATIONS

A. Competition laws as framework laws for economic activity

The current interest in competition policies reflects their importance as framework laws for economic activity. They are of course important because framework policies and the existing institutions help define the context in which the market economy operates, in both developed and developing countries. We speak of a "framework law" because the market, as an institution, requires rules for all economic agents and for all transactions. As well as pursuing the goals of establishing a market economy, a new law governing the interrelationship between economic agents introduces a new and universal behavioural framework that applies to all members of society. Whatever the design of the particular framework, if there is a real commitment to setting up such a mechanism, consistency will be one of the overriding principles in the process, to ensure that the mechanism is not incompatible with competition policy. The Government lays down the basic rules that define the work and scope of the institutions, including the market; it should therefore not act only when those institutions fail to work, but should establish a framework within which they can work acceptably.

If such consistency was the aim of society, the "nerve centres" of competition would have to be dealt with before any regulation or rule was drawn up that might affect the relationships between economic agents, since, in an abstract sense, all individuals in society are covered by competition rules. Although the rights to economic freedom are enshrined in law, the way in which they are exercised is determined by a framework that is above personal considerations. Thus, Coase points out that an elaborate system of rules and regulations is needed if there is to be something close to perfect competition.[1] If the framework provided by competition policies serves that general purpose, these policies become reference points. The development of the market as an institution then becomes a given, not just a matter for competition agencies or a few organs of State.

The nature of the framework law reveals the breadth of these concepts, insofar as they involve all economic activities, regardless of the extent of State intervention in them, the structure of ownership, particular regulatory frameworks or the protection regime to which they are subject.

It is precisely at this point that competition policy becomes linked with the concepts of regulation and opening up. Competition or, in fact, competition laws are not intended to replace the system of prices. Particularly in developing countries, where transaction costs have generally been associated for long periods with a non-market-oriented system, the argument is put forward that competition policy should prioritize or promote the establishment of the structure known as the market, rather than deal with ways of doing business.

In this context, when we speak of setting up institutions as a necessary part of economic development, we are not referring only to the consolidation of a system to protect competition: helping establish markets is a preparatory step and paves the way for understanding the market as an institution.

1. Competition policies and other areas of State intervention

The term "competition policy" is defined as the set of governmental measures that have a direct impact on the individual behaviour of companies and on industry structure. Khemani and Dutz (1994) point out that a suitable competition policy includes, on the one hand, the government policies that can be implemented to improve competition in national and local markets (international trade liberalization, foreign investment and economic deregulation) and, on the other, a competition policy that anticipates anti-competitive practices by companies and unnecessary government intervention in the market. As far as the latter aspect of competition policy is concerned, it should be pointed out that, as will be discussed in more detail below, such intervention is not expressly mentioned in the majority of Latin American competition laws, although it is a fundamental consideration in the debate on the introduction of the policy.

The above approach implies that it is necessary to incorporate this view of competition - and subsequently aspects of efficiency - in all areas where the public sector intervenes, including in government policy-making, the development of normative frameworks and negotiations on international agreements.

The elements identified as integral parts of a comprehensive competition policy include various situations intrinsic to Latin American countries, which point to areas of intervention that will ultimately determine the priorities and effectiveness of the agencies in their efforts to create favourable conditions for companies, improve the incentives for achieving static and dynamic efficiency and promote a reallocation of resources.[2]

It should be borne in mind that State regulation of economic activity, either to offset the failings of the market or to ensure fairness, is often incompatible with competition. In fact, it is possible to speak of free competition only in those sectors where the State does not intervene extensively to determine the manner and conditions in which the economic activity must be carried out.[3] A European Commission report on competition policy reached similar conclusions, noting that, in its desire to strengthen the implementation of competition rules in markets that were once protected and in which competition played a minor role (especially in regulated sectors), the Commission has paid particular attention to the implementation of competition rules in those markets (energy, telecommunications, transport, etc.).[4]

As competition is so closely related to development in all sectors, the task of promoting it cannot be limited to the competition agencies, which generally take action only in cases where it is suspected that competition is being restricted, and the possibility of involving other regulatory agencies in that task basically depends on how the objectives of competition laws are interpreted.

The importance of competition policy therefore goes beyond the introduction of competition into regulated markets. Once competition opportunities have been created, companies need to be able to take advantage of them without being hindered by restrictive practices or by restrictions emanating from the regulations themselves.

It can thus be concluded that it would be advisable to base government policy-making on competition policies, so that these polices can be implemented effectively and in such a way that there is clarity and consistency in the pursuit of policy goals.

B. Cross-cutting nature of competition policy

An analysis of the scope of the objectives set out in the laws and regulatory frameworks in a country can contribute to the cross-cutting application of competition principles.[5] Even though the emphasis in many forums is on analysing the substantive provisions of the laws, the role of competition agencies within the framework provided by those laws should not be

overlooked. Some countries, such as the Dominican Republic and Bolivia, are now considering legislation and would probably find it valuable, in the light of other countries' experience, to adopt a broad interpretation of the duties of the body responsible for implementing competition policy.

1. Purpose of the laws

In recent months, serious efforts have been made to collect and organize information on the regulatory framework for competition in Latin America,[6] making it possible to see the breadth of scope of the competition laws, most of which have been adopted fairly recently.[7]

The competition agency's capacity to act depends largely on the operational independence granted to it and on a broad interpretation of the objectives and scope defined in the legislation. In Latin America, most of the competition legislation provides broad terms of reference that go beyond the prosecution of anti-competitive practices.

The objectives of this legislation, whether they are defined in the presentation of the purpose of the law or in the provisions of its articles, are summarized in table 1. Only those laws containing general provisions other than the prosecution of monopolistic practices have been included.

In many cases, the passages selected illustrate those aspects that later become an integral part of the competition agencies' work. However, it should be emphasized that the agencies are required to play a far broader regulatory role, given the cross-cutting nature of competition policy. Insofar as the rules are designed to promote the market, not just identify prohibited behaviour, the agencies are required to undertake a range of activities.

This is why forums and meetings are so important in allowing us to understand this process in different countries, since the identification of areas of intervention and methods for putting competition principles into practice shapes the agencies' role and, moreover, provides a framework for interpreting how the rules work in economies with several common features that distinguish them from countries with long traditions of free markets.[8]

Table 1

Objectives of competition law in Latin America:

Argentina	To ensure the correct functioning of markets, by guaranteeing free competition, and to punish behaviour that limits, restricts or distorts competition or that constitutes abuse of a dominant position in the market, when such behaviour might result in harm to the general economic interest.
Brazil	To prevent and punish the wrongful use of economic power and offences against the economic order as defined in the constitutional provisions on freedom of initiative, free competition, the social function of ownership and consumer protection.
Columbia	[…] to enhance the efficiency of the national production apparatus; so that consumers may enjoy free competition and access to markets for goods and services; so that companies can participate freely in markets; and so that the market can offer a range of prices and quality for goods and services.
Costa Rica	In competition matters, specifically, the purpose of this law is to establish the protection and promotion of the competition process and of free competition, by preventing and prohibiting monopolies, monopolistic and oligopolistic practices and other restrictions on the efficient functioning of the market.
Venezuela	The purpose of this law is to promote and protect the exercise of free competition and efficiency for the benefit of producers and consumers and to prohibit monopolistic and oligopolistic behaviour and practices and other means of impeding, distorting or limiting the enjoyment of economic freedom.
Panama	The purpose of this law is to protect and ensure free economic competition and free competition, by eradicating monopolistic practices and other restrictions on the efficient functioning of the markets for goods and services, in order to protect the higher interest of the consumer.

2. Competition policies and recent liberalization

The approach to the structure and objectives of competition legislation should take account of the following factors, among others: level of economic development, size of the economy, relative size of the public and private sectors and import and export trends. These factors affect the policy instruments adopted and certainly need to be taken into account when

the enforcement methods perfected in the developed countries are introduced.[9] The "transition" referred to so frequently involves the move from a centralized to a market system or the process of liberalization and deregulation, as the case may be. Owing to the features the two models bring to the structure of the economy, the approach to enforcement can often affect the cost of adjustment. For this reason, clarification of how competition objectives relate to other State objectives, the approach to efficiency and aspects such as sustainable market structures can have a decisive influence on the objectives set by the agencies on a case-by-case basis.

It should be pointed out that the term "transition" is taken here to refer to a process of profound change in society that often incorporates the interpretation of elements of the rule of law. In this way, the introduction of competition laws gives meaning to economic rights, highlighting them and protecting them, while fundamentally changing the order and nature of the State's approach to the economic process.[10] Precisely for this reason, the laws are important in a society governed by the rule of law, as the commitment to set up a market economy obliges the State to take on a new role and individuals to become actively involved in the processes of change.

The task of examining all the elements involved in this transition is fundamental to a review of the objectives of competition policy, basically because it defines an agenda for the State rather than for a competition agency in particular. However, the background - of politics and interest groups - against which competition laws are enacted and liberalization principles are introduced often changes, and the task of promoting the State's and society's competition objectives falls to the competition agencies. This explains why a process of institutional development that is not defined or outlined in competition laws may take place.

According to Tineo (1996), competition laws are something totally new for countries with economies in transition and understanding them is left for the most part to the agencies responsible for their application. This means that the discussions between these "experts" are crucial in gaining an understanding of what characterizes the promotion of free competition in these economies.

3. Position of the competition agency in relation to other State authorities

Ideally, the existence of competition rules, given their very general nature, should reduce the number of regulations or rules required by the State and should, at the same time, mean that individuals have the means effectively to monitor any Government action to curb abuses.[11] It is therefore possible to carry out an analysis of the introduction of competition policy.

A brief survey of cases where competition policies have been successfully introduced shows that most of the costs are political - basically in special interest groups' loss of bargaining power vis-à-vis the Government and in the fact that they are subject to these framework laws rather than to specific regulations whose scope and content can be modified with the help of officials. The costs in this area of public life are therefore due to the nature of the framework law, as has been pointed out.

However, one cannot help but notice the bureaucratic cost associated with the cross-cutting nature of competition policy, as the persistence of sectors subject to special regulations and the processes of privatization and deregulation are invariably linked to consolidation in the areas of competition which are theoretically recognized, but which involve a bureaucratic cost for other sectors.[12]

4. Defining competition agencies' scope for action in the deregulation process

In countries where decision-making is highly centralized, the credibility of the regulations will depend on more rigid structures, whereas it is easier to set up credible regulatory structures in countries where decision-making tends to be more decentralized. It can be inferred from this that the regulatory infrastructure and its particular features will depend largely on the nature of decision-making, since the more transparent this is, the more likely the regulatory frameworks are to respond to the needs of the institutions present in a given economic sector and the less likely it is that the regulatory frameworks will distort the functioning of markets. The productive sector will not be able to make the most of the advantages offered by a market, in terms of increasing its returns and greater dynamism, if the regulatory frameworks are too tight and likely to curb the ability to act of many of the most important economic actors by restricting them to small domestic markets.[13]

In this context, it should be pointed out that the anti-competitive nature of certain regulations is not on its own sufficient reason for a competition agency to challenge them, as there may be some forms of intervention that are efficient in social terms even though they restrict competition. A regulation should not be abolished if it directly offsets the market failings that are bound to cause losses of efficiency which are higher than the cost of the regulation. Moreover, it should be pointed out that competition agencies need to react not only when the substantive provisions of the laws have anti-competitive effects, but also when barriers are raised to entry to, exit from or a continued presence in the market.

Competition rules are generally seen as a way to prevent the excessive exercise of monopoly power, not as a substitute, but as a safeguard, for free competition. Although some authors do not agree that tackling the issue of regulation from the perspective of market failures is the best way to study the appropriate role for government, the literature includes some studies that draw an interesting link between market failures and the role of competition laws.

This is the very area in which competition policy should be applied. In fact, it is because the objective is to create conditions suitable for the market that competition is a cross-cutting issue. It is precisely this cross-cutting nature that thrusts new roles on the competition body and that calls for private actors and the State as a whole to put in place the building blocks for economic liberalization.

Before competition advocacy can be introduced systematically, it is necessary to understand what is meant by "economic liberalization". Generally speaking, it is understood as the ending of an economy's basic price controls (interest and exchange rates) and the lifting of controls on the prices of essential goods. However, those two elements are not enough to open markets in industrial sectors. Rather, it is the consolidation of structural reform that can ensure the development of an investment-friendly environment. Opening up includes dismantling the legal and institutional barriers to the functioning of markets and offering a considerable number of investment incentives based on exploiting the competitive advantages of the various sectors.[14]

Since the State can do a number of things to influence competitiveness in certain sectors and, more to the point, to promote an investment- and development-friendly climate, the task of determining when certain actions taken by the State might affect economic agents' decisions to enter or stay in a market, or when they hold back the market as an institution, can be useful in preparing for the structural transformation which is the long-term goal of all processes of modernization and economic reform.

C. The traditional concept of advocacy

The first distinction in the traditional definitions of advocacy is drawn from the concept of efficiency as defined by the theories of general equilibrium. According to these, in the case of a monopoly, which is understood to be a form of market failure, the State is justified in intervening in order to improve efficiency - that is, improve the allocation of resources - to levels that would not be reached spontaneously. Intervention has thus been associated particularly closely with the enforcement work of antitrust agencies.

This enforcement work, or the full application of antitrust laws, is aimed in principle at detecting and putting a stop to anti-competitive behaviour. It is of a general nature and is in line with the modern approach in that it makes no allusion to the action of antitrust offices with regard to market structure issues, as exemplified by the North American approach to economic concentration and mergers between the end of the Second World War and 1973.[15]

According to some authors, the implementation of antitrust laws in the United States of America depends on action by the Government and by private parties (basically through the submission of claims to the courts). The Government's actions range from the prosecution of civil and criminal offences to the publication of the criteria used for evaluating possible damage to the market from private actions.

The concept of market failures explains in theory why a regime prosecutes abuses of monopoly power when these can be classed, according to the criterion expounded by Lande (1996), as failures exogenous to the intervention of consumers as economic agents.[16] This kind of failure involves reduced consumer choice and thus reductions in the efficiency associated with price competition and other areas of competition. This is why most of the prosecutions concern inefficiencies of a behavioural and structural nature.

However, the very fact that competition regimes go one step further than antitrust mechanisms, in that they have the tools to anticipate situations that might restrict consumer choice, makes it possible to set up a preventive system. It is precisely such a system that is the focus of modern competition policy and that links the proposals in this study, given that the lack of choice often stems from the design of particular regulatory frameworks, the erection of barriers to entry, the way the State itself intervenes in the economy and the private sector's view of its role in the economic system, which changes according to a very interesting interaction at the institutional level that eventually filters down to society.

In this way, correcting market failure that is exogenous to consumers implies drawing up a wider-ranging competition policy that covers the behavioural aspect we have called "enforcement" and the elements indicated in the preceding paragraph. From this point onwards, all policies and actions that the State might implement for this purpose will be referred to as "competition advocacy".

In countries with economies in transition towards liberalization and the establishment of a free market system, the role of competition agencies becomes more important, as those responsible for implementing competition policy often have quite a challenging responsibility to create competition, not just protect it.[17] This task requires them to focus on the fundamental objectives of countries' competition policy, which needs to be reviewed to adapt the competition policy to the context of transition referred to above. In this context, advocacy is not limited to publicizing the scope of the law, but tries to teach companies about the choices that competition offers them, especially since entrepreneurs in these countries are so often in the grip of cartels.[18]

With regard to the design of regulatory frameworks in the broadest sense, the competition policies in countries with economies in transition and in developing countries have been adopted in an environment where economic activity was formerly fairly concentrated, mostly as a result of past government policies and intervention. For this reason, these laws might be seen as instruments for speeding up the process of change in which economic activity is in principle defined by private ownership and market forces rather than by State ownership and control (Khemani, 1996).

III. FACTORS AFFECTING THE DESIGN OF ADVOCACY MODELS IN RECENTLY LIBERALIZED ECONOMIES

Certain crucial factors underline the need for methodologies and studies on the introduction of competition policies in Latin America: the first is that most of their economies have only recently been opened up; the second is that they are typically small, owing to their particular market structure. These two factors raise questions about competition policy as it has been traditionally understood, that is, as a policy to combat price-fixing and protect consumer well-being. In dealing with some of these questions, it has to be remembered that competition policy cannot replace pricing decisions by companies, nor can it regulate the private enterprise system (Demsetz, 1986).

In the case of small economies, competition principles need to be applied with great sensitivity on a case-by-case basis in order to respect the nature of inter-firm relationships and efficiency requirements. The fact that wrong decisions can have a very strong impact on small economies makes it all the more important to focus the analysis on obstacles to entry to the various markets. Consequently, identifying barriers to entry, including those set up by the State, encouraging deregulation and remaining open to trade are complementary activities in the search

for a competition policy which, if enforced, really would ensure a push for higher levels of efficiency and the reallocation of the resources required to make sure the market functions.

So, as has been pointed out by Langenfeld and Yao (1992), the enforcement techniques used by agencies in the developed countries will not necessarily be the same as in countries with economies in transition. Although these authors' comments relate to the economies of Eastern Europe, the basic points they make also apply to Latin American countries. They basically point out that competition legislation was adopted in these countries even before the markets could be said to exist and that one of the goals of the competition laws was to introduce competitive markets.

In the case of small countries, there are bound to be some practices that restrict competition, but that would not be a major problem in the developed economies. A case in point is the use of exclusive distribution contracts, which might involve lifting the barriers to entry facing potential competitors, who are rare anyway in these economies. The effects of such contracts on market dynamics could be expected to be far more significant in these economies than in more open and more highly developed market economies. While hasty generalizations are to be avoided, this is the kind of problem that makes it inadvisable to adopt normative frameworks imported from countries with longer traditions, whose analytical criteria do not necessarily fit the reality in Latin American countries.[19]

There is also a debate on the potential impact of forms of strategic alliance on small market economies and, more importantly, of problems related to the system of economic concentration. Leaving aside for the moment the discussion on whether or not it is appropriate to control mergers in these economies,[20] the fact that the presence in small concentrated markets of only a few participants can lead to economies of scale, and thus greater efficiency, is fundamental to the illustration of another problem.

Enforcement techniques also depend on agencies' ability to monitor markets and, more importantly, on the tools available to them for obtaining market information. The latter is crucial if enforcement is to deter future misconduct. It should be pointed out at this stage that the results of enforcement provide support for the advocacy system insofar as the penalties are a credible threat and are thus taken into account by economic agents when they take the endogenous decision to evaluate the costs of forming a cartel as opposed to the costs of investing in different forms of protection, provided that the competition agency is seen to act consistently and independently.[21]

The debate in these countries is not intended to determine which basic provisions should be contained in these laws, but to interpret their substantive provisions in the context of small economies undergoing an intense process of deregulation.[22] Moreover, the involvement of the agencies in advocacy activities makes it extremely difficult to devise a system for measuring and comparing the effectiveness of competition policy.[23]

This lack of tools and estimates based on measurable results, together with differences in the enforcement techniques used, suggests that some aspects of institutional development could be used to track the effectiveness of competition policies. The effectiveness of competition policies depends more on the vigour with which they are applied than on their actual format. Several authors consider that antitrust regulation is based on the premise that "markets work". The agencies' job is to ensure the conditions are right for this to take place. The careful interpretation of competition laws is thus extremely important when adapting their basic provisions to the economies in which they are to be applied. Several studies have already been made of the policy models used in Mexico and Venezuela.[24]

The elements included in the design of competition advocacy models cover each of the points dealt with in the section on conceptual considerations and also meet the need to solve problems of enforcement techniques, political support, the adoption of general competition criteria and understanding the ways in which the State should intervene through competition policy to remedy society's current lack of choice as a consumer of the good known as the "market".

A. Redefinition of the role of the State

The redefinition of the role of the State is central to the economic reorganization that liberalization involves for countries. States are beginning to understand that they need to ensure that the rules are clear and transparent and to monitor behaviour that might impede the proper functioning of competition mechanisms.

When competition principles are thought of as a framework law for the economy, the corresponding course of action necessarily involves a change of direction and a new approach to the State's role in the economy. If the rules of competition policy are effectively promoted and accepted by society, those principles will undoubtedly contribute to the rule of law. It is not just a question of how the right to economic freedom is interpreted, but of how society should be organized and how the relationships between its component parts are viewed - that is, society is seen as a system of widely differing principles, rules and forms of action.

The institutional approach is aimed at promoting the establishment of markets as institutions, a function performed by the State for the benefit of society. However, it also requires private actors and regulatory bodies, as consumers of the benefits of the market, to call for such an institution to be established.

This is an essential part of advocacy and goes beyond the usual tasks of the competition agencies. However, as will be seen below, promotional activities can be used to get across the ideas of more open and competitive economies and markets.

B. Need to strengthen institutions promoting the free market

Within the general framework described in the first section, there is an equally important but far more specific role for competition agencies. It concerns the need to set up a number of institutions to support the introduction of competition principles if a free market system is to be established.

As has been pointed out in the discussion on competition policy as a general framework for the functioning of the economy, efforts to promote and find areas in which the market can exist and function are the top priorities in any work to strengthen economies that have undergone structural reform, so as to ensure they are open and competitive. If some of the basic notions that recur throughout this study, such as greater market contestability, are re-examined, it can be seen that the effects they can be expected to have on the structure and dynamics of economic sectors are much more far-reaching than the effects of monitoring the provisions of competition laws. It is a far broader task to attempt to establish the market as an institution.

This broader task not only involves society or consumers demanding rules of behaviour, which would provide guidance for the competition agency, but also requires a commitment from the State. This is consistent with the view expressed on competition principles in the definition of the rule of law. At this point there is likely to be a good deal of ambiguity, insofar as it becomes necessary for society to accept competition principles and it is after this that competition policy enters its most visible phase. The problem of negotiations and interest groups involves some important elements related to the inertia underlying the behaviour of economic agents and the debates that capture attention in the political arena.

The areas identified as key to defining the objectives of advocacy are presented below. The basic elements in this part of the model concern: agencies' autonomy and the need for political support for the implementation process; the need to design and apply methodologies to detect obstacles to the functioning of markets that arise as a result of the various forms of State

intervention; the development of market-monitoring tools; the role of the courts; the importance of interaction with other agencies; the role of competition agencies in the privatization process; and some ways to make enforcement more effective.

1. Agencies' autonomy and the need for political support

It is advisable to begin by determining what characterizes agencies' autonomy. Studies have discussed the importance of autonomy in giving the agencies credibility, the usefulness of autonomy in discouraging rent-seeking activities and consequently the possibility of separating, at the functional level, competition policy objectives from other objectives that might be provisional and harmful to allocation efficiency.

Competition policy is not cut off from political cycles. According to Pittman (1992), empirical studies have been undertaken into the influence of political cycles and pressure groups on the decisions of antitrust offices. The most viable approach to the political issue seems to be the one described by Shugart:[25]

> "Proposals for reform that seek to improve antitrust policy … are irrelevant because social benefits and costs do not appear as arguments in the objective function being maximized by the relevant policymakers."[26]

At this point, an aspect of advocacy emerges as a prerequisite for the institutional development process: the degree of political support for the agencies. As pointed out by Salerno (1995), the most important contribution to the development of competition mechanisms lies in the overall policy of opening up, deregulation and privatization within regulatory frameworks that keep restrictions on competition to the minimum. Nevertheless, the sustainability of those efforts depends on political support and the conviction shown by leaders. If there is no political agreement to support competition principles and defend the invaluable autonomy of the competition agencies, the regulatory framework risks being taken over by the companies to which it applies and the agencies' advocacy function is jeopardized, particularly in sectors where the State intervenes.

Again, there are elements that fit in with the overall objective, which should be set by the State. In the circumstances, it would probably be advantageous to encourage public officials to try to "capture" the benefits of regulating the system of competition. This is important insofar as political commitment is found to be necessary, but not on its own sufficient, for the finalization of an effective competition policy.

Agencies need to seize the opportunity to demonstrate their ideas and technical capacity and to sell the benefits of greater competition to political parties and, at the operational level, in their dealings with programmes and policies devised by decentralized branches of government, as there is a good deal of political activity at this level that has direct effects on the functioning of markets.

Another element related to the political aspect and a competition agency's ability to become institutionalized should be mentioned here. In the case of Venezuela, initially, the nature of the agency's activities under what has earlier been called the "traditional advocacy approach" varied according to the political context and the Government's general approach to economic policy. Its ability to work alongside other State agencies and to provide support in the deregulation of several sectors was possible because the government ranks included experts who saw the need for a framework of openness and competition. When all that changed in 1994, the institutions adapted their approach to the objectives defined together with the other authorities and worked within the narrow confines permitted by the systems of controls and protection imposed at the time. Its work as a specialized reference point and its proactive efforts to air the arguments on market dynamics and the impact of different economic measures eventually ensured that the agency became the reference point when the process of opening up and liberalization got under way again 1996.

It is therefore necessary to learn to identify the areas and reference points that are politically viable at a given time, since continuity is the key to acceptance as an institution and to persuading society that the results justify a continued role for the promotion and protection of competition. Although the lesson may be somewhat abstract, it is quite clear in terms of economic policy. Successful competition advocacy feeds back into both the State's objectives and the development of the institutions they are intended to support. The policy's effectiveness and its chances of outliving policy aims that diverge from it depend largely on what is meant by advocacy and on how its constituent parts are defined.

2. Development of competition advocacy models that remove the barriers to entry and to the functioning of markets that result from State regulations

The objectives pursued by the State through the institutions governing the functioning of markets are generally designed to "improve" the ultimate allocation of resources generated by the market and the State usually influences the ultimate allocation of resources by intervening,

depending on the case, in the production, distribution or sale of goods and services, directly or indirectly, imposing standards or providing incentives for those engaged in economic activities.

For an analysis of the cost of the various forms of State intervention in the economy and for a methodology to identify the obstacles to the functioning of markets that arise as a result of State intervention, the author has drawn on a study submitted by Genel and Ferrín as a research proposal to the Latin American Institute for Social Science Research.[27]

In theory, the various forms of State intervention referred to cause friction in the markets either because they raise costs or because they restrict entry to or exit from the market. These costs are the costs of not moving towards a more efficient market or not responding to the need to improve resource allocation in the economy. The State can intervene and produce these effects using countless mechanisms, some of which are reviewed below.

The mechanisms include the design and implementation of regulatory frameworks which might make it more difficult to enter or exit from a market and which lead to a reduction in the contestability the market is capable of generating.[28] In this way, market participants' capacity to react to changes in the way the market operates are artificially restricted because the rules are rigid and often not adapted to prevailing market dynamics.

In response to this problem, new theoretical approaches have been proposed which would alter the role of the State in the functioning of markets. Spulber (1989), after taking into account the costs of State intervention in markets, proposes that such intervention should aim for efficiency gains, that is, when it intervenes, it should take into account both the benefits and the costs of its intervention in order to maximize the positive effects of its action. Given the difficulty in quantifying both the benefits and the costs of intervention, Spulber proposes an alternative whereby the State would focus its attention on drafting and implementing regulations that monitor compliance with the contracts signed in the market in cases where market dynamics alone do not accomplish this. In this way, not only are the costs of its intervention minimized, but also the risk that the intervention might jeopardize the existence of dynamic and contestable markets, since it has less of an effect on the conditions that determine whether competitors enter or exit from the market.

Once these costs have been identified, new areas are opened up in which competition laws can be applied, as the current view of these laws is that they can be used to modernize the way the market is organized. Consequently, competition legislation becomes part of the State's alternative role in that it provides incentives for competitive behaviour and fits in with the

government policy of removing artificial barriers, thereby safeguarding market contestability. For this reason, methodologies have been developed to increase understanding of the way the market operates, on the basis of their structure, the incentives that influence participants' behaviour and the results achieved as a result of their new behavioural patterns.

Within the conceptual framework developed here, a methodology has been designed to determine whether there are barriers to market entry and to determine the costs of any particular regulation or form of intervention. For this purpose, a number of structural, behavioural and performance-related barriers to entry have been defined according to whether they might be affected by one form or another of State intervention. Table 2 presents the definitions arrived at, showing how each barrier is to be understood in the context of the methodology for determining its relation to State intervention in economic activity.

Table 2

Barriers	
Market structure	The characteristics of the market - number of participants and their relative size, the need for vertical integration and the setting up of different production structures - may pose barriers to entry in that they can substantially raise the cost of entry into the market, either because of the very high risk involved in penetrating the market or because of the scale of production required to operate and compete in the market.
Market size	This concept covers the total volume of production for which there is a demand in the particular market concerned. Consequently, an entrant's decision to enter the market will be based on its ability, given the necessary technology and investment, to achieve profitable production volumes. When the limits of the relevant market are altered, decisions on resource allocation are also distorted, insofar as the number of firms encouraged to enter the market is higher or lower than the number required to service the market efficiently.

Table 2 (<u>continued</u>)

Barriers	
Specific investments	In the economic sectors that require investment in technology, know-how and other specific elements of limited use elsewhere, newcomers are unlikely to enter the market unless they are sure that they will be in it long enough to recoup their investment.
Initial investment	Those economic activities which, by their nature, require considerable initial capital are unlikely to be undertaken by a newcomer to the market, who, for lack of the necessary capital, would have to seek additional financing from sources that are not always available to new entrants.
Access to finance	The lack of a credit record in a given line of business can be a high barrier to entry. Government provisions sometimes funnel credit to certain sectors, and some potential competitors may be excluded from such financing.
Technology	Technology in relation to the management of production factors and in relation to processes, designs or intellectual property may be a barrier to entry in cases where it is not available or where it is very expensive or requires very risky investments.
Economies of scale	Depending on the technology available, production levels can be achieved which are more efficient and which minimize average production costs. In the long terms, firms competing with each other can remain in the market only if they achieve these levels of efficiency, which require certain scales of production. Any circumstances that affect the ability of firms in the market to operate at the level of lowest average costs, leaving them to work on a scale that is higher or lower than the scale that is most efficient in the long run, may affect the decision to enter the market or may lead participants in certain markets to make suboptimal use of their resources.

Table 2 (continued)

Barriers	
Economies of scope	Economies of scope are achieved when the production costs of participants already established in a market are lowered by jointly producing two or more products. Thanks to this, the average costs of firms already established in the market are reduced to well below those for the production of similar volumes of a single product by private producers. This discourages newcomers, as it is not profitable for the producer of a single product to enter a market served by firms taking advantage of economies of scope. These advantages can be observed in production and distribution activities.
Access to raw materials	The availability of raw materials often depends on participants' negotiating strength, which new entrants rarely have. At the same time, other economic policies, such as exchange controls, make it difficult to gain access to raw materials for activities that require a large proportion of imported inputs.
Distribution channels	Since distribution channels are fundamental to placing products on the market, they can act as a barrier when they require large investments and gradual development, as they often do. Distribution activities are also limited when restrictions are imposed on the way they operate and on access to them.
Participants' behaviour	Participants' behaviour can impede entry into a sector in that they are able to take action that disadvantages new entrants. The prevailing market structure can also facilitate cooperation between established participants that works against the new entrant.
Learning curve	This can be a barrier to entry if companies already in the market have reached a certain point on the learning curve that enables them to protect themselves against the entry of a new competitor, who will be faced with the costs of operating at a disadvantage for the time it takes to reach that point on the curve.

Table 2 (continued)

Barriers	
Market penetration	This is understood to mean the potential demand for a good or service, given the production and distribution structure available. It can be affected by location, health regulations and any other factor that influences access to consumers.
Concessions	It may be difficult to gain concessions (in terms of time, financial cost, etc.) or they may be reserved for a single company in the case of the exploitation of natural resources or the provision of public services.
Licences	The permits granted by the State for some or all parts of a particular economic activity sometimes represent serious restrictions (in terms of time, costs, etc.) for companies wishing to set up.
Rules on foreign investment	Foreign investors are less likely to invest in a country if foreign investment is subject to restrictions regarding the amount that can be invested, the sector in which investment is allowed, remittance of profits, bureaucracy or taxation, excessive authorization requirements or red tape, or differential treatment for private companies.
Labour regulations	The costs to the payroll of social benefits, seniority increments and holiday pay are a major barrier to entry, especially in labour-intensive sectors.
Environmental regulations	Regulations that restrict, prohibit or, at best, lay down conditions for the production or exploitation of certain products or the manner of their production impose unrecoverable costs on companies, dissuading potential competitors from entering the market.

Table 2 (<u>continued</u>)

Barriers	
Hygiene regulations	These concern companies' duty to maintain strict health controls in the production of goods and services.
Patents	The use of patents is a barrier in that it may excessively restrict access to the production or marketing of a good, a situation usually compounded by poor implementation of the mechanism itself.
Franchises	The requirements for operating a franchise may be restrictive enough to constitute a barrier to entry, especially when dealing with contracts for the distribution and purchase of goods.
Exchange policies	Exchange policies based on quantitative restrictions or excessive form filling for those trying to obtain currencies in certain sectors are a clear obstacle to entry, especially if the company's activities are related to or depend on the import of goods.
Fiscal policies	Specific taxes on the production and/or consumption of certain goods distort forecasts of net income and sales (and consequently the firm's profitability) and thus constitute obstacles for new entrants to the market. Tax policies may also discriminate against some competitors or favour others, harming newcomers' chances of remaining in the market.
Trade polices	Quantitative restrictions on imports of inputs or finished goods and high tariffs on specific goods can limit production or significantly raise the costs to newcomers and thus dissuade them from entering the market.

Table 2 (continued)

Barriers	
Credit policies	Difficulties in obtaining finance, owing to either the requirements imposed, the amount of the financing or the formalities for obtaining it, are an obstacle to entry for companies that need sources of finance to enter the market and to finance their normal business operations.
Pricing policies	Governments' pricing policies are clearly a barrier to entry and/or remaining in the market for the goods affected by them, since companies faced with such policies and delays in changing them have to charge prices which are too low to ensure adequate levels of profitability.
Privatization mechanisms	The privatization mechanisms provided for in a country's legislation can be a barrier to entry if they exclude certain players from the process on discretionary grounds.
Institutional risk	The built-in uncertainty in each sector can be a barrier to entry that is raised higher whenever the State, through its economic policies, increases the risk faced by a new competitor trying to enter the market.

Since each of these barriers can be affected positively or negatively by different forms of intervention, it is proposed to observe the way in which such effects are produced when these concepts are put into practice. This corresponds to the second phase of implementation of the methodology, once the costs generated have been evaluated, so that the net effects of the interventions can be identified.

The cost element has been conceptualized by specifying what is understood by costs, as a way of quantifying the burden on society of operating at other than the most efficient levels. The definitions of these costs are presented in table 3.

Table 3

Type of costs	**Definition**
Costs associated with lack of institutional development	Regulations fail when they are ill-adapted to the institutional framework. Regardless of the theory behind the particular forms of intervention, when this happens and when the regulations cannot be enforced by State institutions, costs arise as a result of the need to expand State bodies or to rectify shortcomings linked to the institutions' inability to perform the duties they were set up to perform. Since government action, if it is to be effective, requires institutions that are able to achieve the goals set for them, any failure by the institutions to do so constitutes a cost to society.
Operational and administrative costs	This type of cost arises when State intervention generates operational and administrative costs, either because it requires the support of a larger number of bureaucrats or because additional costs are incurred in implementing and monitoring the measures, or for some other reason.
Cost in resource allocation	When resource allocation is affected, either because production or consumption levels differ from the levels in a situation of non-intervention or because of their effects on market structure and behaviour, the market operates inefficiently.
Sunken costs	Sunken costs are costs that are difficult to recover because their amortization is not linked to the use of assets. This kind of cost arises, for example, when investment is required to promote a product's brand image, even though there is no guarantee that consumers will respond positively and it is impossible to tell how long it will take to build up a certain market share. It may happen that some kinds of intervention will increase the sunken costs of becoming established in certain activities, thereby increasing the risk and discouraging entry.

Table 3 (continued)

Type of costs	Definition
Ability to innovate in the market	Certain kinds of regulation may involve costs because they restrict innovation by players in the market. When this happens, improvements in productivity factors take longer, so that long-term market equilibrium is achieved at lower levels of efficiency than in cases of non-intervention.

Once the concepts presented in tables 2 and 3 are applied, the nature of the costs generated becomes clear. As a result, a list of policy-making options can be drawn up. In any effort to minimize the loss of efficiency brought about by regulation, the action taken by the State will differ according on the type of cost generated. However, this proposed methodology can even identify types of cost that may be associated with barriers to entry and to a continued presence in the markets identified. Generally speaking, bearing in mind that one of the main aims of competition policy is to reduce transaction costs, the effects of such costs in each of these areas need to be clearly defined if the policy is to make a positive contribution to recommendations and policy-making.

3. Development of market-monitoring tools

Competition agencies need to be able to monitor markets if they are to be effective. This involves setting up mechanisms to process the information they need. They thus need to have basic information available not only to anticipate and detect anti-competitive behaviour, but also to obtain the market information they need to express their views or prepare reports on the structure and performance of markets.

In this respect, market indicators are an important source of up-to-date information on industrial sectors, which is why some countries are now developing proposals for systems of industrial indicators. Basically, they are trying to update and systematize information on economic sectors so that they can develop suitable indicators for, among other things, market structure, size, degree of concentration, barriers to entry, the impact of new entrants, changes in certain competition indicators, market profiles and trends, the pace and quality of innovation and degree of differentiation.

34. Role of the courts

While from the institutional point of view, competition policy gains its legitimacy from the recognition and acceptance of competition mechanisms within society, that process is greatly helped by the legitimacy conferred by the courts on the interpretation of the principles of the laws and the performance of the competition authority - so much so, in fact, that investigation techniques and the investigations themselves require a court decision to put them on a firm procedural footing.

Moreover, the analysis needed to prove that competition is restricted is very different from that used in other areas of law, as the prevalence of economic analysis in defining and proving misbehaviour requires an innovative approach by judges. This is why the training of judges in competition matters is crucial to interpreting the law and strengthening the protection of competition.

As competition laws come under administrative law in most Latin American countries, most of the cases brought before the courts concern compliance with procedural matters. However, an important part of the competition agency's advocacy work should be to continue to publicize its interpretations of the technical criteria involved in the analyses on the basis of which violations of the laws are punished. The aim should be to stimulate discussion on the substantive points forming the legal basis required for the development of a competition regime.

The development of case law that goes further than the formal aspects included in the decisions of administrative bodies is one of the keys to the acceptance of the substance and interpretation of competition rules.[29] Accordingly, the documents produced should contain explanations and follow a clear methodology and, above all, they should stress the de facto assumptions made in the substantive parts.

It is also vital to support the training of judges in these matters, either by obtaining technical support from more experienced competition agencies or by organizing events and workshops dealing with the substantive aspects of anti-competitive practices. It is also important to get across the message that, just as cases dealing with mergers and punitive proceedings affect market dynamics, so the courts' decisions affect the allocation of resources.

Another basic instrument in this area of advocacy is the preparation and publication of technical guidelines to aid courts in reaching judgements on anti-competitive practices.[30] It is also important initially to publicize the theoretical and practical aspects of the analysis of

mergers and investigations and the aspects of other practices. A good starting point for this work is to study in depth the methods used in other countries in order to adapt them to the particular circumstances and experience of each agency.

5. Importance of interaction with other agencies

Studies such as this one are largely based on ideas that have been under discussion in the past two years in Latin American countries which adopted or reintroduced competition laws in the 1990s. It was during these two years that initiatives were taken to share competition agencies' experience and knowledge of the objectives of competition regimes and ways to develop them.

In June 1994, a workshop organized by the World Bank was held in Bogotá, Colombia. After that, the First Meeting on Competition Policies in Latin America and the Caribbean was held in Caracas, Venezuela, in October 1995; the First Meeting of Officials from Ibero-American Competition Authorities was held in Cartagena de Indias, Colombia, in December 1995; during the discussions on the Free Trade Area of the Americas (FTAA), two meetings of the Working Group on Competition Policy were held in Lima, Peru, in May and August 1996; and, lastly, a seminar on competition polices and economic reforms in Latin America was held in Lima, Peru, in August 1996.

A brief review of the reports and programmes of these meetings and of the records of the Caracas meeting in October 1995 and the meetings of the FTAA Working Group on Competition Policy reveals the importance attached to certain points, including the need to encourage the sharing of experience and technical information among agencies in the region, the importance of systematizing and rationalizing the use of the technical cooperation resources currently available to agencies, the role of competition advocacy in consolidating policies, and the differences in the way policies are implemented in these countries and in more industrialized countries.

In their approach to the promotion and protection of competition, agencies should therefore draw on the experience of countries in fairly similar circumstances. This will pave the way for a greater flow of information and better use of training resources, as well as narrowing the substantial differences in the interpretation of legal frameworks.

6. Role of private actors

From an institutional perspective, economics and politics need to be integrated in a theory of political economy that explains how the drafting of economic policy affects the well-being of a range of people, who, in turn, react through the political system to try to shape

the system, either to change it, if it affects them adversely, or to form an interest group to promote and maintain the policy if it offers them some kind of reward.[31] According to this thinking, active interest groups are fundamental to achieving the institutional developments that would respond to society's demands.

That being the case, the active role of businesses should make competition a more important factor in the policies that affect them. The barriers to the functioning of the markets as a result of various actions by the State can therefore be identified, observed and denounced by companies. If there really is to be a commitment to establish more efficient forms of regulation and to encourage lobbying aimed at correcting distortion while causing as the least harm possible to markets, the players in the market - businesses - need to be proactive.

Similarly, it is the productive sectors that can institutionalize the forms of State intervention best suited to promoting competitive advantages in those sectors, since institutionalization requires, above all, society's acknowledgement that certain measures are necessary. To achieve this, commitment alone is not enough; what is needed is a clear vision of the objectives and a commitment not to lobby for more protection mechanisms, but to press for conditions in which greater competition can flourish.

Generally speaking, opening up has been viewed from the viewpoint of dismantling systems of tariff protection. While this undoubtedly permits large efficiency gains, there are other mechanisms that can contribute to reaching efficiency goals in the long run. In economies where the market structure and the behavioural culture of economic agents has been highly distorted by State intervention schemes, competition policy has greater validity and trade policy is not sufficient to promote greater competitiveness in the productive sectors.

In this context, in order to provide a framework within which there can be greater industrialization and efficiency in the allocation and use of resources, a close watch must be kept on the performance of market structures already established in the economy and a number of further actions need to be taken to encourage keen competition between companies. Examples of such actions include:

- Avoid excessive tariff protection;
- Encourage competition from foreign companies;
- Where possible, make use of auctions and tenders when awarding contracts;
- Abolish restrictions imposed on competition by regulations and other rules;

- Encourage small companies to enter well-established areas;
- Encourage improvements in marketing channels and an increase in the number of trade intermediaries.

However, the points analysed so far need to be interpreted far more broadly to show how all those affected by this process can participate. The various elements related to the design of an industrial policy can be brought together by developing a concept of the role played by companies and the Government as seen from the viewpoint of efficiency.

Lastly, the private sector has one other very important role to play, and that is to participate in processes intended to protect competition. The private sector plays a fundamental role in enforcement in developed countries[32] and an important aim of competition policy is to create a greater readiness to report abuses and take action in the courts in competition matters. It is therefore useful to publicize the scope and purpose of the laws, especially with regard to the opportunities that companies have to spot abuses by competitors in the same market. This activity is clearly one of a number of dissemination activities and the results it yields are unlikely to be evident in the short term.

One little-explored area of competition policy, and one which is indispensable for private actors, is the investment framework that the application of these principles can help establish. While the institutional problem posed can be tackled by eliminating or minimizing the situations resulting from rent-seeking behaviour, through the introduction of non-tariff protection measures and other advantages associated with the restructuring of regulatory frameworks, innovation by companies taking risks to compete and grow markets should also be encouraged. Innovation is highly beneficial to society and is thus an additional focus for advocacy activities. Consequently, the application of the law and awareness of it can create a climate of security for investment which will undoubtedly have a multiplier effect in the design of competition systems.

7. Role of competition agencies in the privatization process

Privatizations naturally affect the markets within which they take place, and do so in several ways. Privatization may produce horizontal or vertical concentrations or conglomerates that may affect one or more markets. Consequently, the authorities in charge of privatization need to understand the benefits of ensuring that it does not restrict free competition. In this respect, the incentives offered by the competition agency and by the agency handling the privatization will differ. On the one hand, the agency handling the privatization will be trying to sell to the highest bidder and to obtain as high a price as possible, while, for political reasons,

State enterprises may need to be sold off as quickly as possible to resolve fiscal problems. On the other hand, the competition agency could be trying to make sure the process is transparent, prevent collusion between bidders and monitor the effects of economic concentration on the markets - and none of these aims will necessarily be among the objectives of the agency handling the privatization.

There is sometimes work to be done prior to privatization in drawing up a sector-specific legal framework to give investors a picture of the regulations in force and the opportunities for entry and expansion under the regulations. This is another area in which competition agencies can work. At the same time, there is a need for special training in regulatory matters; seeking the support of multilateral organizations with experience in this area can be an important first step before taking on these tasks. While this does not mean setting up a parallel regulatory system, technical training in the preparation and monitoring of regulations would appear to be a fairly new area that requires attention.

The preceding two paragraphs give a glimpse of what is involved in basic advocacy in sectors that are usually crucial to economic development. Politicians and officials need to be made aware and persuaded of the importance of following competition principles during privatizations. This is no easy task, as the importance of such work lies in the long-term benefits of adhering to efficiency criteria in processes of this sort.

The State can demonstrate its commitment to these principles by defining the role of competition authorities in advance. However, in order to avoid bureaucratic problems during implementation, an effort must be made to sell the benefits of adopting joint work programmes together with other bodies in both the executive and the legislative branches of government.

8. Making enforcement more effective

Some ideas on the ability of competition agencies to send signals to economic agents to discourage anti-competitive behaviour have been developed by Rodríguez and Williams (1993, 1995 and 1996). Their credibility as a deterrent depends largely on the following factors: economic agents' awareness of the objectives and scope of competition laws; the publicity given to agencies' work in detecting and penalizing behaviour that restricts competition; and the success of the courts in developing case law that confirms and legitimizes the interpretation of elements of competition as integral to the rule of law.

As pointed out by Altrogge and Pittman (1992), competition agencies can maximize their effectiveness in detecting and analysing competition-related problems in various ways, including by publishing guidelines on the regulations, devising procedures to investigate conduct and agreements and publicizing their views on the anti-competitive effects of various kinds of behaviour.

An important point to have emerged from the work on evidence of anti-competitive practices concerns competition agencies' power to demand information and their cooperation with other administrative bodies in order to gather the relevant information on cases under investigation. These two elements are important because they are enforcement tools that partly define agencies' day-to-day activities.

These elements will be useful only if the competition agency has a team that has been trained in procedural, methodological and substantive matters, which are paramount in the early stages of enforcement. Consequently, training programmes for professionals require greater investment in time and resources in the early years of the agency's operations. Technical cooperation agreements and exchanges with other competition agencies are crucial in this respect, although care should be taken to ensure their frequency and level of detail match the learning curve and annual operational targets.

Attention has sometimes been drawn to the advisability of setting up undergraduate courses in economics and competition law. Given the number of situations in which politicians, judges, business people, parliamentarians, lawyers and so on need to be made aware of the existence of competition laws, the training of professionals with some knowledge in this area would surely have a knock-on effect that would outweigh the costs of running such courses.

Notes

[1] Coase makes this remark on the basis of studies of the stock market, but the example illustrates quite well the aspects dealt with in this part. See Coase (1991), pp. 14-15.

[2] See Khemani and Dutz (1994).

[3] See Alonso S.R. (1995).

[4] See Commission of the European Communities (1991) and (1996a).

[5] The concept of cross-cutting competition was introduced by Dr. Rodrigo Asenjo, the Chilean National Legal Adviser for Economic Affairs, at a series of information days on competition policy organized by UNCTAD in Havana, Cuba, in June 1996. The term describes the application of the competition approach to all areas of government policy. Since any action that might be undertaken has economic repercussions of some kind, the principles of competition laws cut across all sectors of society.

[6] The Competition Directorate-General of the Commission of the European Communities has produced a compilation of the competition laws and regulations in force in Latin America. Also, the Trade Unit of the Organization of American States has prepared the *Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere,* as background material for the Free Trade Area of the Americas (FTAA) Working Group on Competition Policy.

[7] The following Latin American countries have competition laws:

Argentina	Act No. 22,262, on the defence of competition, of 1 August 1980
Brazil	Act No. 8,884 of 11 June 1994, amended by Act No. 9,069 of 29 June 1995, on the prevention and punishment of economic crime
Chile	Decree-Law No. 211 of 1973, on the defence of free competition; prevents and punishes monopolistic practices; amended by Decree-Law No. 2,760 of 3 July 1979 (revised text)
Colombia	Act No. 155 of 24 December 1959, on restrictive trade practices
Peru	Legislative Decree No. 701 of 5 November 1991, on monopolistic practices that curb and restrict free competition
Mexico	Federal Economic Competition Act of 24 December 1992
Costa Rica	Promotion of Competition and Effective Consumer Protection Act of 20 December 1994

Panama	Act No. 29 of 1 February 1996, establishing regulations on the defence of competition; other measures are being taken
Venezuela	Promotion and Protection of Free Competition Act of 13 January 1992.

[8] Although there may be major differences in the environments within which competition laws are implemented, some laws in countries with a longer tradition in this area also define broad-ranging objectives for their regulatory frameworks. One law that illustrates this is the Canadian Competition Act, which sets itself the objectives of maintaining and encouraging competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[9] "Enforcement" means the full application of the laws. The competition literature generally refers to this activity as a system involving agencies, private bodies and the courts. Insofar as the concept concerns the application of laws, it mostly involves the prosecution and detection of conduct prohibited by them and the application of competition methods and procedures. See Garret (1995) and Conrath (1995).

[10] See Tineo (1996).

[11] See Tineo (1996).

[12] The criteria for identifying the costs of introduction have been formulated by Grindle and Thomas (1991). According to these authors, a policy reform can be changed or reversed at any stage of its life cycle by pressure and reactions from its opponents, so that its chances of success depend largely on the reaction to it. In order to assess those possible reactions, two settings are described for the response to the change in policies: the political arena and the civil service. In the latter setting, when competition criteria and concepts have to be brought within the scope of special regulatory agencies, the reaction is not obvious to the general public, but may generate friction within the civil service.

[13] Commission of the European Communities (1991).

[14] This has been the experience of several countries. In Mexico, competition policy was introduced as part of the Development Plan 1995-2000, on the premise that obstacles to the functioning of markets must be removed if the objectives of competitiveness and greater export capacity are to be achieved. See Federal Commission on Competition (1995).

[15] See Mueller (1996).

[16] In this study, Lande draws a distinction between market failures that originate with consumers and those of external origin, which leads to the distinction between those that should be approached within the framework of the market failure of a monopoly, which involves antitrust action, and those which fall within the scope of consumer protection policies.

[17] See Conrath (1995).

[18] See Jatar (1993) and Vera and Curiel (1994).

[19] For example, the scales used to determine substitutability on the demand side as a function of variations in product prices within the relevant definition of the market in the *Horizontal Merger Guidelines* of the United States Department of Justice (1992) are not applicable to countries going through a period of high inflation, basically because of problems of availability of information and the perception of relative prices by consumers in an inflationary situation.

[20] Rodríguez (1996) presents a model based on analysis of the effects produced by the presence of specific capital regimes that are turned into sunken costs under competition programmes, with regard to the transition to a liberalized economy. On the basis of this analysis, the study concludes that controlling mergers between companies may generate long-term inefficiencies.

[21] See Curiel (1995).

[22] Langenfeld and Yao (1989) cite the organizational evaluation models applied in the countries of Eastern Europe. The approach taken here consists only of organizing observable criteria or factors concerning policy evaluation, whereas the authors suggest following up such variables as organizational structure, laws, procedures and agency staff.

[23] In the United States of America, for example, this effectiveness has been evaluated by analysing the markets in which mergers have taken place (Langenfeld and Yao, 1992).

[24] In 1995 Rodríguez and Williams made a study of the case of Mexico and their methodology was adopted by Curiel in the same year for a study on the introduction of competition policy in Venezuela. Rodríguez and Williams (1995) classify the work of the Federal Commission on Competition under five headings: mergers, public tenders, official investigations, private disputes and legal opinions. On the basis of the number of activities and time spent on them under each of these headings, they drew up a profile of the above-mentioned body's performance, which showed that it spent a significant proportion of its time on advocacy activities.

[25] Cited in Pittman (1992).

[26] Translated into Spanish by the author as "formuladores de políticas".

[27] A more comprehensive discussion on obstacles to the functioning of markets that arise as a result of the various forms of State intervention can be found in Curiel, Ferrín and Genel (1996).

[28] A market is perfectly contestable if it is accessible to potential entrants and meets the following conditions: first, potential entrants can supply the same market demands and use the same production techniques as those available to established companies and, second, potential participants can assess the profitability of entry on the basis of prices prior to entry of established companies. See Baumol, Panzar and Willig (1982).

[29] See Tineo (1996).

[30] To date, Venezuela is the only Latin American country to have produced a publication of this sort, having published general guidelines on the assessment of economic concentration activities, (which are currently being revised), and guidelines on the assessment of economic concentration activities in relation to firms on the verge of bankruptcy.

[31] See "Structuring institutions for economic development", paper delivered by Douglas C. North at the Central Bank of Venezuela, Caracas, 3 August 1995.

[32] On this point, see Garret (1995), chapters 7 and 8.

Bibliography

Alarcón, M.

1995 "Sistema colombiano de defensa de la competencia", paper delivered at the First Meeting of Officials from Ibero-American Competition Authorities, Cartagena de Indias, Colombia, 3-6 December 1995.

Alonso S., R.

1995 "Competencia y desregulación económica: los informes del Tribunal de Defensa de la Competencia sobre la liberalización de los servicios", in *Estudios Jurídicos en Homenaje al Profesor Aurelio Menéndez,* Editorial Civitas.

Altrogge, P. D. and R. Pittman

1992 "Some principles for an effective competition policy in developing and transforming economies", mimeo, August 1992.

Anderson, R. D. and D. Khosla

1994 *Competition Policy as a Dimension of Economic Policy: A Comparative Perspective,* Economics and International Affairs Directorate, Bureau of Competition Policy, Canada, May 1994.

Baumol, W. J., J. C. Panzar and R. D. Willig

1982 *Contestable Markets and the Theory of Industry Structure,* Harcourt Brace Jovanovich, New York.

Boner, R. A. and R. Krueger

1990 *The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities,* World Bank, Technical Paper No. 160.

Bureau of Competition Policy of Canada

1993 *An Overview of Canada's Competition Act,* Director of Investigation and Research, Quebec.

1989 *Canadian Competition Policy: Its Interface with Other Economic and Social Policies. A Framework for Discussion,* Bureau of Competition Policy, Consumer and Corporate Affairs of Canada, September 1989.

Coase, R. H.

1991 *La empresa, el mercado y la ley,* Alianza Editorial, Madrid.

Coate M., R. Bustamante and A. E. Rodríguez

1992 "Antitrust in Latin America: regulating Government and business", invited paper presented at the Agricultural Economics Association Symposium on "Law, Institutions and Economic Transformation in Developing Countries: a Comparative Perspective", 10 August 1992.

Commission of the European Communities

1996a *European Community Competition Policy - 1995*, Luxembourg, Office for Official Publications of the European Communities.

1996b *Competition Policy Newsletter,* vol. 2, No. 1, Spring 1996.

1996c *Compilation of Competition Legislation, Latin America, vol. 1,* Brussels, July 1996.

1991 *European Community Competition Policy - 1991,* Luxembourg, Office for Official Publications of the European Communities.

Conrath, C.

1995 *Practical Handbook of Antimonopoly Law and Enforcement for an Economy in Transition.*

Curiel L., C.

1995 "Elementos para la aplicación de políticas de competencia en economías en transición: la experiencia en Venezuela" , paper presented at the First Meeting on Competition Policies in Latin America and the Caribbean, Caracas, Venezuela, October 1995.

Curiel C., J. Ferrín and T. Genel

1996 "Barreras a la entrada derivadas de los distintos canales de intervención del Estado" mimeo, Venezuelan Supervisory Authority for the Promotion and Protection of Competition (Procompetencia), Caracas.

Demsetz, H.

1986 *La competencia: aspectos económicos, jurídicos y políticos,* Alianza Universidad, Madrid.

***Diario Oficial* (Chile)**

1979 Decree-Law No. 2,760 of 3 July 1979, *Diario Oficial* No. 30,406, 5 July 1979.

1973 Decree-Law No. 211 of 17 December 1973, *Diario Oficial* No. 28,733, 22 December 1973.

***Diario Oficial da Uiao* (Brazil)**

1994 Act No. 8,884 of 11 June 1994, *Diario Oficial da Uiao,* 13 June 1994.

***Diario Oficial de la Federación* (Mexico)**

1993 Federal Economic Competition Act, *Diario Oficial de la Federación,* 24 December 1993.

Diario Oficial de la República de Colombia

1959 Act No. 155, on restrictive business practices, of 24 December 1959.

***Diario Oficial "El Peruano"* (Peru)**

1996 Legislative Decree No. 701 of 5 November 1991, *Diario Oficial,* 7 November 1991.

Federal Commission on Competition (Mexico)

1995 *Annual Report 1994-95,* Federal Commission on Competition of the United Mexican States.

Gaceta Oficial de la República de Venezuela

1992 Promotion and Protection of Free Competition Act, *Gaceta Oficial,* No. 34,880, 13 January 1993.

Garret, J. J.

1995 *World Antitrust Law and Practice: A Comprehensive Manual for Lawyers and Businesses,* Little, Brown and Company, Boston.

Grindle, M. and J. Thomas

1991 *Public Choices and Policy Change: The Political Economy of Reform in Developing Countries,* John Hopkins University Press, Baltimore.

Jatar, A. J.

1993 *Implementing Competition Policy in Recently Liberalized Economies: The Case of Venezuela,* Venezuelan Supervisory Authority for the Promotion and Protection of Competition (Procompetencia), Caracas.

Kelly, J. and A. Perera

1995 "Life patterns of institutions and policies: *Procompetencia* in Venezuela", paper to be presented at the annual meeting of the Latin American Studies Association, Caracas, September 1995.

Khemani, R. S.

1996 "Changes in industrial economic paradigm and the development of competition policy", speaking notes for a paper presented at the Seminar on Competition Polices and Economic Reforms in Latin America, Lima, Peru, August 1996.

Khemani, R. S. and M. Dutz

1995 "The instruments of competition policy and their relevance for economic developments", in Claudio R. Fristak, ed., *Regulatory Policies and Reform in Industrializing Countries,* World Bank, 1995.

Langenfeld, J. and Yao D.

1992 "Competition policy and privatization during the transition of Central and Eastern Europe to a market economy: an organizational perspective", mimeo, Federal Trade Commission, Washington, D.C.

Malard, N. T.

1995 "Sistema Brasileiro de Defensa da Concorréncia", paper presented at the First Meeting of Officials from Ibero-American Competition Authorities, Cartagena de Indias, Colombia, 3-6 December 1995.

Mieres, D., A. C. González, C. Curiel and B. Améstica

1995 *Consideraciones y Recomendaciones en torno a la Ampliación del Régimen Competitivo de Precios en la Agenda Venezuela,* Venezuelan Supervisory Authority for the Promotion and Protection of Competition (Procompetencia), Caracas.

Mueller, D. C.

1996 "Lessons from the United States' antitrust history", *International Journal of Industrial Organization*, vol. 14, No. 4.

Naím, M.

1993 *Papers, Tigers & Minotaurs: The Politics of Venezuela's Economics Reforms,* Carnegie Endowment for International Peace, Washington, D.C.

1984 "Posibilidades y limitaciones del funcionamiento de los mercados en los países menos desarrollados: una aplicación del enfoque de mercados y jerarquías al caso de Venezuela", working paper, Ediciones IESA, Caracas.

National Institute for Competition and Industrial Property (Brazil)

1994 *Annual Report 1994,* Free Competition Commission.

Navarro, J. C. and R. Rigobón

1992 *La Economía Política del Ajuste Estructural y de la Reforma del Sector Público en Venezuela,* Instituto de Estudios Superiores de Administración, Caracas, July 1992.

North, D.

1995a "Estructurando instituciones para el desarrollo económico", lecture delivered by D.C. North at the Central Bank of Venezuela, August 1995.

1995b "El rol de INDECOPI en la estructuración de mercados eficientes en el Perú", in *Importancia de las instituciones en el desarrollo de una economía de mercado,* INDECOPI, Lima.

Organization for Economic Cooperation and Development (OECD)

1995 "Convergence on competition laws and policies: overview. Working Party of the Trade Committee", Working Party No. 1 of the Committee on Competition Law and Policy (COM/TD/DAFFE/CLP(95)32/REV2).

1991 *Competition and Economic Development*, OECD, Paris.

Organization of American States (OAS), Trade Unit

1996 "Inventory of domestic laws and regulations relating to competition policy in the western hemisphere", preliminary report presented to the FTAA Working Group on Competition Policy, July 1996.

Paredes-Molina, R. D.

1995 "Políticas de competencia en un país sin tradición de mercado (Chile)", study prepared for the International Workshop on Regulation and Deregulation in Chile and Latin America, World Bank/University of Chile, 5-7 October 1995.

Perera, A.

1994 "Estudio de la Superintendencia para la Promoción y Protección de la Libre Competencia como un caso de desarrollo institucional", MA thesis, Instituto de Estudios Superiores de Administración, Caracas, July 1994.

Pittman, R.

1992 "Antitrust and the political process", in D. B. Audretsch and J. J. Siegfried, eds., *Empirical Studies in Industrial Organization: Essays in Honor of Leonard W. Weiss*, Kluwer, Netherlands.

Reyes A. M. and F. J. Iraola

1993 "Defensa de la competencia: síntesis del sistema argentino actual y proyectos de reforma", in *Revista de Derecho Industrial*, vol. 15, January-April 1993, No. 43, Buenos Aires.

Rodríguez, A. E.

1996 *The Role of Merger Policy in Recently Liberalized Economies*, Center for Trade and International Diplomacy, Monterey Institute of International Studies, January 1996.

1994 *Antitrust Policy in Recently Liberalized Economies*, Washington, D.C.

1993 "The Venezuelan antitrust initiative: an empirical quick look", paper prepared for the conference on Venezuelan competition legislation and some contributions to comparative law, Caracas, 21-23 June 1993.

Rodríguez, A. E. and M. Williams

1996 "Limits to antitrust policy for reforming economies", *Houston Journal of International Law*, vol. 18, No. 2, Winter 1996.

1995 "Economic liberalization and antitrust in Mexico", *Revista de Análisis Económico*, 1995 (forthcoming).

1993 *Antitrust and Liberalization in Developing Economies*, Washington, D.C.

Salerno, H.

1995 *El Sistema de Defensa de la Competencia en Argentina*, paper delivered at the First Meeting of Officials from Ibero-American Competition Authorities, Cartagena de Indias, Colombia, 3-6 December 1995.

Sherer, F. M. and D. Ross

1990 *Industrial Market Structure and Performance*, Houghton Mifflin.

Spulber, D.

1989 *Regulation and Markets*, MIT, Cambridge.

Stiglitz, J.

1988 *Economics of the Public Sector*, Norton, New York and London.

Tavares de Araujo, J.

1995a *Contestability and Economic Integration in the Western Hemisphere,* OAS Trade Unit, November 1995.

1995b "Competencia y competitividad: perspectivas y tendencias", report prepared for the course on "Competition and competitiveness in integrated areas: processes and experiences in the European Union and Latin America", organized by the Regional Integration Training Centre, Piriápolis, Uruguay, 6-10 March 1995.

Tineo, L.

1996 "Los límites para la interpretación del derecho de la competencia en América Latina", paper presented at the Seminar on Competition Policies and Economic Reforms in Latin America, Lima, Peru, August 1996.

United States Department of Justice

1992 *Horizontal Merger Guidelines.*

Venezuelan Supervisory Authority for the Promotion and Protection of Competition (Procompetencia)

1996a *Annual Report, 1995.*

1996b "Informe especial sobre el esquema de integración a ser adoptado en la venta del complejo de producción de aluminio de la Corporación Venezolana de Guayana", Caracas, February 1996.

1995 *Annual Report, 1994.*

1994 *Summary of Activities, 1992-93.*

Vera, L. and C. Curiel

1994 "Estructura y ethos anti-competitivos en Venezuela: un análisis de competencia", mimeo, Venezuelan Supervisory Authority for the Promotion and Protection of Competition (Procompetencia), Caracas, October 1994.

Williamson, O.

1985 *Las instituciones económicas del capitalismo,* Fondo de Cultura Económica, Mexico.

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