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(UNCTAD)**

COMPAL Programme

Strengthening Institutions and Capacities in
the area of Competition and Consumer
Protection Policies in Latin America

Cases of Bolivia, Costa Rica, El Salvador, Honduras,
Guatemala, Nicaragua and Peru

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List of Frequently Used Abbreviations in the Text

APEC	Asia–Pacific Economic Cooperation
CACM	Central American Common Market
CAFTA	Central American Free Trade Agreement
CARICOM	Caribbean Community
CFC	Comisión Federal de Competencia – Federal Competition Commission (Mexico)
CLICAC	Comisión de Libre Competencia y asuntos del Consumidor – Panama's Commission for Antitrust and Consumer Affairs
CODEDCO	Comité de Defensa de los Derechos del Consumidor – Bolivia's Consumer Movement
COPROCOM	Comisión de Promoción de la Competencia – Competition Promotion Commission (Costa Rica)
DGCTM	Dirección General de Competencia y Transparencia de Mercados – Directorate for Market Competition and Transparency (Nicaragua)
DIACO	Dirección de Atención y Asistencia al Consumidor – Directorate to assist consumer matters (Guatemala)
EC	European Community
ECLAC	Economic Commission for Latin America and the Caribbean
EU	European Union
FIAS	Foreign Investment Advisory Service (World Bank)
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GDP	Gross Domestic Product
GTZ	Gesellschaft für Technische Zusammenarbeit (Germany)
IADB	Inter-American Development Bank
IDRC	International Development Research Centre
INDECOPI	Instituto Nacional para la Defensa de la Competencia y de la Propiedad Intelectual – National Institute for the Defence of Competition and Intellectual Property (Peru)
MERCOSUR	Mercado Común del Sur – Southern Common Market
MIFIC	Ministerio de Fomento, Industria y Comercio – Ministry of Development, Industry and Trade (Nicaragua)
ODECO	Oficinas de defensa del Consumidor – Office for the Defence of Consumers (Bolivia)
OECD	Organisation for Economic Co-operation and Development
OSINERG	Organismo Supervisor de Energía – Supervisory Body for Energy (Peru)
OSIPTEL	Organismo Supervisor de Telecomunicaciones – Supervisory Body for Telecommunications (Peru)
OSITRAN	Organismo Supervisor de Transporte – Supervisory Body for Transport (Peru)
SDT	Special and Differential Treatment
SICA	Sistema de Integración Centroamericana – Central American Integration System
SIECA	Secretaría de Integración Económica Centroamericana – Secretariat for Central American Economic Integration
SIRESE	Sistema de Regulación Sectorial – System for Sectoral Regulation (Bolivia)
SMEs	Small and Medium sized Enterprises
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

PREFACE

This document draws on the findings of the sub-regional reports for Central America and for Bolivia and Peru that were prepared during Phase I of the Project on Strengthening Institutions and Capacities in the area of Competition and Consumer Protection Policies in Latin America: Cases of Bolivia, Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua and Peru.

The exploratory missions to those countries were carried out by international experts from October to December 2003 and identified the major needs and priorities in the above-mentioned countries. The report draws on the lessons from their national reports both in the field of competition and consumer policies, from the two sub-regional seminars organized in San Jose, Costa Rica (8–10 December 2003) and in Lima, Peru (22–24 March 2004). The report also draws on the experiences of the bilateral meetings held in Sao Paulo during the Preparatory UNCTAD XI Seminar on the Role of Competition in the Promotion of Competitiveness and Development: Experiences from Latin America and the Caribbean and other regions (Sao Paulo, 10–12 June 2004) and from other discussions, such as those that took place at the UNCTAD XI parallel event on Competition, Competitiveness, and Development (Sao Paulo, 14 June 2004).

The work undertaken during Phase I of the project made possible the launching of the second phase of the programme now known as COMPAL. This programme, which started on 5 November 2004, is oriented towards cooperation with Nicaragua, Costa Rica, El Salvador, Peru and Bolivia. It will serve not only to provide for the needs and priorities of those countries but also as an opportunity to exchange experiences among countries in the region of Latin America and in other regions undergoing development.

It is appropriate to thank Maria Cecilia Martinez (Bolivia), Pamela Sittenfeld y Hazel Orozco (Costa Rica), Celina Escolán (El Salvador), Edgar Reyes (Guatemala), Jessica María Campos (Honduras), Julio Bendaña (Nicaragua) and Odette Herbozo (Peru) for their support, which was of key importance for the successful undertaking of the exploratory missions to their respective countries as well as the outcome of the sub-regional seminars and the parallel event organized during UNCTAD XI.

It is also important to acknowledge the effort and dedication of the consultants who worked in the preparation of national reports during Phase I, namely, Beatriz Boza, Claudia Collado, Liana Lacayo, Juan Pablo Lorenzini, Ricardo Maguiña, Gabriel Muadi and Diego Petrecolla. Their work is to be commended and they presented the results of their exploratory missions at the seminars held in San José and Lima.

The work carried out by Dr. Simon J. Evenett, the international technical adviser to the project, also merits a mention. He contributed extensively to the conceptual framework of the project and other ideas, which are reflected in this report. Mario Ballivian (SIRESE, Bolivia), Joselyn Olaechea (OSIPTEL, Peru) and Gonzalo Ruiz (INDECOPI, Peru) also transmitted their day-to-day experience and extensive knowledge in the areas covered by the report. Their unconditional support was key to the preparation of this report.

We are grateful to the State Secretariat for Economic Affairs (SECO) of the Helvetic Confederation and the Swiss Competition Agency (COMCO) for the support provided during Phase I of the programme. In particular, for the participation of their representatives in the aforementioned bilateral meetings where they provided their views and guidance to the national coordinators during the discussions held in the events. Their collaboration is ratified by the launching of the second Phase of the COMPAL programme, which started on 5 November 2004.

Similarly, the preparation of the report was enriched by constant discussions held with colleagues of the Branch, Elizabeth Gachuri and Lucian Cernat. María Carmen Marin contributed to the organization of the exploratory missions, the preparation of the Seminars held in San José, Costa Rica and Lima, Peru, and the preparation of the English version of this report.

It is hoped that the content of this report represents a useful tool for both the analysis of issues of competition and of consumer policies in selected Latin American countries as well as lessons learned from the technical assistance in these areas.

Finally, during the editing of this report, certain revisions have been made to the text to reflect information, statistical and chronological data referring to the exploratory missions of international experts during 2003 and the duration of Phase I of the project now entitled COMPAL.

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Executive Summary

This report is part of Phase I of UNCTAD's project on strengthening institutions and capacities in the areas of competition and consumer protection in Latin America which examines the cases of Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Peru.

Phase I of the Project included the identification of needs in the exploratory missions to beneficiary countries, the preparation of national reports (two per country for competition and consumer policy issues, respectively), and two sub-regional reports prepared by UNCTAD on the basis of the national reports prepared by international consultants, specialized in the Latin American region, and which were presented in two sub-regional seminars organized by UNCTAD.

The report introduces, at the outset, a brief conceptual framework related to the role of Competition and Consumer Protection in promoting development, in particular the convergence between competition law objectives, consumer protection and economic efficiency (dynamic and static). This problem is of crucial importance in developing countries. Another issue highlighted in the report is the relationship between regulatory bodies and competition agencies. This will be of particular interest to those countries that still have to enact competition laws, but have made progress in the formulation and adoption of sectorial laws and regulations.

The document is then organized into six chapters. Chapter 1 analyses the economic conditions and identifies the key economic sectors in Central American Countries¹ and Bolivia and Peru.

Taking into consideration the size of Central American countries, it makes the case for adopting competition legislation that is adapted to the needs of each country. In this regard, the existing legal and institutional context is examined in each country as well as its relationship with other legislation and public policies related to competition.

Chapter 2 presents the needs and priorities in the field of competition and consumer protection issues in two countries. First, Bolivia, a country whose development has encountered a number of problems, such as political instability and an increasing informal economy, which have undermined the underlying structural reforms carried out in the 1990s. Secondly, Peru, which despite encountering economic bottlenecks, has been able to develop a competition and consumer protection culture and to establish a multidisciplinary agency, namely INDECOPI.

A major contribution of Chapters 1 and 2 is to highlight the existence of anti-competitive practices and the manner in which they have been dealt with both in countries that have competition law and policy (Costa Rica, El Salvador² and Peru) and in countries that have not yet adopted competition laws (Bolivia, Guatemala, Honduras and Nicaragua). In the latter group of countries, the investigation revealed anti-competitive practices in some sectors of the economy, and after analysing the performance of sector regulators, it was found that sanctions had not been effectively implemented. The previous statement supports an effective competition policy (i.e. the legal and institutional context to promote competition) in this group of countries.

Chapters 3 and 4 survey the consumer protection needs identified in the exploratory missions. Chapter 3 is devoted to the case of Central American countries, by outlining the legal and institutional context as well as identifying consumer protection needs in each country. Finally, it outlines the legal and institutional needs of governmental associations and civil society (including consumer associations) with the aim of identifying the type of requirements common to all countries.

Chapter 4 considers the needs in the field of consumer protection for the cases of Bolivia and Peru. In the case of Bolivia, the following needs were identified: (a) diffusion and sensitizing on consumer protection, (b) strengthening the regulatory framework, and (c) strengthening consumer associations. In the case of Peru, the identified needs include: (a) reform of the legislation on consumer protection, (b) strengthening the role of INDECOPI in promoting a culture of consumer protection, and (c) strengthening consumer associations.

¹ The concept of Central America varies widely. The "Central American Isthmus" includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. Some data used in this report refer to the wider concept of the Central American Isthmus and not only to Central America, which excludes Panama.

² El Salvador adopted a competition law on 26 November 2004. However, it has not yet been implemented.

Chapters 5 and 6 analyse the cooperation in the field of competition policy and consumer protection in the case of Central American countries and in Bolivia and Peru, as well as the best way to organize it in support of the needs identified in the countries discussed in previous chapters.

In this regard, it is maintained that, despite the obstacles encountered by integration agreements in which Central American countries participate, regional integration is an effective way to integrate into the world economy. Moreover, various Central American countries have raised the need to include competition provisions in their requests for technical assistance within the framework of such agreements, as it is an issue linked to other public policies. In spite of the clear willingness to include competition issues in recent Free Trade Agreements (FTA), the Central American Free Trade Agreement (US-CAFTA) does not include provisions on Competition Policy. This may hamper the ability of Central American countries to deal with anti-competitive practices, which may affect trade between these economies and the US.

The integration efforts of Central American countries are of two types: integration between similar economies as is the case of the Central American Integration System (SICA), and Integration with developed countries as in the Free Trade Area of the Americas (FTAA). This is a forum in which the countries analyse, among others, competition issues. In both categories, Central American countries project themselves as seekers of technical cooperation. This type of link, i.e. with a developed country (the United States), which is the main destination for Central American trade, is the one being negotiated in the FTA between the United States and Central America (CAFTA), concluded at the beginning of 2004. The present report deals with both types of integration and reinforces the importance of strengthening the negotiating capacity of these countries.

A fundamental prerequisite of optimal technical assistance to Central American countries is the need to avoid duplicating activities. This chapter includes a table showing the type of assistance received by each country, in the hope of establishing possible synergies with UNCTAD's assistance, and of enabling a better response to the needs identified in Phase I of the project.

With regard to the cases of Bolivia and Peru, the cooperation received in the field of competition and consumer protection has been insufficient. Both countries require additional support to be able to meet the needs identified in the field of competition and consumer protection during the respective exploratory missions.

As a result of Phase I, the UNCTAD Secretariat has prepared Phase II entitled COMPAL whose objective is two-fold: first to facilitate the adoption and implementation of competition laws in selected countries that have been drafting laws (i.e. Nicaragua, and Bolivia, as well as El Salvador which has just adopted a competition law), and, second, to deepen the application of the law in more advanced countries, such as Costa Rica and Peru.

The COMPAL programme will give a particular emphasis to the exchange of experiences between these countries. Through the strengthening of competition agencies or public institutions in charge of promoting competition and the better understanding of the benefits of competition among consumers, public officials and the private sector, the programme will contribute to the establishment of a business environment that is conducive to the development of the private sector, with beneficial gains for society at large, especially for consumers.

The direct beneficiaries will be the competition agencies or public institutions in charge of promoting competition and consumer protection. The project will strengthen their efforts to adopt and implement a competition regime, which will have positive impacts on the development of the private sector, notably SMEs, as well as on consumers and their organizations.

Special attention will be given to incorporate the private sector into the planned activities as a means of sensitizing them to the benefits of competition in enhancing economic efficiency in their businesses.

Conceptual Framework

UNCTAD has extensive experience in the work of competition law and policy as well as in the field of consumer protection. Box 1 summarizes UNCTAD's mandate in these two fields. Most recently, the UNCTAD XI Mandate, contained in the "São Paulo Consensus" (adopted in São Paulo during 13–18 June 2004), agreed that

"37. (...) Furthermore, the extent to which full economic and social benefits can be derived from FDI is dependent on, among other things, a vibrant domestic private sector, improved access to international markets, well-designed competition law and policy, and the implementation of investment policies as an integral part of national development strategies.

72. Competition policies best suited to their development needs are important for developing countries in safeguarding against anti-competitive behaviour in their domestic markets, as well as in responding effectively to a range of anti-competitive practices in international markets, which often considerably reduce the positive effects of trade liberalization for consumers and enterprises, especially SMEs.

89. Efforts should be made to prevent and dismantle anti-competitive structures and practices and promote responsibility and accountability of corporate actors at both national and international levels, thereby enabling developing countries' producers, enterprises and consumers to take advantage of trade liberalization. This should be supplemented by the promotion of a culture of competition and improved cooperation between competition authorities. Developing countries are encouraged to consider, as a matter of importance, establishing competition laws and frameworks best suited to their development needs, complemented by technical and financial assistance for capacity building, taking fully into account national policy objectives and capacity constraints.

95. UNCTAD should build on and strengthen the implementation of the Bangkok Plan of Action within the three pillars of its work. To achieve this aim, UNCTAD should:

Help ensure that anti-competitive practices do not impede or negate the realization of the benefits that should arise from liberalization in globalized markets, in particular for developing countries and less developed countries (LDCs);

104. UNCTAD should further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competition law and policies, including at a regional level.³"

³ São Paulo Consensus TD/410. 25 June 2004.

Box 1: UNCTAD's role in the field of competition and consumer protection

UNCTAD has been supporting the initiatives of developing countries in the field of competition law and policy since UNCTAD III, which was held in Santiago, Chile (1972). In 1980, the United Nations General Assembly adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (hereafter referred to as the Set⁴). To date the Set is still the only fully multilateral instrument on competition law and policy. Four UN Review Conferences (1985, 1990, 1995 and 2000) have been held to review all aspects of the Set. On the occasion of the Fourth Review Conference (Geneva, September 2000), the validity of the Set was reaffirmed and UNCTAD was requested to strengthen its technical assistance and capacity-building activities and promote international cooperation in the field of competition.

The Intergovernmental Group of Experts on Competition Law and Policy, which holds annual meetings under the auspices of UNCTAD in Geneva, provides a forum for multilateral consultations, discussions and exchange of views between States on matters related to the Set. On such occasions, Member States decide on the activities that the Secretariat should undertake. In the sixth Session of the IGE on Competition Law and Policy held in Geneva (November 2004), UNCTAD was requested to pursue and, where possible, expand its capacity-building and technical cooperation activities (including training) in all regions, within the available resources, taking into account the deliberations and consultations that took place at the sixth session. The meeting also served as a preparation for the Fifth Review Conference of the UN Set on Competition to be held in Antalya (Turkey) in November 2005.

It is worth mentioning that in the Bangkok Plan of Action (UNCTAD X)⁵ the need to "strengthen the capacities of public institutions for competition and consumer protection in developing countries and help them to educate the public and representatives of the private sector in this field" was agreed.

Moreover, the Fourth Review Conference held in 2000, decided that UNCTAD should provide support to public authorities in the areas of competition and consumer protection and help them sensitize public opinion, as well as governments and private sector representatives, to UNCTAD's work, which aims at defending consumer interests to ensure that competition norms guarantee better quality and opportunities, as well as lower prices of goods and services, which should help alleviate poverty. UNCTAD adopted the United Nations Guidelines for Consumer Protection, which were expanded in 1999 (see www.unctad.org).

These mandates, together with the agreed Sao Paulo Consensus (UNCTAD XI, June 2004), serve as the basis for UNCTAD's technical cooperation activities in the field of competition law and policy

Box 1 contains the guidelines for UNCTAD's work programme in the field of competition and consumer protection. It is important to establish a conceptual framework as a point of departure for those developing countries that do not have competition laws and policies.

The aforementioned conceptual framework is divided in two parts. The first describes ways in which competition law and its enforcement can affect prices, competitiveness, economic development and poverty. The second refers to the interrelation between sectoral regulators and the competition agency, which is key to the process of implementing competition regulation in countries that do not have competition laws in all sectors of the economy.

a. The role of competition law and enforcement supporting development in Latin America

This section begins with a few preliminary remarks to define key aspects of competition law and policy.

Competition law: definition, instruments, and objectives

Before proceeding further it is useful to distinguish between the terms 'competition law' and 'competition policy'. As one group of scholars recently put it:

⁴ UNCTAD. TD/RBP/10/Rev.2, United Nations, Geneva, 2000.

⁵ UNCTAD X. Bangkok Plan of Action, Bangkok, Thailand. 12-19 Feb. 2000 TD/386 - 18/02/00 At Paragraph 141.

“competition (or antitrust) law lays down the rules for competitive rivalry. It comprises a set of directives that constrain the strategies available to firms⁶”.

In contrast, competition policy is a far broader term. The term competition policy refers to all of those government measures that can influence the intensity of competition in national markets or that impact on an economic entity’s freedom to trade.⁷ Consequently, a nation’s competition laws are part of its competition policy, but so also are many other laws and policies including trade policies, measures towards foreign investors, domestic business regulation, privatization initiatives and the like.

Given that the focus here is on competition law, it may be useful to report that UNCTAD (2002) has identified the following five state measures that tend to be enacted through competition legislation:

(i) measures relating to agreements between firms in the same market to restrain competition. These measures can include provisions banning cartels as well as provisions permitting cartels under certain circumstances;

(ii) measures relating to attempts by a large incumbent firm to exercise market power independently (sometimes referred to as an abuse of a dominant position);

(iii) measures relating to firms that, acting collectively but in the absence of an explicit agreement between them, attempt to exercise market power. These measures are sometimes referred to as measures against collective dominance;

(iv) measures relating to attempts by a firm or firms to drive one or more of their rivals out of a market. Laws prohibiting predatory pricing are an example of such measures;

(v) measures relating to collaboration between firms for the purposes of research, development, testing, marketing, and the distribution of products.

In addition, some national competition laws grant to the agency entrusted with enforcing these laws the right to comment on, or otherwise intervene in, the formation of competition policies more generally. When a competition agency comments on the policy proposals of another state body, or when it makes the case for greater inter-firm rivalry, it is said to be engaging in *competition advocacy*

There is considerable debate over the goals of competition law. Many observers from industrialized countries contend that the goal should be to enhance the static and dynamic efficiency of an economy by altering the allocation of resources.⁸ However, for better or for worse, many jurisdictions have bestowed upon their competition laws a number of non-efficiency-based objectives, such as Mexico’s Federal Economic Competition law which seeks “to protect the competition process, and the free market access.”⁹

The effects of enforcing competition law on prices, poverty reduction, competitiveness, and dynamic economic performance

By and large, the enforcement of competition law can have a large number of pro-developmental effects. Some effects are felt in the near term, and some in the longer term.

⁶ Audretsch, D.B., Baumol, W.J. and Burke, A.E. (2001). Competition policy in dynamic markets. *International Journal of Industrial Organization* 19: 613–634.

⁷ It should be stressed that the weight given to these two components has tended to vary across jurisdictions and over time.

⁸See: (i) POSNER, Richard. (1978). *Antitrust Law: An Economic Perspective*. University of Chicago Press, (ii) POSNER, Richard. (2001). Antitrust in the New Economy. *Antitrust Law Journal* 925–943 (iii) Baumol, W.J. (2001). When is inter-firm coordination beneficial? The case of innovation. *International Journal of Industrial Organization* 19: 727–737.

⁹Refer to <http://www.cfc.gob.mx/>

And some of the benefits of credible and effective competition law enforcement do not require actions by the state at all. In this section, the principal effects are summarized.

Whether or not one is interested in short-term or longer-term effects, it is important to appreciate that effective competition law works through three channels. First, the investigation of competition agencies can result in anti-competitive practices being broken up – just as in the case of the poultry cartel in Lima, Peru. Here enforcement is *corrective* and can put a stop to an anti-competitive act. Second, competition laws can require that some acts that firms want to undertake – such as mergers, acquisitions, or agreements between distributors and manufacturers – be reviewed before they actually occur. Here competition law is *pre-emptive* in its effects. Third, once credible, the threat of competition law enforcement can dissuade firms from undertaking anti-competitive acts in the first place. Here, competition law has a *deterrent effect*.

The fact that competition law works through three channels is no guarantee that the outcomes are beneficial to society. Competition laws must not reinforce entrenched economic interests. The staff necessary to enforce them must be well trained and be able to interpret often complex pieces of economic evidence. Moreover, the power granted by law to competition enforcement officials must not be abused through corruption or bureaucratic harassment of the private sector. In short, having a competition law on the statute books is no guarantee of pro-development outcomes – and one of the goals of this sub-regional report is to identify the first steps that Central American nations might take to ensure that any competition laws and enforcement practices are better aligned with national development strategies.

In the near term, an immediate effect of competition law enforcement against price fixing and collusion is to encourage inter-firm rivalry, which typically results in lower prices for purchasers. It is a mistake to think that only consumers are purchasers. Indeed, this mistake is compounded when it is realized that many of these consumers are the poor that development policy hopes to extricate from poverty. Firms and governments buy many goods and services too. When enforcement lowers the prices of inputs to production, the competitiveness of the purchasing firm improves. And when competition enforcement attacks bid rigging, governments pay less for essential items (such as medicines) and for building projects (e.g. schools and hospitals).

While the above short-term effects of competition law and its enforcement are quite widely accepted, what is far more controversial is the relationship between enforcement and dynamic – or long-term – economic performance. It would take too much space to describe each and every viewpoint, so instead the major arguments are summarized below.¹⁰

Put simply, the following five arguments contend that promoting rivalry between firms enhances dynamic economic performance: (i) greater competition between firms sharpens incentives to cut costs and to improve productivity; (ii) the benefits from trade reform, deregulation, and privatization will not be realized without the potential for active and effective enforcement of competition law; (iii) the appropriate enforcement of competition law adds transparency to a nation's commercial landscape which, in turn, attracts foreign direct investment; (iv) greater competition in product markets stimulates both product and process innovations; and (v) rivalry in the market for future innovations can be protected by the active and appropriate enforcement of merger and acquisition laws which prevent, for example, one firm taking over another firm which has a potentially strong, but not as yet fully developed, range of rival products.

While it is not claimed that each of these arguments applies with equal force in every developing country, the conceptual arguments and the available empirical evidence by and large support the view that promoting inter-firm rivalry enhances the dynamic economic performance of developing economies. Furthermore, it is worth noting that in the second, third and fifth arguments above demonstrate that the appropriate enforcement of

¹⁰ Interested readers are referred to a longer account in WTO (2003).

competition law plays a direct role in promoting long-term economic performance; in the other two arguments such enforcement plays an indirect role by first fostering inter-firm rivalry.

On the other hand, the following four arguments question whether unfettered rivalry between firms promotes development: (i) missing markets, especially financial markets, imply that investments can only be financed out of retained profits, which are eroded by unfettered competition between firms; (ii) firms, it is argued, need to achieve a certain size to compete effectively on world markets or to withstand competition from imports. This view has clear implications for the conduct of reviews of proposed mergers and acquisitions, especially in those sectors where so-called national champions currently, or might in the future, operate; (iii) governments need not intervene to promote rivalry in markets where innovation is the principal source of competition. In such markets, current monopoly profits act as a spur to innovation and the creation of new products and processes; and (iv) maximizing rivalry leads to inefficient outcomes in national monopolies and in some network industries.

The first three of these arguments are flawed and certainly do not provide a general critique to implementing competition law and enforcing it properly. The first argument is unpersuasive as it suggests that competition law should somehow compensate for inadequate capital markets and banks; the solution, of course, is to develop the latter directly so that firms can borrow to invest. The second argument applies at most to the few export industries with substantial economies of scale. It turns out that few manufacturing industries in developing economies have falling costs of production when output rises. Moreover, even if one is convinced that the firms actually fit the definition of national champions, the most they call for is an exemption from competition law – and, therefore, this is not a valid argument for implementing a competition law in the first place. The third argument cannot apply to those many markets in developing countries where prices – rather than innovation – are the central focus of competition. Moreover, empirical studies have shown that competitive pressure strengthens the incentive to innovate, not weakens it.¹¹

The fourth argument above (which referred to natural monopolies) can be taken into account in the design of a national competition law. Exemptions can be offered for natural monopolies and an appropriate regulatory framework created to encourage the large incumbent firms not to exploit their monopoly power. It should be noted that nothing prevents a competition enforcement agency acting as a sectoral regulator too.

To summarize, the appropriate and well-resourced enforcement of competition law can promote development by lowering prices, encouraging competitiveness, reducing monopoly power, and advancing long-term development. The arguments advanced against adopting a competition law are at best arguments for an exception to those laws – at worst, these arguments are flawed. The consequences described here are the ones that Central American economies can expect to reap as they enforce their competition laws. Typically, the initial caseload of competition agencies is cautious and conservative. But as experience develops, and as the enforcement agency's credibility is enhanced with the private sector, then the deterrent effects of competition law will reinforce the corrective and pre-emptive consequences of these laws.

Consumer protection policies and development

With the move towards democracy and measures to liberalize domestic sectors and foreign trade, policy makers in Central America and elsewhere have taken a greater interest in the linkages between consumer protection policies and economic and sustainable development. This has manifested itself in a greater commitment to implementing and enforcing national consumer protection statutes and to adhering more closely to the UN Guidelines for Consumer Protection (United Nations, 1999a). Before discussing the developmental impact

¹¹ See WTO 2003 and references contained therein.

of these policies, a few preliminary comments on the nature of consumer protection policies are in order.

Consumer protection policies: motivation, instruments, and implementation

Although consumers' – or more generally, purchasers' – interests can be perceived broadly to include the prices, quality, reliability, safety, etc., of goods and services, consumer protection policy is said to have a narrower set of objectives. Mexico, in its Annual Report on Consumer Policy Developments in 2001 presented to the OECD, argued that the objectives of its consumer protection policy were:

- “To protect and to defend consumers' rights in order to avoid that their patrimony is damaged because of undue practices or suppliers' abuses,”
- “To educate suppliers to the purpose of diminishing the incidence of complaints so as to create a culture of service to the client”.¹²

In Mexico and elsewhere these objectives are typically accomplished through a combination of the following means:

- (1) Legal measures that articulate the rights of purchasers, including forms of redress.
- (2) Legal measures to codify certain standards that suppliers – taken to include wholesalers and retailers and not just producers – must adhere to.
- (3) Legal measures that permit a state agency to approve, under certain circumstances, standards proposed by suppliers.
- (4) Legal measures empowering state agencies to verify and investigate whether any legal standard has been met and to change those standards, where appropriate.
- (5) Legal measures permitting investigations by a state agency into whether consumers' rights have been infringed.
- (6) Legal measures to create tribunals or other bodies for the purpose of informally and formally resolving consumers' complaints and other infringements of these laws. Such tribunals may be judicial or administrative and may have the power to award compensation and to impose fines or other forms of punishment.
- (7) State funding of research, testing, and information dissemination on matters relating to consumers' rights and the obligations on producers.
- (8) Measures to encourage the participation of civil society and international organizations in the design of, debate on, and implementation of, consumer protection policies and laws.
- (9) The sectoral coverage of such policies is also specified by law, and may well include exemptions for state industries and enterprises.

In recent years, financial, transportation, and communication services have been brought within the ambit of these laws, in recognition of their growing role in developing economies. Moreover, initiatives have been undertaken to raise awareness of sustainable consumption (e.g. water and energy use), which is an element of the UN Guidelines.

It should also be noted that the above list of measures (associated with consumer protection laws and policy) are quite distinct from those associated with competition law. In some discussions, these two bodies of law are incorrectly conflated.

¹² Government of Mexico (2002). Mexico. Annual Report of Consumer Policy Developments 2001. Available at: <http://www.oecd.org/dataoecd/34/0/1955364.pdf>.

Consumer protection policies and development

In discerning the effects of these policies on development, it is important to appreciate that effective implementation of the associated laws and policies is a necessary condition for any positive developmental impact. As Edwards (2003) has argued:

“Many leading commentators have noted that unimplemented laws and toothless consumer protection institutions make any legislation marginal. In addition, legislation must be complemented by effective information and education, representation in policy and decision procedures, accessible and enforceable redress mechanisms, action to promote competition and deter abusive business practices, and policies to promote sustainable production and consumption.”

As in the case of competition law, the enforcement of consumer protection law can have distinctive corrective, pre-emptive, and deterrent effects. When such laws are properly implemented what are the effects on economic and social development?

The first effect is to ensure that the health and safety of consumers is not threatened or harmed after they make purchases and that any quality or other assurances given by producers are honoured. Apart from obvious and important health considerations concerning poor quality food, unsafe medicines, and dangerous goods and services, all of the latter contribute towards *reduced* and more variable (and, therefore, less reliable) labour force participation through sickness.

The second effect relates to the *commitment value* of consumer protection policies. Once firms know that they can and will be held to promises that they make on quality, reliability, etc., then those firms that can deliver improved goods and services will now be able to credibly make announcements to that effect. Before, consumers would not have believed any promises about quality improvements, warranties, and the like. This argument highlights that certain innovations by firms – which benefit consumers – are actually contingent on effective consumer protection policies. Furthermore, such innovative firms have an incentive to see such laws properly enforced.

The third effect of consumer protection policies is to create a cadre of discerning consumers. Although this may seem a little odd, it is worth noting that Michael Porter in his account of the competitiveness of nations gives considerable weight to the role that discerning consumers can play in provoking competition between firms and innovation by them (Porter, 1990). In contrast, undemanding consumers provide little impetus to suppliers to improve their products, services, delivery times, reliability, etc. Firms that are able to supply demanding domestic consumers are more likely to be able to meet the needs of foreign consumers, providing a link between consumer protection policy and competitiveness also.

Counteracting these three positive effects of consumer protection law on development are the legitimate concerns that inappropriate or inadequate enforcement can lead to bureaucratic harassment of the private sector and a more uncertain business climate. Such concerns can be remedied by better governance policies and not by throwing the baby out with the bath water and not implementing consumer protection laws in the first place.

b. Sectoral regulation and competition authorities: challenges and potential responses

Introduction

In many developing countries, sectoral regulation was introduced well before competition legislation. This has created a number of challenges for the implementation of competition law and for associated enforcement efforts. This section describes those challenges and outlines the advantages and disadvantages of a number of potential policy options, highlighting some of the important factors that policy makers must take into account.

Indeed, given that sectors vary so much in their economic characteristics, in the social and developmental concerns that they raise, and in the likelihood of regulatory capture,¹³ it is perhaps not surprising that no straightforward solution exists to the problem of overlapping jurisdictions between sectoral regulators and competition agencies. Almost by definition, one of the complicating factors is that the multiplicity of objectives that underlie state policy far exceeds the number of tools available to the state to meet them. Inevitably, trade-offs have to be made and, if this is not managed transparently and consistently, this can result in greater uncertainty faced by firms, jeopardizing investment and the creation of employment.

The remainder of this section refers to further aspects of the nature of the policy challenge raised by overlapping jurisdictions of competition agencies and regulatory bodies.

Reconciling competition law and sectoral regulation: the challenge posed to policy makers

Although concerns about anti-competitive conduct by incumbent firms are one reason why governments have intervened in some economic sectors, this is by no means the only rationale for state regulation. Concerns about fairness, about access to goods and services by the poor and by those in geographically remote areas, about prudential behaviour (in the case of health, safety, the environment, and the financial sector) are some other rationales. In many cases, the traditional response has been to establish for each industry a distinct sector-specific regulator with stated mandates and powers. The sector-specific nature of both the government objectives¹⁴ and the technologies¹⁵ and corporate organizations employed by firms probably accounts for the creation of separate regulators for each industry.

Whether or not a regulator attains its specified mandate is an interesting question, but this is not our primary concern here. Instead, this discussion will focus on the consequences of a government deciding (typically after many sectoral regulators have been established) to take stronger measures against anti-competitive practices in their jurisdiction. Often this intention manifests itself in the passage of a competition law that grants powers to state bodies to investigate anti-competitive practice(s) and, should they be found, to punish those responsible or to order the cessation of the practice(s). The prior existence of state regulators immediately raises the following questions concerning the enactment and implementation of competition law:

- Which, if any, of the provisions of the competition law would apply to sectors regulated by other state bodies?
- Would the investigative powers of, and sanctions available to, the competition agency differ across sectors subject to regulation and those that are not?
- Would any decision that the competition agency takes with respect to a firm operating in a regulated sector be decided in consultation with, or even with the approval of, the relevant sectoral regulator?
- Which government body, if any, should adjudicate on disagreements between the sectoral regulator and the competition agency that arise in the furtherance of the latter's duties?
- What rights, if any, does the competition agency have to investigate, to comment (including publicly), and to otherwise act on the operations and decisions of the sectoral

¹³ "Regulatory capture" is said to occur when private interests in a sector *de facto* or *de jure* control the sectoral regulator that was supposed to oversee their behaviour. Sometimes the form of capture can be very subtle, such as the strategic supply of information to the regulator. In other instances, practices not usually associated with good governance are resorted to.

¹⁴ Such as the provision of affordable water.

¹⁵ In the jargon of economics, this can include "natural monopolies"; that is, technologies which generate continuously falling average costs as output increases.

regulator or on the state body or bodies that establishes the mandate for the sectoral regulator?

- Whose investigations and decisions take precedence: the competition agency or the sectoral regulator?
- What rules, if any, govern the sharing of information between the competition agency, a state regulator, and the state bodies overseeing the latter?

It is worth noting that these questions are in addition to the more general questions faced by policy makers when establishing a competition agency. Moreover, apart from the legal “division of labour” that is the subject of the questions above, a number of pragmatic questions of implementation arise including:

- Given the shortages of talented human capital in developing countries, is it desirable to consolidate all regulatory and other powers for a particular industry into a single government agency? Indeed, taking this point to its logical conclusion, is it advisable to establish a cross-sectoral enforcement agency?
- Does the creation of a second government agency to oversee selected aspects of the private sector’s behaviour in a given sector add further to the uncertainty and to the regulatory burdens faced by such firms?
- Are sector-specific private sector interests less likely to “capture” (or unduly influence) a competition agency than a sector-specific regulator? Furthermore, which type of agency is best able to preserve its independence from political forces?

Taken together, there are a number of legal, pragmatic, and governance-related factors that are raised when considering the potential future or actual relationship between a sectoral regulator and national competition law and its associated enforcers. The discussion now turns to an evaluation of a number of options that are available to policy makers.

Options for policy makers

It is possible to identify at least eight options available to policy makers. To facilitate comparisons across these options Table 1 highlights each one’s advantages and disadvantages. As will become clear no option is without some disadvantages, suggesting that policy makers will have to make a number of institutional and substantive trade-offs.

Table 1: Eight policy options available to address the potential for overlapping jurisdictions between competition agencies¹⁶ and sectoral regulators.

Options	Advantages	Disadvantages
1. Exempt regulated sectors from national competition law.	1. Eliminates uncertainty created by dual reviews of these sectors. 2. The scarce resources of the competition agency can be devoted to unregulated sectors of the economy.	1. Sectoral regulator may not tackle anti-competitive practices.
2. Subordinate competition agency's decisions in a regulated sector to the relevant sectoral regulator.	1. Allows competition enforcers' concerns to be aired but not to make them supersede the mandate of the sectoral regulator.	1. May not result in anti-competitive practices being tackled, especially if the regulator sees no mandate for doing so, if the regulator does not have the staff to assess the arguments made by the competition agency, or if the regulator has been "captured" by the firms it is supposed to oversee. 2. The competition agency devotes scarce resources to investigations in the sector in question as well as the relevant regulator. There is a potential for duplication.
3. Subordinate a sectoral regulator's decisions to that of the competition agency.	1. Gives primacy to tackling anti-competitive practices stated in the nation's law. Indeed, this option prevents a state regulator's explicit or implicit approval of an anti-competitive practice from being implemented.	1. May result in the social and development objectives of regulatory policy being given less prominence. Moreover, under this option it is not clear whether and by what means competition enforcement officials would factor in the non-efficiency-related objectives of regulation. 2. The competition agency devotes scarce resources to investigations in the sector in question as well as the relevant regulator. There is a potential for duplication.
4. Make the investigation and action against anti-competitive behaviour by firms in a regulated sector solely the responsibility of the competition enforcement agency, and allow the sectoral regulator to act on other aspects of firm behaviour or to set the terms for that behaviour.	1. This option can reduce regulatory uncertainty (compared to options 2 and 3), as firms know that only one agency will investigate and rule on each type of behaviour.	1. The division of tasks may not be as easy as it sounds. Some corporate practices may well be efficiency enhancing yet fall out of the sectoral regulators' other objectives. Thus, this option does not reconcile any conflicts between the objectives of competition law and sectoral regulation. 2. Effectiveness of the competition agency may be undermined by instructions from the sectoral regulators to firms to fix prices, set quantities, etc. (or by exemptions granted by the sectoral agency that allow firms to engage in anti-competitive practices). 3. There is the potential for simultaneous investigations and actions by these state bodies, which adds to the burdens and uncertainty faced by firms.
5. Option 4 plus the competition agency has the right to be consulted on, and comment on, decisions by state regulators before the latter acts.	1. Enables the competition agency to subtly or not so subtly alter the perceived political costs and benefits of various choices faced by the state regulator. 2. The competition agency could make life a lot harder for a captured state regulator.	1. While giving a voice to the competition agency, this option does not mandate the sectoral regulator to take on board the former's concerns. Moreover, this option does not provide a means for reconciling any conflicting objectives. 2. Disadvantages 2 and 3 of option 4 (above) still apply.

¹⁶ For the purpose of this table, it is assumed that a single state body has been set up to implement the nation's competition law. With multiple state bodies enforcing the competition law, the number of options increases further. Implicit in the text of this table is the assumption that the competition law is directed towards the behaviour of private (non-state) enterprises only.

Options	Advantages	Disadvantages
6. Decisions by each agency have to be approved by the other.	1. In principle, this option ensures that both anti-competitive practices and the objectives of state regulation are addressed. Indeed, such a regime might encourage the sectoral regulator and the competition agency to establish a formal cooperative mechanism and to find ways to attain the objectives of state regulation that minimize the disruption to competition. 2. Can prevent a "captured" state regulator from taking decisions with anti-competitive effects.	1. In practice, this option is a recipe for locking in the <i>status quo</i> . Changes in policy regime can become difficult to accomplish. 2. Unless a transparent mechanism for inter-agency cooperation was established, firms may face considerable uncertainty.
7. Option 6 plus a provision that any dispute between the sectoral regulator and the competition agency will be resolved by government (reference to Ministers or to the Cabinet.)	1. Provides a mechanism to overcome deadlock that could emerge under option 6.	1. There is no guarantee that the government will be willing or able to resolve the deadlock. 2. Nor is there any guarantee that any resolution would respect the principles underlying the competition law or the regulatory law. For example, if the ultimate decision lies in the hands of captured policy makers then anti-competitive practices are unlikely to be addressed. 3. The envisaged provision provides each agency with an alternative to resolving their differences with the other. In effect, the provision provides each agency with less incentive to find a solution to their own challenges without compromising the objectives of the other.
8. Ensure that the body responsible for a certain sector accepts the decisions of the competition authority	1. Reduces the number of bodies enforcing law against anti-competitive practices. 2. Reduces the possibility of "capture" in a competition agency working transversally in all sectors. 3. Savings on fixed costs from the reduced sectoral and/or competition agencies enforcing the law.	1. There is no guarantee that the sectoral regulators absorbed by the competition authority will have pro-competitive ideology or the necessary capabilities to analyse anti-competitive practices in markets. On the contrary, staff in the competition agency must set the guiding principles for sectoral rules. A problem of work overload can arise. 2. Increased costs arising from the transition to the new institutional framework. 3. This alternative does not specify the means in which a competition agency could accept compensations between the objectives of economic efficiency and the duties of economic regulation.

Source: Simon Evenett (March 2004). Input for the discussion on the inter-relationship between competition agencies and sectoral regulators.

CHAPTER I

Definition of Needs and Priorities in the Area of Competition Policies in Central America

1.1. Economic context ¹⁷

It has been argued that a small economy is “an independent sovereign economy that can support only a small number of competitors in most of its industries when catering to demand,” and which is characterized by monopolistic or oligopolistic structures in most of its industries.¹⁸ Low population size, low population dispersion, high openness to trade, high industrial concentration levels, high entry barriers and suboptimal levels of production are some characteristic of small markets. Their structural problems may lead to market concentration and higher prices. These strengthen the need for competition law and policy, which would help them to correct market failure brought about by both structure and conduct aspects that support the market mechanism. It may enhance development and discipline foreign investors. In view of the fact that there may be winners and losers, governments should introduce supportive social policies. Competition advocacy and institutional strengthening are seen as necessary tools in order for the competition policy to gain acceptability and be effective.

Furthermore, it is widely recognized that, in small economies, the adoption of competition law and policy needs to be tackled with a different approach to that taken in large developing countries. Some argue that small open economies do not need competition law because imports would discipline domestic firms in their concentrated markets. Despite openness, however, there is still a non-tradable sector created by natural or market barriers, and there could be serious competition problems, requiring competition discipline.

Small open economies should, therefore, have strong competition laws proscribing anti-competitive agreements and abuse of a dominant market position and should have flexible instruments of merger control regulation, and there should be no attempt to limit the scope of the law. In view of the importance of mergers in small economies as a means to increase concentration above relatively low thresholds, it has been argued that prohibiting all mergers would be economically harmful, and, therefore, small economies should adopt a merger policy consisting of a set of flexible instruments to be applied on a case by case basis to mitigate competition concerns while promoting economic efficiency.¹⁹

Apart from specific tailoring of competition law, competition policy in small economies should apply strict rules to market powers that are clearly anti-competitive. Furthermore, it is argued that economic theory and basic doctrines that serve as a basis for competition policy in large economies can apply equally in smaller ones, since some conduct is against the public interest in any economy regardless of size. Collusive conduct or abuse of dominance is generally much greater in small economies than in large ones due to higher industrial concentration levels and entry barriers, and remedies for such conduct should usually be conduct-oriented rather than structural.

¹⁷ Figures used in this publication are updated as of November, 2004.

¹⁸ (Gal, 2001:6).

¹⁹ See Khemani cited by Gal, *op. cit.* page 1457.

For example, the Central America (CA) sub-region is composed of five market economies with small populations (Costa Rica: 4 million, El Salvador: 6.5 million, Honduras 6.6 million, Guatemala 13.9 million and Nicaragua 5.1 million). As Table 2 shows, according to figures available at the time of this publication, GDP moderately increased by approximately 2.5% in 2003, with the exception of Costa Rica where it attained a record 6.5%.

Table 2: Central America: GDP evolution.

(Real annual variation, %)				
	2000	2001	2002p	2003e
Central America	3.0	1.9	2.4	3.4
Costa Rica	1.8	1.0	2.9	6.5
El Salvador	2.2	1.7	2.2	1.8
Guatemala	3.6	2.3	2.2	2.1
Honduras	5.7	2.6	2.7	2.2
Nicaragua	4.2	3.0	1.0	2.3

p: provisional; e: estimated.

Source: ECLAC: (1) Central American Isthmus. Economic outcomes for 2003 and projections for 2004. July 2004.

(2) ECLAC. Economic Study of Latin America and the Caribbean for 2003 and perspective for 2004. September 2004.

Nevertheless, GDP *per capita* in Central America increased slightly in 2003 (2000: 0.5%, 2001: -0.7%, 2002: 0.0%, 2003: 1.1%, according to preliminary figures).²⁰ This situation points to the need to make additional efforts to achieve better social welfare.

According to recent estimates, the sub-region has benefited from increased exports, mainly of goods from firms operating within the free trade zone but also exports of traditional and non-traditional goods. The exports of high technology goods (INTEL) originating from Costa Rica are worth highlighting. Among the factors generating external income are textiles from the maquila industry, intrazonal and exchange trade with Mexico, as well as increased international tourism and remittances from relatives abroad. The remittances continue to be key to the balance of payments, stimulating economic development as well as being important contributors to the financial, fiscal and commercial sectors of the economy.

Estimations for 2004 suggest that growth rates in Central American economies will be similar to those of 2003, due to surmounting factors that threatened the stability of the economy. The next section examines several elements in the five Central American economies under study in this report.

1.1.1. Economic situation and key sectors in Central American economies

The Costa Rican economy has grown rapidly and steadily during the 1990s. More recently economic growth registered a record figure of 6.5% (estimated), which has been attributed to increased exports, especially microprocessors produced by the INTEL plant, medical equipment and pharmaceutical products.

²⁰ ECLAC Central American Isthmus: Economic Evolution during 2003 and perspectives for 2004 (31 July 2004).

El Salvador has registered a moderate growth in GDP since 2000 (2.2%), falling to 1.8%²¹ in 2003 according to estimated figures. Since 1989, the government has been implementing measures to strengthen the private sector and to encourage economic opening. One of the main challenges for the new government will be to consolidate public finance, mainly regarding costs of pension systems and the external debt. GDP growth in 2004 is estimated to be between 1.8% and 2.3%, due to increased private consumption, remittances and exports from the Maquila industry.

Guatemala is the largest economy in the Central American sub-region, with a population of 13.9 million inhabitants. The growth of GDP since 2001 has been slow (2001: 2.3%, 2002: 2.2% and 2003: 2.1%). In addition, internal factors, such as clashes between the government and certain business groups and uncertainty generated by the presidential elections in November 2003, have caused a fall in the gross domestic investment (-8.6% according to figures from ECLAC). Recently, exports have increased and, jointly with Costa Rica and El Salvador, the three countries generate approximately 80% of intra-Centroamerican exports.

In the case of Honduras, even though development indicators have improved in recent years, Hurricane Mitch and tropical storms, which struck the country in October 1998, have had a serious impact on the economy, affecting the infrastructure, production and exports. The latest indicators of GDP show a recovery since 1999; in 2001 the growth rate was over 2% and in 2003 it reached 3.2%. The contribution of agriculture to GDP fell dramatically, reaching 15.3% in 2002. The main reasons for the fall being the little importance granted to crops such as coffee and to the growth of the manufacturing market. Although the maquila industry has grown significantly in recent years, the agricultural sector remains important providing 36.6% of employment to the economically active population. Economic policy in Honduras is oriented towards structural reforms.

The Nicaraguan economy improved in 1999 (7.0%) and 2000 (4.2%), which was followed by low growth rates over the last few years (2.3% in 2003). Natural disasters (Hurricane Mitch, volcanic eruptions, earthquakes, tidal waves and droughts) have significantly affected the country. Agriculture is gradually growing in importance, whereas the relative weight of other sources of income – especially manufacturing – is diminishing. Naturally, this affects the capacity of the country to compete in international markets.

Since the mid-1990s, the Nicaraguan government has undertaken a series of key reforms. These included market liberalization measures, such as the progressive elimination of trade barriers, reform of an oversized public sector, which implied personnel cuts, the closure of public companies, and an intensive privatization policy in certain areas such as energy and telecommunications. The financial sector was also reformed through the adoption of modern legislation, an integral pension system, and significant improvements in the management of public expenditure. All these reforms have brought about positive effects for the economy and boosted foreign investors' interest. The government clearly intends to recover through economic growth and the attraction of Foreign Direct Investment (FDI).

1.1.2. Economic and commercial opening, deregulation and privatization

From the mid-1980s and mainly throughout the 1990s, Central American countries have carried out a series of economic reforms, based on economic deregulation and privatization and opening the market to free trade.

²¹ Some sources estimate GDP growth in 2003 at 2%. See ECLAC, Economic Study of Latin America and the Caribbean for 2003 and perspectives for 2004. September 2004.

Central American countries share certain characteristics. Aside from being small economies, they are open to trade, their exports are relatively diverse and they trade with a reduced number of partners, the United States being the most important one. In August 1983, the American government passed the Caribbean Basin Economic Recovery Act, which grants preferential tariff treatment to most products originating from Central American countries and the Caribbean. It initially had a 12-year validity term until 30th September 1995, but it was then extended to 2008 through the ratification of the Trade and Development Law (known as NAFTA parity) in October 2000.

Efforts towards a customs union

As a way of liberalizing trade, a common customs area was established within the confines of the Central American economic integration (detailed in Chapter 5 under cooperation and the Central American economies), which seeks the usual objectives of such schemes, namely free trade of services, especially those associated with the trade of goods, a common external tariff and customs administration, a mechanism of collection, administration and distribution of the tributary income, a common external trade policy and uniform trade regulations.

In the first half of the 1990s, the Central American integration achieved significant advances in establishing a customs union. Subsequently, countries took the decision to adopt timetables to reduce custom tariffs, with the intention of making them converge into a common external tariff by the end of 2000. This has not been achieved in its totality.

The tariff policy is based on the following parameters:²² 0% for capital goods and raw materials produced outside Central America, 5% for raw materials produced in Central America, 10% for intermediate goods produced in Central America and 15% for goods for final consumption. Exceptions exist for products such as textiles, clothing, shoes, tyres and farming products, whose custom tariffs are set by the Uruguay Round.

In practice, there are still numerous obstacles to the free circulation of merchandise, encouraging countries to delay meeting the target of full tariff convergence by the end of 2005. Among the existing obstacles, it is worth outlining the application of differentiated product tariffs by countries and safeguard clauses. In this respect, according to the Central American Tariff Agreement, the latter would enable (whenever required) a change in the tariff rate for a determined product from the one decided at intraregional level. The safeguard clauses applied to imports from the sub-region have recently become part of the common external tariff.

In the Uruguay Round, Central American countries took on commitments in terms of market access, which consisted of reducing and consolidating their tariff levels. These commitments can be found in the Annexed Lists corresponding to Article II of the 1994 GATT. They were to be achieved during the period from 1995 to 2004, which was the term for implementation agreed by the developing countries. From the methodological point of view and the type of product, each list of concessions was divided into two major sections: (a) farming products and (b) other products.

In the case of the farming sector, countries were committed to reducing internal production and export subsidies, eliminating non-tariff barriers or converting them into an equivalent tariff, as well as reducing the levels reached by the latter. As the levels reached by the equivalents were extremely high, countries agreed to guarantee the access to merchandise through what is denominated as "contingent tariffs".

In general, the concessions granted in the Uruguay Round were established in the Lists²³ and can be seen in Table 3.

²² SIECA. Situation status of the Central American Integration until October 2003. Central America, 2003.

²³ SIECA, *op. cit*

Table 3: Concessions granted in the Uruguay Round to Central American countries.		
<i>COUNTRY</i>	FARMING PRODUCTS	OTHER PRODUCTS
Costa Rica	Will consolidate the tariff ceiling of farming products, within 10 years (1995–2004), to a maximum level of 45% <i>ad valorem</i> , from a basic level of 55%, with the exceptions of the ones negotiated in the adhesion that are contained in List LXXXV.	The tariff ceiling of other products consolidates them, in the same period, at a maximum level of 45% <i>ad valorem</i> .
El Salvador	Ratifies the general ceiling of 40% <i>ad valorem</i> consolidated in the adhesion, effective from 31/12/93, with the exceptions contained in the List LXXXVII.	<i>Idem</i>
Guatemala	Will consolidate a ceiling of 40% <i>ad valorem</i> , when finalizing the implementation period of the Agreement, starting off with a basic level of 45%, with the exceptions contained in List LXXXVIII.	It ratifies the ceiling of 45% <i>ad valorem</i> negotiated in the adhesion, with the exceptions of Chapters 50 to 64 of the SAC, whose consolidated level is of 50% <i>ad valorem</i> , and the exceptions of List LXXXVIII.
Honduras*	Consolidated a general ceiling of 35% <i>ad valorem</i> , effective from the adhesion.	<i>Idem</i>
Nicaragua	Consolidated a ceiling of 60% <i>ad valorem</i> , effective from 1/1/95, with the commitment to reduce it to 40% during the implementation period, with the exceptions contained in List XXIX.	Consolidated a general ceiling of 60% <i>ad valorem</i> , effective from 1/1/95, with the commitment to reduce it to a maximum of 40% <i>ad valorem</i> , effective from 1/1/99.

Source: SIECA from the List of Countries - appendix to Article II of GATT 1994.

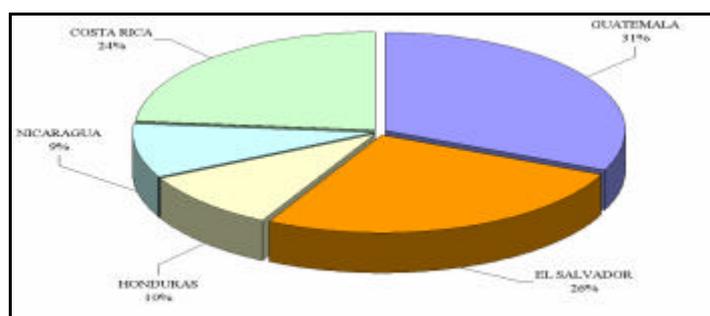
*The Honduran commitments are the result of the GATT adhesion negotiations and not of the Uruguay Round.

The opening of Central American economies is also evident in the elimination or simplification of other measures related to import tariffs, such as contingent tariffs, seasonal tariffs and special regimes. Only Costa Rica, Guatemala and Nicaragua still apply tariff contingents to some farming products, either because they occupy an important place in the basic food basket of the population or because they are exposed to intense external competition (bovine and poultry meat, wheat, corn, sugar, rice, oil, milk and beans). None of the five countries apply seasonal tariffs, whereas the special regimes that imply reduction or tariff exemption apply to the import of raw materials and capital assets for exporting industries as well as production in free trade zones. As for quantitative control measures, none of the five member countries apply automatic licenses or import quotas. Discretionary licenses can be invoked in the case of four products not yet subject to the regime of the Central American Free Trade, i.e. sugar, wheat, wheatflour and alcohol.

If we consider the period between 1999 and 2002, intra-regional trade among Central American countries grew by 17% and, in 2003, a slight growth was registered. The main exporting countries in the region were Guatemala (31%), El Salvador (26%) and Costa Rica (24%), see Graph 1.

Graph 1: Interregional exports (%)

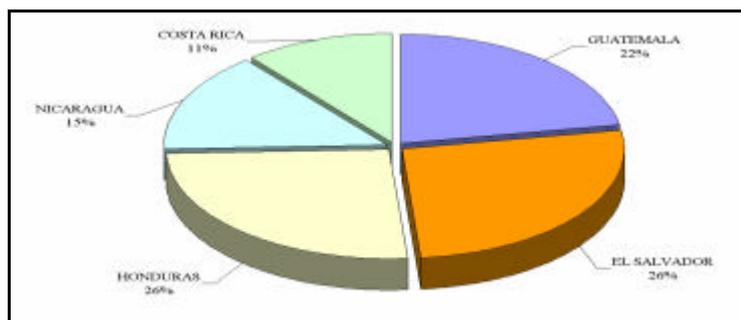
1999–2002



Source: SIECA, Information Technology General Directorate.

Intra-regional trade has increased since the signing of the Tegucigalpa Protocol, which gave birth to the Central American Integration System (SICA) in 1992. As for the participation of countries in inter-zonal trade flows, it is worth highlighting El Salvador's participation in both exports and imports that reached 26% (see Graphs 1 and 2, respectively). Honduras and Nicaragua are the economies with the lowest sales in the region, although their participation in total import figures amount to 26% and 15%, respectively. On the other hand, Guatemala is the most important exporter of the sub-region with 31.6% and Costa Rica, exports 24% and imports 11%.

Graph 2: Interregional imports (%)



Source: SIECA, Information Technology General Directorate.

In Central America, all the products originating from the region benefit from free trade agreements, with the exception of products listed under Appendix "A" of the General Treaty of Central American Economic Integration.²⁴ Nevertheless, trade of some products (unroasted coffee, sugar cane, etc.) is subject to restrictions common to the five countries, and trade of other products (roasted coffee, alcohol and oil derivatives) is subject to bilateral restrictions.

1.2. The need to develop a competition advocacy in the different regulatory bodies

Economic reforms in Central American countries have not always been accompanied by legal and institutional changes to promote competition and avoid the abuse of market power, especially by large companies.

Costa Rica has a legal and institutional competition framework and El Salvador adopted a competition law in November 2004. The other Central American countries are still discussing draft bills (Nicaragua and Honduras). Nevertheless, all Central American countries have sectoral legislations, for example, the one applicable to competition.

When analysing the legal and institutional competition context in Central American countries, it is worth examining their experience in privatizing the electricity and telecommunication sectors, as most countries in the region have introduced competition wherever possible. In many cases, sectoral regulator bodies have been assigned the functions of a competition authority. However, there is no competition advocacy as such.

If these countries were to establish competition laws, they will need to ensure adequate coordination among the different regulatory bodies.²⁵

²⁴ SIECA, *op. cit*

²⁵ See the UNCTAD Model Law on Competition (revised version) (2003a). New chapter on the relationship between competition authorities and regulatory bodies, including sectorial regulators. Geneva, 2003.

1.2.1. Costa Rica

Costa Rica has developed its own regime for the promotion of competition and has adopted a moderate position on the privatization of public utility services.

The conditions for regulating competition are guaranteed by Article 46 of the current constitution, which prohibits monopolies of a particular type and practices “restricting the freedom of trade, agriculture and industry”. This article also protects consumer rights and provides support to the associations that consumers may create to defend their rights.

Slow progress has been made in terms of regulation and privatization. Currently, insurance, telecommunications, electricity, and water distribution, production and imports of fuel as well as alcohol distillation still belong to the state. As a matter of fact, the transfer to the private sector of services, which were provided by large public monopolies, has faced solid resistance from civil society such as unions. Thus, the Costa Rican Energy Institute (ICE) remains a state monopoly of energy and telecommunications, which along with the state insurance company (also a monopoly) and the Costa Rican Oil Refinery (RECOPE), constitute the core suppliers of goods and services in the public sector.

In Costa Rica, there has been only one case of institutional centralization and this took place slowly. In 1996, the former Electrical Supply Regulating Organization became the Regulating Authority of Public Services (ARESEP),²⁶ whose objectives include to: harmonize interests among consumers, service providers and users; balance the needs of service users with the interests of public service providers; fix the prices of services according to the “necessary costs to provide the service, enable a competitive income and guarantee the suitable development of the activity”; supervise that the requirements in terms of quantity, quality and continuity of public services are met; ensure the protection of the environment, when regulated services are provided or concessions are granted. In addition, ARESEP receives complaints from public service users, investigates them and can sanction the culprit company with the administrative procedure foreseen under the Public Administration Law. Finally, ARESEP is in charge of granting concessions for the private supply of energy.

Despite the important progress made in terms of regulation, the enforcement of competition law has been difficult due to factors, such as the constitutional jurisprudence turning more conservative over trade liberation in the last few years.

A second problem is the lack of rationalization in the different regulations issued by the public administration. The National Commission for Consumers (CNC) has no capacity to carry out an exhaustive revision and issue recommendations on all the new governmental measures to avoid over-regulation. The role of the Legislative Assembly must also be mentioned, as it can paralyse a Law initiative, with the intervention of only one of its members. It must be added that the Office for the Simplification of Administrative Procedures²⁷ has very limited reach and requires not only to be simplified but also to rethink the regulations that must continue to exist.

In the telecommunications sector, the only company allowed by the Costa Rican Legislation to operate in the market of telephone services is the ICE group, a state-owned company. The tariffs that ICE charges for services are fixed by the Regulating Authority of Public Services (ARESEP). As is the case in several other countries in the region, the low rates for local calls are subsidized by higher rates charged for the long-distance international segment.

²⁶ The public services regulated by ARESEP include electricity (generation, transmission, distribution and commercialization), telecommunication services, supply of aqueducts and sewage services, hydrocarbon fuels, water and drainage, public transport (except air transport), sea and air services in the national harbours, railway freight transportation, collection and treatment of solid and industrial wastes.

²⁷ Created between 1998 and 2001, through which an important effort was made to modernize the regulatory framework.

The telecommunication and energy sectors belong to a single monopoly in the public sector, ICE. Nevertheless, over the last number of years, ICE has gained greater administrative and financial independence. Traditionally, ICE had to finance certain areas in the public sector, which had nothing to do with its activities. Nowadays, it has more expeditious bidding mechanisms, and is exempt from these processes in the case of small purchases. ICE can also manage its revenues and investments more freely.

In order to complement the generation of electricity by ICE with private supply, Law 7200 was approved in 1990 to allow the private sector to generate up to 15% of the country's total electrical energy. In 1995, a new law, Law 7508, increased the potential participation of the private sector to 30% of the total supply. The main difference between both laws being that in the former, private companies did not have to compete to sell electricity to ICE, but with the latter, companies must undergo a bidding process.

It is interesting to highlight the structure of the electricity market in Costa Rica. ICE still has a monopoly over the transmission of energy, whereas there is more competition on the generation side. However, ICE exercises significant power in the market by being vertically integrated backwards (transmission) and forwards (generation). The eight companies distributing electricity have a concession within a specific zone except for ICE, which, according to Decree 449, has the power to distribute electricity throughout the country. ICE and the National Commission for Power and Light (CNFL) are the two companies dominating the national market. They cover 79% of the country's subscribers and are responsible for 81% of the total sales of energy. The rural electrification cooperatives and two other companies sell the rest of the electricity.²⁸ Tables 4 and 5 show data summarizing the regulation of the electrical market in Costa Rica.

Table 4:

Costa Rica: regulation structure in the electrical market.

<u>% Private participation</u>	
Generation	10
Transmission	0
Distribution	0
<u>C3</u>	
Generation	100
Transmission	100
Distribution	80

Table 5:

Costa Rica: regulation in the electrical market. Year 2000

<u>Attributes</u>	
Regulatory authority	Multisectorial
Independence of the regulator	Yes
Passing on of generation costs to users	
Tariff rebalance	No
Free entrance	
Generation	No
Number of generating companies	1 main

Source: These tables are based on the article "Sustainability of Reform in Central America: Market Convergence and Regional Integration". Richard Tomiak and Jaime Millan. Infrastructure and Financial Markets Division. Inter-American Development Bank. 2001.

²⁸ Source: ECLAC based on official figures.

With regard to the hydrocarbon and oil derivatives sector, the country has a monopolistic refinery company owned by the state – RECOPE – which handles the refinement, storage, import and wholesale distribution of derivatives, whereas the private sector participates only in retail distribution. The prices of oil products are fixed by ARESEP at all the stages in the production chain down to the final consumer. The management of RECOPE takes place within a narrow institutional framework, which includes ARESEP and other public institutions. This structure renders strategic decision making slow and inefficient, limiting the company's possibilities of expansion and association with strategic companies from the private sector.

One of the main barriers to opening the petrol market is the existence of a single price for this product, regardless of geographical location, which makes the activity non-profitable.

The participation of the private sector in this sector is limited to the retail distribution of petrol to petrol stations and this is the only case in which multinational oil companies (namely Shell, Texaco and Elf) work along with national companies.

Six companies in the private sector manage the retail distribution of liquefied gas. Competition, however, is limited because the final price is fixed by ARESEP and because each distributor works with different types of containers that require different filling valves. This binds customers to a single distributor.

1.2.2. El Salvador

Although discussions on competition law date back to the beginning of the 1990s, it is only in recent years that the debate has resurged with greater strength. In November 2004, a competition law was finally adopted and it is expected that, in 2005, the Competition Authority will be established.

There is a set of norms linked to economic competition regulating the protection and defence of consumers, as well as sectors such as electricity, hydrocarbons and telecommunications. These sectors are also supervised and regulated by the norms of their respective authorities. On the other hand, Articles 101, 102 and 110 of El Salvador's Political Constitution favour political freedom and prohibit monopolistic practices. Nevertheless, there is no normative legal body to make these constitutional provisions effective. Additionally, Article 232 of the Penal Code foresees sanctions for offences related to the market, free competition and consumer protection.

The process of economic reform in El Salvador began with the restructuring of some banks and their subsequent sale. It continued with the sales of hotels, sugar mills, free zones and the national cement company, as well as with the liberalization of coffee and sugar exports. In a second stage, the majority of public services were privatized, including the electricity and telecommunications companies.

Currently, the country has a group of fiscal bodies responsible for the supervision and monitoring of activities in the different economic sectors, which have a decisive influence on the country's conditions for competition. Among the most important ones are the Regulatory Authorities for finance, assets, pensions, energy and telecommunications.

In order to integrate the economy into the global markets and contribute to increasing its competitiveness, a series of economic and regulatory reforms were undertaken in El Salvador, which included the demonopolization of state companies providing public utility services, especially in the energy and telecommunication sectors. In general, the reform has not been accompanied by a dynamic and systematic process to create and strengthen institutions responsible for the supervision and monitoring of such reform. Neither was it accompanied by training of human resources to be able to perform those activities. For this reason, some of the privatized sectors do not have sufficient effective competition and their respective monitoring and supervisory institutions have been weakened by time or have not fulfilled their assignments.

In the field of telecommunications, the reform of the sector is protected by the Law of Telecommunications of November 1997 and the Electricity and Telecommunication General Supervision Law (SIGET) – which is the regulating body responsible for the sector. Thanks to these two instruments, the privatization process of the state company ANTEL – Telecommunications National Administration – was achieved. The objective was to create a new regulatory framework for the sector and to operate the radioelectric spectrum with prices and conditions freely negotiated between operators.

As in other Central American countries, the telecommunications sector in El Salvador was privatized with the active participation of the companies and through the adoption of policies concentrating on the sale of public telephone operators. Competition problems still persist in the sector and it seems necessary to increase the participation of the private sector as well as to develop independent and autonomous regulation and supervision.

In the power sector, the wholesale market (WM) is the main mechanism to allocate energy production between generators and consumers, based on the model adopted by El Salvador, Guatemala and Panama. The general model consists of separating production, transportation and distribution of energy, and of opening the transmission systems to introduce competition in the markets of electricity production and large consumption.

A survey²⁹ by ECLAC shows that El Salvador is the only country that considers competition at the retail level. It also indicates that Guatemala and El Salvador are the only countries where competing tradesmen and middlemen are allowed to participate in the energy market produced by the generators. This means that distributors and large consumers can buy directly from the producers and traders.

At the institutional level, the administration of the country's wholesale market is the responsibility of the Transaction Unit (TU) which is a private company that operates the transmission system and maintains its safety. In addition, it guarantees the minimum quality of services and supplies.

The Salvadoran electrical market comprises three generating companies: the Hydroelectric Company of the Lempa River (CEL), Nejapa Power (subsidiary of Coastal) and Duke Energy International, which generate 93% of the national production. Between 5% and 6% is imported from Guatemala and 1% comes from hydroelectric mini centrals. The market is characterized by high concentration, regardless of whether it includes the Nejapa Power production within the CEL supply. Duke, on the other hand, reached almost 13% of participation in 2000 and managed to influence the hydroelectric supply of the CEL centrals.

In the electricity production segment in El Salvador there is a duopoly condition of little competition with a clearly dominant position of CEL and Duke. As for the distribution segment, there are currently five companies working with segmented markets, in which the majority of individual users have little possibility of selecting a specific supplier. The current tendency reveals the creation of concentrations and mergers.

Tables 6 and 7 show data representing the electrical market regulation in El Salvador.

²⁹ Hernandez, R. and C. Schatan (2001) "Competition and Regulation Policies in the Central American Isthmus", ECLAC, Sub-regional Headquarters Mexico.

Table 6:**El Salvador: property structure of the electrical market.****Year 2000**

% Private participation	
Generation	40
Transmission	0
Distribution	100
C3	
Generation	70
Transmission	100
Distribution	100

Table 7:**El Salvador: regulation of the electrical market.**

Attributes	
Regulatory authority	Multisectorial
Independence of the regulator	No
Passing on of generation costs to users	Quarterly prom. of spot prices
Fare rebalance	No, maintained subsidies
Free entrance	
Generation	Yes
Number of generating companies	3 + Imports

Source: These tables are based on the article "Sustainability of Reform in Central America: Market Convergence and Regional Integration". Richard Tomiak and Jaime Millan. Infrastructure and Financial Markets Division. Inter-American Development Bank. 2001.

The oil industry is regulated by the Minister of Economy while the hydrocarbons subsector is regulated through the Directorate of Hydrocarbons and Mines (DHM), which was established in 1992 and was given the functions of regulation, fiscalization and control of oil unloading operations and derivatives. In addition, it supervises quality and quantity along the supply chain, calculates the import parity prices, supervises consumer prices and establishes the maximum invoicing prices of liquefied gas, which is a reference for fuels. The DHM promotes foreign and national private investment in the hydrocarbons and mining sector, at the same time as regulating and controlling an adequate and permanent supply of hydrocarbons in the domestic market.

As regards refineries, Esso and Shell own an oil refinery in Acajutla, Refinería Petrolera Acajutla SA (RASA), which accounts for slightly more than 65% of the market, whereas Texaco's participation is almost 15%.

In terms of sectorial laws regulating competition and markets, it was agreed that these should temporarily take on the role of a competition authority, in the absence of a proper authority. Once a competition authority has been established, it will need to be the only competition regulator serving the different markets, and will have to take into consideration the opinion of each market regulatory body when handling its cases.³⁰

The need to confer competition functions on regulators is explained by the belief that there are anti-competitive practices in certain regulated markets, although their existence has not been corroborated. For example, in the electricity market, accusations of price-setting agreements between competing companies have been recorded in the electricity generation sector. The identified absolute monopolistic practice consists of fixing the sale price for distributors. The power to sanction anti-competitive practices is relatively recent, and to date there has been no sanction.

³⁰ Muadi, Gabriel Arturo. El Salvador. Report on the Needs and Priorities in the Area of Competition Policies. 28 November 2003. Paragraphs 113 and 114.

However, there are two cases of investigation against the hydroelectric generator and a thermal generator. The electrical sector is regulated by the aforementioned SIGET. The Electricity Law (Article 3, Paragraphs b and g) grants to the regulating body, among other functions, to deal with the defence of competition and to sanction infractions, such as abuse of market power when setting electricity prices. It also has the power to order the cessation of anti-competitive practices, etc.³¹

In the telecommunication market, some cases of abuse of dominant position have occurred in the home phone operators by creating, for example, technical obstacles to interconnection, but there has never been any case taken. Nevertheless, there exists a resolution (currently being revised by the Supreme Court), whereby all public service phone operators are ordered to freeze their interconnection charges. If the Court approves the resolution and it becomes effective, cases of non-compliance will surely provide sufficient reasons to instigate the first files. Telecommunications are regulated by the General Telecommunication Authority, which is a sectoral body.³²

In this sector, telecommunication operators are forbidden from making any type of agreement to fix, raise, or manipulate sales prices or rent their services to third parties or final consumers, or to make agreements with a view to carving up the market. Cross-subsidies are also forbidden in telecommunication services that are provided in competition with other operators, except in transitory situations specifically considered by the law. As long as there is no governmental institution to regulate restrictive practices to competition, SIGET will be able to limit the participation of certain natural and legal persons, in processes granting use concessions within the radioelectric network or limiting the transfer of the right to use such concessions, if proven that such transfer is intended to create entry barriers for competing companies. Unfortunately, the aforementioned powers are not sufficient, due to the lack of technical capacity to undertake a formal investigation in the relevant market.³³

As for the pension market, it initially consisted of six national and foreign economic agents. The mergers carried out by the Administrations of Foreign Pension Funds in their country of origin have had an impact on the Salvadoran market, where only two out of the six former associations still remain. Although the Pension Funds Authority is in charge of regulation, the institution does not have the authority to control the economic concentration of the participating economic agents.³⁴

1.2.3. Guatemala

In Guatemala, there is currently no specific competition or anti-monopoly legislation. A draft bill project is being discussed and analysed in the Economic Commission and Congress for the Consumer. The Guatemalan political constitution favours free trade and forces the state to stop practices that entail concentration of goods. Article 119 also refers to the protection of consumers and Article 130 prohibits monopolies and privileges. Additionally, there is a Code of Commerce, a Penal Code and a Consumer Protection Law. The prohibition of monopolies, cartels and other forms of monopolies are considered in the Penal Code and fusions, while prohibition of monopolies and unfair trade acts are foreseen in the Code of Commerce.

Among the legislation concerning competition, it is worth highlighting the General Electrical Law, the General Telecommunication Law, the Hydrocarbon Trade Law, the Intellectual Property Law, the Foreign Investment Law and the Bank Law.

³¹ See Appendix 6 "Identifying anti-competitive Practices in the sectorial markets". In Muadi, Gabriel Arturo. El Salvador, *op. cit* Page 40.

³² *Ibidem*: Additionally Paragraphs 97 to 100

³³ *Loc. cit.*

³⁴ *Loc. cit.*

Within the institutional framework, the National Competitiveness Program (PRONACOM), established in 1998 and under the coordination of the Ministry of Economy, stands out. In the context of this programme, some investigations have been made in certain economic sectors, such as in the cement, insurance, telecom, sugar and hydrocarbon sectors. From the reports compiled on these sectors, it was concluded that there was a need to establish competition policy in order to stimulate competitive practices.

The Ministry of Economy has a Vice-Ministry for Investment and Competition dealing with competition issues, and under which the Directorate for Consumer Protection, the National Quality System, the Directorate for Competition and the Service Unit for Commerce and Investment also operate.

In 1991, the process of privatization and economic reform began in Guatemala, through programmes of demonopolization that purported to bring greater efficiency to markets, attract higher flows of foreign investment and finance social investments in the health and education sectors. In 1993, a process was started to sell selective state assets of low use and yield, aiming at financing programmes of social interest. In 1998, the most important part of the process was concluded with the liquidation of assets and privatization. Also privatized were the Electrical Company of Guatemala (EEGSA), and the distribution companies of the National Institute of Electrification (INDE) and Telecommunications of Guatemala (TELGUA). An administrative contract was also agreed with the postal service and the railway company. As part of the modernization programme and as a follow-up to the policy of liquidation, deconcentration and deregulation, reforms of public services, such as telecom, electricity, airports, sports, and railways were undertaken. Furthermore, changes in the legal and institutional framework were implemented through the creation of regulating bodies and the sale of assets, concessions and administrative contracts.

With regard to telecommunications, reform of the sector was started in 1996 to make it more efficient and to raise the quality and scope of its services. The reform consisted of promulgating the general law on telecommunications³⁵ as a legal instrument, the liquidation of the Guatemalan Telecommunication Company (GUATEL), the establishment of the Communications Authority (SIT) as the regulating and supervisory body, the Creation of the Fund for Development of Telephony (FONDETEL), the establishment of a new scheme of tariffs and the adoption of market mechanisms such as auction of frequencies for the radioelectric spectrum.

Subsequently, Telecommunications of Guatemala (TELGUA Ltd) was created as an anonymous company and entered the market introducing wireless telephony and providing local and long-distance services. Nowadays, the telecommunication market has opened itself and includes, for example, the Spanish Company Telefonica in the PCS market.

The sale of the state's telecommunications company ended the reform process of the sector with relative success, considering the number of legal obstacles and political negotiations it faced. The reform was based on the following principles:

(1) the acknowledgement that there is no monopolistic power in telecommunications and that the regulation required is minimal, (2) free access to all the networks, which diminishes or eliminates monopolistic power, (3) negotiations between the parties as the ideal solution for conflicts, (4) the creation of arbitration mechanisms, and (5) lack of crossed subsidies between the services.

It is also worth stressing that the current legal framework is modern and was designed with all the elements required to open the sector to competition.

³⁵ Article 1 of the General Law on Telecommunications establishes that its objective is to "support the efficient development of telecommunications, promote competition between the different suppliers in the telecommunication sector, stimulate investments in the sector, protect the rights of the users and the service supplying industries and support the rational use of the radio-electrical spectrum". Moreover, the central element of this law seems to be linked to competition freedom and to free price fixing and to the creation of the Telecommunications Authority (SIT). Moreover, the law includes issues on free price establishment and the use of auctions for the radio-electrical spectrum.

However, this objective has not been totally achieved and there is still need for more effective competition in the market of local or home telephony. As for mobile telephony, there is more competition between COMCEL and TELGUA Ltd, although it is limited. Therefore, if the real objective is to open the sector to competition, it has not yet happened since TELGUA remains the dominant operator in the sector.

The General Law of Electricity of 1996 contains the basic elements to ensure free generation, transmission and distribution of electricity, as well as creating the National Commission on Electricity as the regulating body. Moreover, a wholesale market has been generated and different companies are in charge of generating, transmitting and distributing electricity.

Thus, the Ministry of Energy and Mining, the National Commission on Electrical Energy (CNEE) and the wholesale market constitute the institutional structure in the energy sector. The Ministry of Energy and Mining has regulatory and planning functions; CNEE controls the regulatory framework and at the same time defines technical norms and sets tariffs. This structure presents one defect, which is that the regulator reports directly to the Ministry of Energy, thus weakening the power and independence of the regulators' actions, in a context where the state's participation in energy generation remains high.

The General Law on Electricity establishes that the generation, transmission and distribution projects can be undertaken by any private entity (except in the cases involving tax resources). Moreover, it establishes the wholesale market as a spot market that defines the basis for price setting and regulated tariffs.

In Guatemala, as in El Salvador and Panama, the wholesale market is the basic mechanism for the distribution of the production of energy between generators and consumers. The administration is the responsibility of the Wholesale Market Administrator (AWM), which is itself regulated by the General Law on Electricity and by its own regulations. The AWM establishes short-term market prices for power and energy transfers, guarantees the safety and the supply of electrical energy; organizes the delivery or programme of the operation, the coordination of the International Connected System (SNI) and the administration of business transactions in the wholesale market.

Tables 8 and 9 present the investment and regulation in the electrical market

Table 8:
Guatemala: investments in the electrical electrical market. 1992–2002.

	In Mill. USD	
	Part	
Independent producers	700	49.9
Transmission	81	5.8
Private distribution	621	44.3
EGAS	520	83.7
DEORSA-DEOCSA	101	16.3
	1402	

Table 9:
Guatemala: regulation in the

Regulatory authority	Sectorial
Independence of the Regulator	No
Passing on of generation costs to users	Average of contract and spot purchases Quarterly adjusted annual forecasts
Fare rebalancing	Does not maintain subsidies
Free entrance Generation	Yes
Number of companies Generation	4

Source: These tables are based on the article "Sustainability of Reform in Central America: Market Convergence and Regional Integration". Richard Tomiak and Jaime Millan. Infrastructure and Financial Markets Division. Inter-American Development Bank. 2001.

The reform of the sector through the General Law on Electricity established the conditions to promote private investment, free competition and the separation of the generation, transmission and distribution functions. In a period of 5 years, Guatemala increased its generating capacity, managed to eliminate rationing and became an electricity exporting country to El Salvador. The reform process in Guatemala was brought about by the sale of EEGSA 's generating plants and other companies in the area. The process is qualified by most analysts as a success having had a clear auction proceeding, which enabled transparency and the liquidation of the state's assets. Currently, the market shows clear features of economic efficiency, implementation of legislation, consolidation of the institutional framework and, above all, an increase in investment, which has reached more than 50% of the generation market and 90% of the distribution market.

In general, the participation of an important number of agents can be observed in all the production segments, which in turn favours competition. However, it is worth paying attention to the purchase of energy and sales contracts (Power Purchase Agreements, PPA), which do not meet the conditions necessary to participate in the wholesale market. As a result, costs in the regulated market are increasing and must then be financed through higher subsidy levels. This means that the terms on which they are negotiated have to be analysed.³⁶

The Energy and Mining Ministry is the national regulatory institution in the energy sector, in general, and in the hydrocarbons subsector, in particular, whose supervision is undertaken by the General Directorate of Hydrocarbons, including oil exploration and exploitation.

Together, the three multinational companies (Texaco, in charge of the refinery, Shell and Esso) account for more than 78% of the importation and the refining of liquid hydrocarbons. In the oil-liquefied gas (OLG) market, there are a large number of independent and vertically integrated importers, which account for more than 50% of the segment.

With regard to regulation, the Law on Hydrocarbons and the Law on the Commercialization of Hydrocarbons, through their respective regulations establish sanctions for practices against free competition. These laws aim at seeking economic efficiency and the promotion of free competition for the oil market and its derivatives.

The most important part of the Law on the Commercialization of Hydrocarbons is how it sets the conditions and requirements to obtain export and import licences, in addition to controlling import and export operations performed by the General Directorate of Hydrocarbons (DGH). Nowadays, the liberalization process in the market of liquid products is progressing more than in any other Central American country. This is due to it being the most important market in the region and having lower entry barriers, which enabled various independent importers of multinational oil companies to organize better pricing policy in the market. In summary, the fuel market has opened itself, but has to be accompanied by free competition legislation.

1.2.4. Honduras

Although a number of economic reforms were achieved leading to some positive economic results, the country still faces problems related to inadequate competition conditions. There is currently a Code of Commerce dating from 1950, which controls monopolistic practices between companies. The requests in this area are within the authority of civil or criminal tribunals, depending on the cases. By the time of the present publication, a law bill proposal was being prepared within the framework of the National Competitiveness Program.

³⁶ The wholesale market is based on three basic mechanisms for the purchase and sale of electricity: the Contract Market, in which contracts freely agreed between agents and big users are established; The spot market, for opportunity transactions of energy, with prices established per hour; and the Market of Power Deviation (MDP) for power transaction opportunities, with a monthly price determined by the Wholesale Market Administrator (AWM).

The Consumer Protection Law of 1989 has played a crucial role in putting an end to many abuses experienced by consumers in the market and against which they had few possibilities to defend themselves. One of the changes required is to adapt the Law to the current situation of deregulation, in which the executive power, already in practice, does not control prices. Progress has also been made in the area of justice administration in terms of consumer rights. The offences in this area are divided into penal and administrative. In order to deal with the penal procedures, the Prosecutor's office for Consumer Protection was created in 1997, and is attached to the Public Ministry. This institution has considerably improved the administration of justice in this field.

As for the participation of the national and foreign private sector in the supply of public services, which used to be provided exclusively by the state, the Law for the Promotion of National Infrastructure and Public Work Development (known as the Concession Law) of 1998 clearly defines the conditions for granting concessions, licences and permits for building, maintenance of works, installations and public services. The regulation of the areas controlled by the law is the responsibility of the Authority for Concessions and Licences, regulated by the Treasury of the Republic, to which it is affiliated.

There are other laws that have contributed to improving the conditions for competition in markets of special interest to foreign investors. For example, the Law on Investment (June 1992) and the Law to Promote Production, Competitiveness and Support for Human Development (No. 131-98) of 1998, which, among others, have significantly reduced the income tax rate and net asset. As for the Tributary Reform Law of 1998, it decreased the rate of income tax from 42% to 27%, leaving it at the same level as in the other countries in the region. The Conciliation and Arbitration Law, which substituted the 1906 arbitration process, opened the possibility for the state to submit to arbitration with private individuals. Finally, a law for administrative simplification is currently being discussed, whose objective is to eliminate the bureaucratic obstacles to creation of companies under the Code of Commerce.

In terms of privatization, progress has been slow due to the lack of a legal and institutional framework and the divergence of interests in different sectors of society. Moreover, the privatization of services had to be accompanied by adequate regulation to ensure that natural monopolies transferred to the private sector would behave as near as possible as they are supposed to do in a competitive market. In this area, there has been slow progress within the country. In general, different forms of regulating public services have been developed, ranging from autonomous technical bodies to limited regulators due to the state's political interests. The regulating bodies still need to be granted autonomy.

The first initiative to introduce modern regulation was the creation of the Presidential Commission for the Modernization of the State in 1993, in which all sectors of civil society, as well as the political parties, were represented. This modernization included the innovation of the system to regulate public services. The scheme introduced in 1993 has changed several times, and this has made its functioning difficult. Initially, two regulating bodies were created by the Presidential Commission: the Energy Commission (registered under the Presidency of the Republic) and the National Commission for the Supervision of Public Services (CNSSP). Among other functions, these commissions were supposed to fix the tariffs and design development policies for the companies providing services.

Although the aforementioned regulating bodies have the authority to promote competition, only the regulating body in the telecommunications sector has developed a specific regulatory framework to this end. The National Commission on Telecommunications (CONATEL) has developed regulations aimed at promoting competition and sanctioning anti-competitive behaviours in the telecommunications market. However, the institution does not have the experience, or the necessary technical standards conforming to the latest international practices, to be able to sanction the prohibited practices within its regulatory framework. To date, however, it has not encountered any case, since it is a monopolistic market. As for the creation of a national competition framework, the regulating body keeps affirming that the telecommunications sector must be responsible for promoting competition and sanctioning the violations of the law, since they are the ones who know the market.

Competition has slowly entered this industry starting with information services and mobile telephones. The establishment of legislation to privatize the telephony has been a somewhat slow process, partly due to the strong opposition from the unions. In 1995, a new telecommunications law was approved, which enabled the deregulation of this activity and built the foundations for its subsequent privatization. It was decided that the public sector would keep 51% of the company's share. However, this process has faced many obstacles. For example, the mobile phone market is open, but has not been auctioned yet and the connections remain extremely high for the telephony. In any case, the number of lines in services has considerably increased.

The policy adopted by the Government in the energy sector is more conservative than the policy developed in El Salvador and Guatemala and more open than in the case of Costa Rica. The public sector participates in 56.2% of the generation of electricity and the rest is provided by the private sector. Tables 10 and 11 present some data characteristic of the regulation of the electrical market in Honduras

Table 10: Honduras: Property structure electrical market. in the electrical market.

Year 2000

<hr/>	
% of Private participation	
Generation	60
Transmission	0
Distribution	0
<hr/>	
C3*	
Generation	90
Transmission	100
Distribution	100

* Market participation of the 3 main companies

Table 11: Honduras: Regulation in the

<hr/>	
Attributes	
<hr/>	
Regulatory authority	Sectorial
Independence of the Regulator	No
Passing on of generation costs to users	Long-term marginal costs
Fare rebalancing	No, maintained subsidies
Free entrance	
Generation	Yes
Number of companies	
Generation	4 + Imports

SOURCE: These tables are based on the article "Sustainability of Reform in Central America: Market Convergence and Regional Integration". Richard Tomiak and Jaime Millan. Infrastructure and Financial Markets Division. Inter-American Development Bank. 2001.

In terms of hydrocarbons, Honduras does not have its own refinery, and thus it must import all of this product. The prices of liquid fuel are completely regulated at all stages, and the relevant authority sets the prices for all the importers based on a formula of parity with imports. It was argued³⁷ that the situation of this highly regulated market could change in Honduras if the Law on the Commercialization of Hydrocarbons is approved. This being the case, price control is eliminated and replaced with a free regime that would generate space for a competitive market. The same law would also consider some aspects related to competition. Indeed, Article 10 compels suppliers to offer their products without any discrimination and it also forbids cartels, monopolistic or oligopolistic practices, price fixing, and other actions limiting competition.

³⁷ Competition and deregulation Policies in the Central American Isthmus (project by BID/FOMIN/CEPAL, 2001).

1.2.5. Nicaragua

In Nicaragua, there is a draft competition bill proposal. Additionally, Articles 99, 104 and 105 of the Political Constitution refer to anti-competitive practices and the need to defend the concept of economic efficiency and the effective allocation of resources, greater profits to consumers, guarantee entrepreneurial freedom and equality before the law and the state's economic policies. There is a clear awareness between economic agents and national authorities on the pressing need to raise productivity and competitiveness. However, the role of competition law and policy is not so obvious, and more lobbying is needed at national level.

Nicaragua has taken several steps towards the establishment of competition law. Starting with technical assistance from the German agency, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), for the competitive transformation of the economy (1992–1998). One of the objectives was to create a competition policy framework. The first draft bill was prepared and has been subsequently revised on various occasions, the last version dating back to 2000.

One of the motivations to have competition law and establish a competition authority was the Government's insistence on undertaking actions towards greater competition in the markets and/or avoiding anti-competitive business practices.

Nicaragua has sectorial laws for the electricity, telecommunications, hydrocarbons and financial markets. Some of the most important laws in this area are: the Law on the Creation of the Authority for Banks and Other Financial Institutions (No. 125 dating from 10th April 1991), the General Law on Telecommunications and Postal Services (No. 200 dating from 18th August 1995), the Law on Hydrocarbon Supplies and Chapter VI of the competition promotion (No. 277/6 dating from February 1998); the Law on Electrical Industry (No. 272 dating from 23rd April 1998) and the Law for the Reform of the Organic Law of the Nicaraguan Institute of Energy (INE) (No. 271 dating from 1st April 1998).

In institutional terms, advances have been made in the supervisory and regulatory bodies of the privatized State companies. In 1998, the General Directorate for Competition and Market Transparency (DGCTM) was created to promote free competition, efficiency and the defence of consumer rights in all the internal markets for goods and services. Additionally, it has the following functions: organization, direction and supervision of the national standardization and metrology systems, which consist of four directorates: the Competition and Deregulation Directorate, which develops the regulatory framework and competition actions, the Consumer Defence Directorate, the Directorate of Technology, Standardization and Metrology and the Directorate for Intellectual Property, with activities concerning trade marks, patents and royalties.

The DGCTM aims at protecting consumers, by providing them with information mechanisms that will improve their purchase decision making and protect their welfare. Currently, this Directorate works as a technical consulting agency and not as a specialized professional agency. Recently, many steps have been taken to reduce unnecessary procedures and promote better governmental norms, with some specific efforts in terms of intellectual property. Moreover, the one-stop investment office was approved for the building industry and a working committee was established for the creation of such offices.

The absence of a competition policy framework clearly affects the investment climate and the competitiveness of Nicaragua in a negative manner, resulting in political and economic uncertainty and the failure to eliminate market distortions. Consequently, it would be necessary for the government to create such a framework as soon as possible.

According to some analyses, the current Competition Draft Bill Proposal in Nicaragua presents the following weaknesses: (i) it does not consider competition advocacy sufficiently, making it necessary to include a special chapter indicating the general principles to adhere to in order to simplify procedures, the economic analysis or cost-benefit of laws, regulations, etc., as well as the authority to promote deregulation; (ii) it establishes prior administrative authorizations to those practices that restrain company rivalry and which could have negative effects on free competition. This is extremely complicated and expensive for a competition entity to administer since it involves the examination of just about any behaviour adopted by companies; (iii) merger control is not considered because it is too expensive and demanding, both for the involved parties and for the competition organization itself. In this respect, it does not seem clear that merger control is suitable for a small economy such as Nicaragua's, where industrial concentration tends to be high for natural reasons; and (iv) it is not clear whether the competition entity will be autonomous.

The process of privatizing state companies providing public services (power, hydrocarbons, telecommunications and aqueducts and sewage) favoured the creation of a regulatory and institutional framework that prevented the newly privatized companies transforming from state monopolies into private monopolies.

Between 1990 and 1995, 346 companies out of the 351 administered by the state-owned holding company CORNAP (National Corporation of the Public Sector) were either privatized or liquidated. The privatization process has suffered delays and is not finished yet. In this context, the progress of structural reforms has been slower and the privatization process has encountered a series of difficulties due to legal or administrative complications.

In the telecommunications sector, the privatization process of ENITEL (the Nicaraguan state-owned telecom company), a phone service provider in Nicaragua started in the 1990s, has been slow due to some difficulties arising from different legal or administrative complications. A Swedish group bought 40% of ENITEL activities but has faced legal problems. In 1995, the Nicaraguan Institute for Telecommunication and Postal services (TELCOR) was created in order to separate the regulatory functions from the operation functions concentrated in ENITEL.

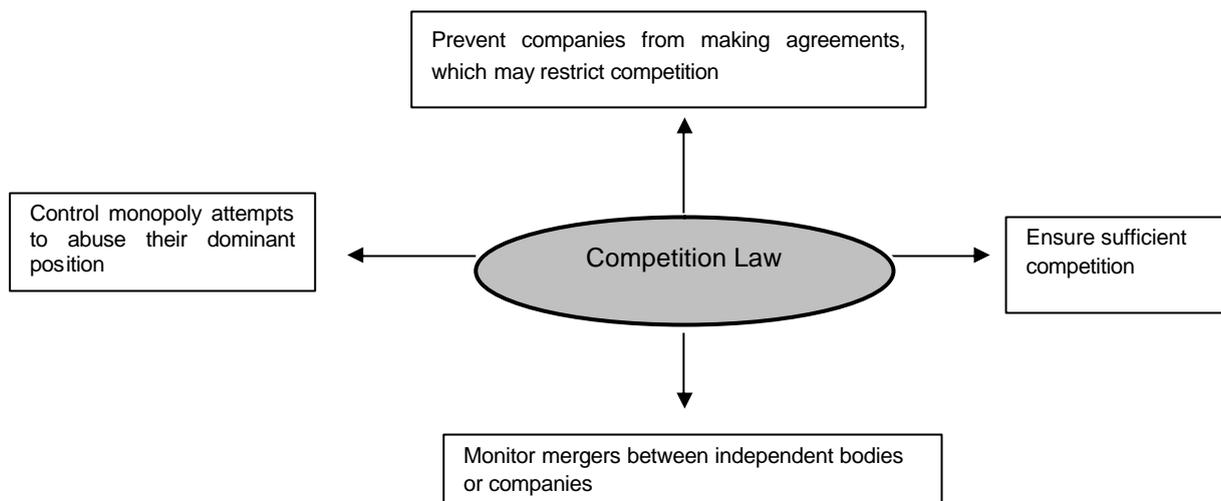
The lack of a single framework regulating competition has been partly replaced by sectorial dispositions, such as the Law on the Creation of the Authority for Banks and Other Financial Institutions, the General Law on Telecommunications and Postal Services, and the Law on the Electrical Industry. However, they have not turned out to be good substitutes for competition law.

1.3. The need for competition law and policy to challenge the presence of presumed anti-competitive practices in non-regulated sectors

There is no single model for competition policy that brings along a single competition law. Nevertheless, literature on competition policy has considered the existence of basic aspects that any legal system should contain and include, such as: (i) provisions to prevent companies from making agreements that restrict competition, (ii) mechanisms to control the abuse of dominant positions on the part of monopolistic companies, (iii) tools to ensure competition between companies, and (iv) monitoring of mergers and acquisitions between independent companies that would create concentrations in the market or decrease the existing competitiveness.³⁸ Graph 3 summarizes the described focus, which could serve as a reference for Central American countries that do not have competition regimes and that are currently examining the system they should adopt.

³⁸ See (i) Whish, Richard. *Competition Law* (Butterworths, 2001). Page 15. (ii) Source, Carmen Fuente. *Competition Policy in Latin America. Implications for Infrastructure Services*. Inter-American Development Bank, 2001. Available at: http://www.iadb.org/sds/doc/IFM-Carmen_Fuente-paper.pdf

Graph 3



Based on a survey by ECLAC, and with the purpose of examining the current structure of Central American markets,³⁹ three productive sectors (sugar, cement and fertilizers) have been identified which exhibit obvious market distortions.

These sectors are strongly linked to the international market, since they have a strong impact on almost all the consumers in the countries of the Central American Isthmus and because they represent a considerable challenge for competition policy.

The above-mentioned report argues that such products present common features. They are basic, homogeneous products, with uniform quality norms and use standard technologies. In general, such features facilitate coordination between companies producing these goods. Moreover, since transportation and storage costs are high, companies have incentives to divide the markets geographically among themselves

Since the majority of Central American markets do not have laws for the defence of competition, some business practices were detected, which, had there been a law or a competition authority, would have been considered as anti-competitive and eventually sanctioned. These practices have generally harmful effects on consumers and on companies, which, in many cases, have to pay for raw materials at higher prices than those that are competitive.

Thus, by trying to analyse the implications that competition law would have in El Salvador,⁴⁰ Guatemala, Honduras and Nicaragua, some specific key aspects were examined during the verification of the presumed anti-competitive practices.

Since such practices may not be illegal, and thus, anti-competitive, it is necessary to analyse any evidence that could be relevant for the legal and/or economic assessment of these practices. Some assumptions, however, could not be corroborated during the exploratory missions undertaken in the aforementioned countries, and will therefore, have to remain as basic information or eventually alleged facts.⁴¹

³⁹ See ECLAC (Mexico) Claudia Schatan and Marcos Avalos. Conditions for Competition in the international context: cement, sugar and fertilizers in Central America. Refer to www.eclac.cl

⁴⁰ Cfr. Section 1.3.1. referring to the new competition legislation in El Salvador.

⁴¹ It is important to distinguish between alleged facts and/or pieces of evidence and the so-called pertinent factors for the evaluation when certain practices weaken the competition process (market position, market position of the competitors, market position of the buyers, entry barriers, market maturity, level of trade, nature of the product and other factors).

For example, in the case of existing barriers to entry as a factor to complete the evaluation of conditions for competition, it is important that the barriers are identified and eliminated. However, the identification of presumed anti-competitive practices also depends on other factors, such as the maturity of the market and the position in the market of other competitors. Therefore, it is advisable to refer only to them as items of information and/or alleged facts.

As a preliminary question to the analysis described above, it is necessary to take into consideration the political context when adopting a competition law and the corresponding implementation by the relevant authorities. For example, issues such as the notion of having a competition policy in relation to the industrial policy and other development objectives, the obstacles that the productive and entrepreneurial sectors would face, and the costs and implications of a possible law constitute the so-called discussion topics likely to be important obstacles in the adoption of a norm on competition.

As can be observed in Table 12, the obstacles faced by the production and entrepreneurial sectors to implement competition law, mainly originate from the lack of a competition culture among economic agents. This is meant in the sense of knowing which practices must come within the remit of competition law, and which offences must be sanctioned and how. Additionally, as a core of specialists on economy and law does not exist, it is expected that there will be a certain amount of confusion at the beginning regarding these issues. Finally, since the majority of the economic markets are cartelized, it would somehow generate a lot of opposition within society.

Table 12: Possible implications of adopting competition law and policies in countries that are in the process of drafting their laws and policies.

Discussion topics/country	El Salvador ⁴²	Guatemala	Honduras	Nicaragua
Competition policy and its link with industrial policy and other development objectives	<p>Know the contents of the new law and those currently operating elsewhere</p> <p>Require a reasonable time to adapt business practices</p>	<p>Option between designing a competition policy only including competition advocacy or having a Model Law</p>	<p>Ways of developing a competition culture</p> <p>Change in the manner of conducting economic activity</p>	<p>Benefits, opportunities of a competition law</p> <p>Possible negative effects in the productive sectors due to a lack of competition culture</p> <p>Expansion of plans and projects for industrial strengthening and development oriented towards innovation and technological development, in agreement with foreign trade policies and the FTA companies</p> <p>Accelerate the process of regulatory improvement and administrative simplification</p> <p>Boost the trading climate and improve entrepreneurial competitiveness</p>
Obstacles faced by the production and entrepreneurial sectors	<p>Shortage of qualified human resources in the area of competition</p> <p>Need to learn to compete in a market where privileges disappear</p> <p>Ignorance of what the role of the state will be</p>	<p>Ignorance of the scope of application of the possible competition law and the infractions to be sanctioned</p> <p>Shortage of economic and legal specialists</p> <p>Opposition from the « cartel » markets</p>	<p>General lack of knowledge on competition policies</p> <p>Lack of qualified human resources to provide advisory services</p> <p>Refusal by certain traditional sectors to adopt a law which could jeopardize their entrepreneurial stability</p>	<p>Given the current persistent tradition in some industrial sectors, companies refuse to undergo a decartelization process and to stop using other monopolistic practices.</p> <p>Lack of competition culture</p> <p>Doubts on the new institutional structure on competition policy</p>
Costs and implications of a possible law	<p>Legal consequences⁴³ or political repercussions⁴⁴ of competition law might be used more as an instrument to protect the national market from foreign investment or competition</p>	<p>Impossible to include all the different types of complaints due to the lack of competition culture</p> <p>Undue use of alternative ways (protecting actions through constitutional means) resulting in an excessive workload of the courts.</p>	<p><i>Ibidem</i> case El Salvador.</p>	<p>Politicization of the law, the opposing sectors can emphasize the lack of employment or the inexperience of the legal system, which could result in the wrong interpretation of the law</p> <p>By imposing changes on the patterns of behaviour ranging from monopolistic to free competition, some companies' benefits will be affected, leading to possible unemployment. Little interest in changing the current practices</p> <p>Conflict between sectorial laws on regulated monopolies and competition law, i.e. the agency may not be able to fulfil the expectations of the sectors, in terms of political efficiency</p>

Source: This table is based on primary sources provided by the project's national coordinators and consultants, Phase I (September 2003-August 2004).

⁴² Albeit El Salvador has recently adopted a competition law, the problems that are described in this table are thought to remain as such since the law has not yet been fully implemented .

⁴³ The legal consequences of the existence of a competition law are to be regarded as follows: non-constitutional refutations against the law, non-recognition of competition authority resolutions and the like.

⁴⁴ Topic to be under the control of government, which would convert the competition law into an instrument through which a given government could pursue its official and non-official opponents.

The following section aims at presenting the approach used to identify anti-competitive practices in countries that do not yet have competition legislation or a competition authority. To this end, primary sources in each country were consulted and requested to provide information (indications, proofs, facts, any available information) on existing anti-competitive practices. Moreover, information was sought relating to the manner in which sectorial bodies have handled the anti-competitive practices encountered. The evidence gathered shows the need to have a competition law and a competition authority able to investigate and sanction such practices

1.3.1. El Salvador⁴⁵

After having considered several competition draft bills, the Law for Free Competition was finally approved in November 2004. It is envisaged to establish a Regulatory Authority for Competition with the same functions as a competition agency.⁴⁶ It is expected that these developments will result in incentives for national and foreign investment, an improved business environment and greater efficiency in the overall productive framework.

During the exploratory mission carried out in El Salvador, as part of the project on strengthening institutional and capacity building referred to in this report, it was found that the level of development in terms of defence of competition and institutional capacity was incredibly low. Some institutions directly or indirectly related to competition policies were created for specific purposes, but without any strategic planning that enabled them to prevent the following practices.⁴⁷

	Table 13: El Salvador – practices which would be anti-competitive if allegations are shown to be true
Sugar	Price-fixing agreements between producers Territory distribution between producers Vertical integration in the marketing and distribution of sugar
Beer	Regional agreement on beer production Regional agreement on beer distribution Vertical integration in beer distribution
Cement	Abuse of dominant position on the part of the only agent in the market
Liquid fuels	Price setting between importing companies
Small and medium-sized company trading	Predatory prices between competitors to remove their rivals from the market Misleading publicity Buying and selling conditions of raw materials Quota setting for the sale of a product Price setting between suppliers and distributors

Source: (Table 8 modified and extended) El Salvador: Summary of restrictive business practices, which consolidates the information in Appendix 5: "Table of identification of the anti-competitive practices in the non regulated markets". See: Muadi, Gabriel Arturo. Report on the needs and priorities in the area of Competition Policies, 28th November 2003, page 23.

⁴⁵ The impact of the new competition legislation and its enforcement will be analysed after some time has elapsed.

⁴⁶ Ramos, Carlos. La Prensa Gráfica. Source visited on 29 November 2004 at www.laprensagrafica.com/nacion54758.asp.

⁴⁷ The identification process, used to demonstrate the existence of anti-competitive practices in El Salvador, started by analysing the laws and regulations that constitute a legal barrier or technical barrier to enter the market. These barriers are directly harmful for any economic agent, whether national or foreign. The planned solution was to start a deregulation process or promulgate an economic reform, which would liberalize the markets, e.g. the hydrocarbon distribution, sugar import and drinkable water supply, among other identified barriers. See Muadi, Gabriel Arturo. El Salvador. Report on the needs and priorities in the area of Competition Policies. 24th November 2003. Paragraphs 108 and 109.

From the information provided in Table 13, it is clear that there are complaints of abuse of dominant position in the cement market against this economic agent, which have not been verified due to the lack of effective regulation and enforcement in the area of competition. For example, the price of a 46 kg bag of cement in El Salvador is one of the most expensive in the Latin American region. It has a production capacity of between 1.1 and 1.2 million tonnes per year and its economic importance comes from the fact that the cement production represents approximately 1.0% of the GDP in the last number of years.

Moreover, in the sugar market, there are ten refineries, which ensure the national production. Evidence of monopolistic practices in this market is in the fixing of sales price, which takes place between the producers. The state does not have the power to impose sanctions for such practices.⁴⁸

In the beer market, there is only one producer at national level, which is responsible for production, distribution and imports of more than twenty brands of beer. There is unconfirmed evidence of cartels in the distribution of beer within the Central American territory. It is observed that although there is no custom tariff levied on beer imports from the region, there are no imports between countries.

In the market of liquid fuels, there are four importers, out of which three are multinational companies (Esso, Shell and Texaco) and a national one (Puma). The monopolistic practice of price fixing among competing companies has been reported but not corroborated. Although it is supervised by the Ministry of Economy (Directorate of Hydrocarbons and Mining), the law does not provide the centralized body with power to sanction anti-competitive practices. It is worth adding that business people from small and medium-sized companies (MIPYME) complain that their activities are subject to abuse of dominant position from other economic agents, which fix prices, impose subscriptions quotas, condition sales and use predatory pricing practices.

The above examples demonstrate the need to verify and confirm those practices as being anti-competitive. Moreover, they need to be fully eliminated from the market through competition policy based on a regulatory framework that prohibits restrictive business practices and abuses of dominant position. The regulations would also establish the obligation of previous notification of mergers and acquisitions within the Salvadorian market to the competition authority. These actions would aim at strengthening the domestic market.⁴⁹

During the exploratory mission to El Salvador, it was observed that there was agreement in the different sectors of Salvadoran society on the need to have free competition legislation before the end of the previous government's mandate. In June 2004, the new government set up the Presidential Commission for Consumer Protection. This demonstrates the willingness of the current government to face consumer problems.⁵⁰ However, political will is not sufficient for the successful implementation of competition policy. There is a need to strengthen some aspects linked to the lack of local experience in terms of investigation methods of market structures and behaviours as well as lack of experience on the part of regulating bodies in terms of competition.⁵¹

⁴⁸ See also Appendix 5: "Table of identification of anti-competitive practices in non regulated markets". In: Muadi, Gabriel Arturo. El Salvador. Report on the Needs and Priorities in the Area of Competition Policy. 24th November 2003. Pages 38 and 39.

⁴⁹ *Ibidem*: Paragraph 111.

⁵⁰ See *Infra* at section 3.2.2.

⁵¹ See Muadi, Gabriel Arturo, *op. cit.* Paragraph 115.

With regard to the need to have legal tools to control behaviour, it has been the case that much anti-competitive behaviour has arisen from legal initiatives that were meant to promote economic activity but in the long run have become legal obstacles to the efficient functioning of markets. Among the initiatives turned obstacles are those providing incentives that are not justified, laws regulating the functioning of markets whose regulation has become obsolete over time, and laws promoting unnecessary monopolistic practices that have resulted in artificial barriers to entry for new competitors into the markets. Therefore, where deregulation is incomplete, a complementary programme of competition advocacy is required to review legal regulations in markets and to remove economic privileges and the norms that maintain the functioning of monopolized markets.⁵²

1.3.2. Guatemala

In Guatemala, a draft bill proposal for competition is currently being discussed. In this respect, having identified the anti-competitive practices described in Table 14, the need to have a competition law able to analyse and sanction the presumed anti-competitive practices described below is recognized.

Market	Table 14: Guatemala – evidence of what would constitute anti-competitive practices (2002–2003).
Beer	Until September 2003, only one vertically integrated company existed. The brewery has eight national brands and four imported ones. The beer market is worth more than USD 400 million per year, i.e. 1.7% of GDP. However, in September 2003, a new beer producer entered the national market, with a production capacity of 1.1 million hectolitres per year. The latter has only one brand and does not distribute imported beer. The incumbent brewery restored its production plant to reach a capacity of 3.0 million hectolitres per year. A third brewery is about to enter the market, producing one national brand and distributing one foreign brand. Before the entrance of the new breweries, the incumbent brewery was controlling 95% of the market.
Cement	There is only one cement producing company. In 1999, it produced 1.9 million tonnes. There is one Mexican company importing cement. Cement production represented 1.1% of the GDP in 2002. Although there is currently only one company producing cement, soon a new cement company will be operational, with a production capacity of 13 million quintals of cement, approximately 0.7 million tonnes. The capacity of the incumbent cement producer is approximately 3.2 million tonnes per year.
Sugar	Sugar is distributed in the domestic market through a distribution company that fixes the price and determines the places for wholesale distribution. This company concentrates the production of 17 refineries, which use four brands for commercialization.
Bean market	There is a high concentration in the market of canned beans. One company contributes more than 75% of the market share.

Source: own elaboration based on primary sources: table on a brief description of anti-competitive practices in 2002 and 2003. Sent by Edgar Reyes. November 2003.

As can be observed in Table 14, monopolistic practices can be identified both in the beer and in the cement markets. Had there been competition law in Guatemala, these practices would have been sanctioned. In the same way, in 2002, monopolistic practices were identified in sugar distribution. This activity is controlled by a single company that fixes prices and concentrates the production from 17 sugar refineries. The table also shows that the bean market is highly concentrated (a single company represents 75% of the market).

⁵² *Ibidem*: Paragraph 116 and following.

1.3.3. Honduras

In Honduras, the institutions directly or indirectly linked to competition policy do not have the experience nor the legal technical means to promote and defend competition in the market and in the regulated sectors.⁵³

Market	Table 15: Honduras– evidence of what would constitute anti-competitive practices (1999–2003).
Sugar	Price-fixing agreements between producers Territory distribution between producers Vertical integration in the sugar commercialization and distribution
Beer	Regional agreement on beer production Regional agreement on beer distribution Vertical integration in beer distribution
Hydrocarbons	Price fixing between importing companies
Cement	Abuse of dominant position

Source: Table 4 (Modified) Honduras: Summary of Restrictive Business Practices consolidating the information in Appendix 5 « Table of identification of anti-competitive practices in the non regulated markets » In Muadi, Gabriel Arturo. Honduras. Report on the Needs and Priorities in the Area of Competition Policy, 24th November 2003, page 22.

In the sugar market, for example, the representative of the National Association of Sugar Producers of Honduras stated that the seven sugar refineries in the country would be organized by December 2004 in a way that would allow them to compete at international level and have better access to the US market, which is a major destination for the country's exports. In order to be competitive, the national and regional sugar producers have a specific agreement not to export to neighbouring countries and thus maintain their dominant position in their respective markets.

There are barriers to entry in the sugar market, such as in the commercialization and distribution of the product. The seven refineries operating in the country distribute their products through the same distributing company, which has an effect on the price set at national level, as well as on the production quotas.⁵⁴

Also, there is another barrier to entry affecting access to the international market with profitable prices – due to the existing world supply, in order to enter the market producers must first be able to meet the quotas imposed by the United States on sugar producers at regional level.⁵⁵

In the market of liquid fuels in Honduras, there are five importers consisting of national, multinational, large and small local companies. There have been accusations of price-fixing agreements between competing companies in this market, since 50% of hydrocarbon imports are consumed by the industrial sector and the other 50% by the petrol stations, but they have not been corroborated. Regarding the barriers to entry, the most important obstacle to entering this market is the large investment required to participate. Moreover, the size of the market prevents companies from accruing the benefits of economies of scale. The Hydrocarbon Draft Bill Proposal is currently being revised in order to change market regulations and orient them towards the promotion of free price setting by market forces and the elimination of the existing monopoly in fuel transportation and petrol stations.⁵⁶

⁵³ See Muadi, Gabriel Arturo. Honduras. Report on the Needs and Priorities in the Area of Competition Policy – 24th November 2003 – Paragraph 118.

⁵⁴ See also Appendix 5: "Table of identification of anti-competitive practices in non regulated markets". In: Muadi, Gabriel Arturo. Honduras, *op. cit* Page 34

⁵⁵ *Loc. cit.*

⁵⁶ *Loc. cit.*

Due to the situation mentioned in the previous paragraph, the institutional weakness regarding market regulation, the promotion of competition in the Honduran economy has been seriously delayed. The identification of barriers to entry, originating from either the state or business practices, constitutes a relevant factor in the potential analysis that a competition agency should take into account in order to identify and sanction anti-competitive practices. Consequently, there is clear justification for the need to establish an efficient legal framework for competition law.

Furthermore, there are other obstacles to implementing an adequate competition policy. For example, the lack of competition culture and experience prevent competition from becoming a key judiciary asset.⁵⁷

Due to the commercial economic tradition inherited from colonial times, there are economic sectors still being run like *"fiefdoms"*, protected by the state itself through legal entry barriers to the market. The most common legal instruments are licences, state authorizations, concessions granted by the central or municipal government, which facilitate the development of certain economic activities.

1.3.4. Nicaragua

In general, the analysis of Nicaraguan industries shows an increasingly high concentration in the market. The dominant position of some companies is worrying as they generate anti-competitive practices and abuses of dominant market power. However, the most important step to take is to put pressure on the government so that it introduces protectionist measures and regulates the entrepreneurial sector and industries. Table 16 reflects the main evidence on which to base the above assertions.

Market	Table 16: Nicaragua – evidence of what constitutes anti-competitive practices (1999–2003).
Flour	Price-setting agreements between competitors Production quotas.
Oil	Price-setting agreements between competitors Production quotas.
Sugar	Price-setting agreements between competitors Production quotas.
Drinks	Price-setting agreements between competitors Production quotas (represent 3.2% of the GDP) Vertical agreements Exclusive distribution agreements

Source: Own elaboration based on Primary Sources: table shows a brief description of anti-competitive practices 'carried out' during 1999-2003. Sent by Julio Bendaña. November 2003.

From the above table, it can be deduced that absolute monopolistic practices are presumably taking place in the flour, oil, sugar and drinks markets, and have been particularly recurrent between 1999 and 2003. This could be explained by the existing price-fixing agreements between competitors (horizontal agreements). However, to reach this conclusion a certain evaluation must exist, in which particular elements would play important roles. It is also worth mentioning the monopolistic practices in the drinks market.

⁵⁷ *Ibidem*: Paragraph 119.

Using other available sources,⁵⁸ and based on four pilot industries – dairy products, freight transportation, fishing and drinks – other elements have been identified as restricting the capacity of companies to compete. This conclusion can be made when considering indicators such as national consumption, exports and employment. The identified elements in the survey include issues ranging from government policies to possible restrictive business practices taking place in the private sector.

Competition problems were found in each of the sectors studied. For example, in the dairy products sector, there are non-corroborated accusations of price-fixing agreements between competing companies for liquid and powder milk. Additional obstacles to competition were also identified on the temporary protection provided through high import customs tariffs, protection requests and the additional support on the part of the producers to those barriers. In the freight transportation sector, countries in the region complain about the discriminatory practices of Nicaraguan operators. Moreover, there is discontent about possible protectionist measures in the submitted Transportation Draft Bill Proposal, which is currently under discussion in Parliament.

In other sectors, such as fishing, the vertical integration in the prawn and crayfish processing activities added to a possible agreement on price fixing between competing companies is harmful to competition. Finally, in the drinks sector, there is a growing vertical integration within the alcoholic drinks segment with increased supposed restrictions to effective competition through the establishment of entry barriers for imported competitors' products. There have also been accusations of anti-competitive business practices by the main fizzy drinks producers and, finally, about the high costs of the raw materials caused by the cartelization of the sugar industry.

These restrictions probably have a negative impact on society's welfare and the optimal operation of the above-mentioned industries, as they increase the cost of raw materials for producers, eroding their competitiveness and resulting in higher prices for the end-user. Therefore, such restrictions generate not only a negative impact on international competitiveness, but also a worsening of the welfare of Nicaraguan society as a whole.

Although the concern to establish a competition regime has been an important issue since the beginning of the 1990s, the proliferation of evidence suggesting the presence of anti-competitive practices is obvious from the preceding paragraphs. Therefore, the need to make changes to competition policy is evident.

There are important obstacles that Nicaraguan society will have to face at the time of adopting a competition law. Accordingly, it is becoming necessary to define a coherent industrial policy along with an associated competition policy that the production and enterprise sector can reach consensus on. In addition, competition culture needs to be promoted, especially at the level of the industrial sectors, which are used to establishing vertical and horizontal agreements to operate in a given market. It has been demonstrated that the problem of lack of information introduces concerns at the level of the production sectors when realizing that practices of abuse of dominant position (which are usual in Nicaragua) will be prohibited.

Moreover, any concerns that reinforcing the independence of the potential competition authority would generate excessive bureaucracy and institutional costs must be assuaged. Of course, in a situation of financial and technical resource shortages, which characterizes the country, some sectors fear that the creation of a competition authority could bring about more problems than solutions.

⁵⁸ See Foreign Investment Advisory Service (FIAS) A joint service of the International Financial Corporation and the World Bank. Competitiveness, attraction of direct foreign investments and the role of competition policy. May, 2003

1.4. The need to strengthen the legal and institutional framework of the competition authority in Costa Rica⁵⁹

Competition legislation in Costa Rica was established in the 1990s as a fourth policy complementing the policies to open the market to free trade, tax reforms and state deregulation, which started in the 1980s. Thus, in 1995, the Law for the Promotion of Competition and the Effective Defence of the Consumer was passed.

The main objective of the law is the promotion and protection of free competition, as well as the rights and interests of consumers. This is achieved through the prevention and prohibition of monopolies and monopolistic practices, as well as other practices that may restrict the efficient running of the market. This is also achieved through the elimination of unnecessary regulations affecting economic activities.

In order to achieve this objective, the law establishes five fields of action:

- (a) Economic deregulation,
- (b) Price regulation in cases of exception,
- (c) Anti-monopoly legislation
- (d) Unfair competition and
- (e) Consumer protection.

For the development of these five areas, the law created three commissions: the National Commission for the Consumer, which is responsible for the implementation of consumer protection regulation, the Commission for the Promotion of Competition, which is in charge of implementing anti-monopoly norms, and the Commission for Deregulation, which is responsible for developing the process of economic deregulation.

The work of the Commission for the Promotion of Competition can be divided into two parts: promotional activity and protection activity (research). From its inception, the Commission has focused on promoting a competition culture in the country, by making known the Law for the Promotion of Competition and the Effective Defence of the Consumer. Over the years, the Commission has undertaken a series of marketing and training activities in order to inform the economic agents and public institutions about the reach of the antitrust norms in the country. Moreover, it issued a series of publications, such as guides, glossaries and bulletins with the intention of guiding and informing industrialists. Currently, the Commission issues a monthly bulletin informing the public in general on its decisions in the different cases investigated. It has also issued more than 150 opinions in the area of competition policy and free competition with respect to laws, decrees, projects and other administrative acts, as well as certain practices of the agents in order to warn the Commission about monopolistic practices and forbidden concentrations.

Nevertheless, after eight years, the existence of a competition culture in the country still cannot be spoken of, although some progress has been made. This is particularly obvious in some groups such as the specialized media, the entrepreneurs and some consumer associations. Therefore, it is essential to continue the work of promoting the law. The dissemination must be particularly emphasized in groups that revise and control the decisions of the competition agency, such as the judicial power, the Republic's Attorney General's Office, the politicians and academia among others. This should be done with the purpose of seeking the support of these groups in the implementation of the competition legislation. This is particularly important in the case of the Judicial Power, since the Commission's resolutions to promote Competition are revised before the Courts of Justice.

⁵⁹ Texts provided by Pamela Sittenfeld (COPROCOM) and Diego Petrecollo, as part of the exploratory mission to Costa Rica. November, 2003.

On the other hand, it must be mentioned that from its inception in August 1995, the Costa Rican competition authority has investigated and dealt with more than 100 cases. Some enquiries have been undertaken on their own initiative while others have resulted from complaints about economic agents.

During the first years, the investigative work has mainly been focused on hard-core cartels, partly because they are the most harmful in the market. Currently, the enquiries undertaken under the Authority's own initiative are oriented to markets with high degrees of concentration, either to investigate and sanction anti-competitive practices or to eliminate possible barriers to entry. The former is mainly due to the fact that this type of practice is often found in small economies. Due to the nature of the markets under analysis, most of the identified practices are of vertical character. In the case of mergers, the Commission's work has been marginal. This is due to the lack of mechanisms for previous notification. Consequently, the Commission can only act *ex post*, which means that it is practically impossible for the competition agency to prosecute this type of practice.

With regard to sanctions and corrective interim measures, there has been an increase in both the number of sanctions levied on economic agents and fines paid for such sanctions.

There has been a change in the last few years with respect to the handling of cases. In the first place, the current priority is concentrated markets. Therefore, there has been an increase in the number of identified cases of vertical restraint practices. Secondly, the Commission for the Promotion of Competition has become much more active in the investigation of anti-competitive practices, in order to effectively discourage economic agents from practising them. This does not mean that the practices have stopped, or that the Commission should stop promoting a competition culture. It simply suggests that, currently, promotion is mainly oriented towards certain interest groups. In the area of mergers, a regulation is currently being drafted to enable the Commission to be more active in this area. The regulation will introduce a mechanism for previous notification.

1.4.1. Substantive aspects

The Law for the Promotion of Competition and the Effective Defence of the Consumer prohibits the following practices: horizontal (absolute) and vertical (relative) restraints and anti-competitive concentrations (mergers).

As regards absolute monopolistic practices,⁶⁰ Article 11 of the Law defines them as acts, contracts, agreements, arrangements or alliances between competing economic agents, whose objective or effect can be any one of the following situations: (i) fix, increase, agree on or manipulate the price at which goods or services are offered or supplied in markets or exchange information with the same objective; (ii) establish the obligation to produce, process, distribute or trade restricted or limited amounts of goods or supplies of a number, volume or frequency of services; (iii) divide, distribute, assign or impose portions or segments of an existing or future market of goods or services, through customers, suppliers and determined or determinable times and places; and (iv) establish, arrange or coordinate supplies or the abstention in auction sales, adjudications, closures or public auctions.

⁶⁰ Absolute monopolistic practices consist of agreements or alliances between competing economic agents, which restrain competition. They are of the vertical type since they occur at the same level of the production chain or in the commercialization of goods and services.

In Costa Rica this type of practice is null *ipso jure*. The legal analysis is made in accordance with the so-called "rule *per se*", according to which they are prohibited under any circumstances and considered illicit in themselves. To determine the illegality of these practices, it is not necessarily to assess the size of the affected market, nor its effects. It is sufficient to verify the assumptions established in Article 11 to determine their illegality. Only the previous aspects will be taken into account to determine the sanction to be imposed. Thus, to determine the illegality of this type of practice, two elements must be verified: that economic agents are competing with each other and that economic agents have committed some of the practices described in the Law.

On the other hand, relative monopolistic practices⁶¹ can also have pro-competitive and pro-efficiency effects. Therefore, in order to determine their illegality and damage to free competition, they must be analysed under the "rule of reason". Three elements must be proved: (i) that the economic agent, who commits the practice, has substantial power in the relevant market, (ii) that the practices are described in the Law, and (iii) that the practice is, or aims at, either improperly removing other economic agents from the market, or substantially preventing entry access or establishes exclusive advantages in favour of one or several people.

The practices described under Article 12 are as follows: (i) the setting, imposition or establishment of exclusive distribution of goods or services, according to subject, geographic situation or determined periods of time, including the division, distribution or allocation of clients or suppliers, between economic agents who are not competing with each other; (ii) the price imposition or other conditions that a distributor or supplier must observe, when selling or distributing goods or providing services; (iii) the sale or transaction subject to buying, acquiring, selling or providing other goods or additional services, different or distinguishable or on reciprocity; (iv) the sale or transaction subject to the condition of not using, acquiring, selling or providing the available goods or services that are usually supplied to third parties; (v) the agreement between several economic agents or the invitation to exert pressure on some clients or suppliers, in order to dissuade them from a determined practice, to take reprisals or to force them to act in a specific way; (vi) the production or commercialization of goods and service at prices inferior to their normal value; and (vii) in general, any deliberate act that may in the end lead to the exit of competitors from the market or to stop their entry.

As for concentrations, they can be mergers, i.e. acquisition of control or any other act that concentrates societies, associations, actions and capital, trustees and assets in general, and that take place between competitors, suppliers, customers and other economic agents, with the purpose of decreasing, harming or hindering competition or free competition of equal, similar or strongly linked goods and services. Concentrations can be classified as (i) vertical: defined as concentrations in which the intervening economic agents are part of the different stages of the production process, from the manufacturing of raw materials, to the production, marketing and distribution of goods, (ii) horizontal: this type of concentration occurs when the economic agents are at the same level of production or marketing, (iii) conglomerate concentration: is the concentration in which the companies which are supposed to concentrate participate in different markets not related to each other.

⁶¹ Relative monopolistic practices: acts, contracts, agreements, adjustments or combinations, whose object or effect is or can be the illegal displacement of other agents from the market, the substantial impediment of their access or the establishment of exclusive advantages in favour of one or several people. These practices are normally made between companies operating at different market levels or phases of the productive process, in such a way that they hinder or prevent the competition process and free competition at such levels. For this reason they can also have vertical characteristics.

In order to analyse concentrations, competition legislation indicates that criteria need to be followed to determine the substantive power in the relevant market. In Costa Rica, the experience of the Commission in the area of concentrations has been relatively limited since the legislation lacks detailed regulation in this area. Additionally, the mechanism of pre-notification is not established. The control mechanism is *de facto*, which makes the work of the competition agency difficult, since they cannot establish conditions or corrective measures to the concentrations that have been put into effect.

1.4.2. Institutional aspects

The Commission for the Promotion of Competition (COPROCOM) is a maximum deconcentration entity, registered under the Ministry of Economy, Industry and Commerce (MEIC). According to the General Law on Public Administration, deconcentration is evident when a superior cannot revoke decisions made by an officer of lower rank, revise or substitute practices of subordinates or the Court, even when the person in a lower position works under the supervision, receiving orders and instructions of the superior. The Commission has total autonomy from the Ministry of Economy, Industry and Commerce. Its resolutions cannot be revised by any other administrative body. They can only be revised by the Tribunals of Justice.

The Commission does not have financial and administrative autonomy, as its budget is included in the budget assigned to the Ministry of Economy, Industry and Commerce for economic activities. Nevertheless, once the Minister has established it, the Commission can use the budget according to its objectives, and, in principle, without any restriction to undertake the activities of promotion and protection of competition.

The level of autonomy enjoyed by the agency has given it more credibility before the different institutions and the public in general. For example, this image of independence has enabled the agency to have its opinions considered as technical, non-political criteria. This has also made the different interest groups more receptive to the proposals of the agency. Moreover, the different public institutions constantly consult the Commission, seeking its opinion on terms of competition and free competition.

1.4.3. Evaluation of administrative procedures addressed to COPROCOM

Since its inception in 1995, COPROCOM has fined businesses that have carried out anti-competitive practices, such as price-fixing agreements, refusal to disseminate information and impeding the entry of new competitors. The total number of cases received since its creation in 1995 until 2002 is detailed in Table 17.

Table 17: Number of cases received per year between 1995 and 2002, COPROCOM.

Year	Denunciations	Consultations	Own initiative enquiries	Opinions	Price settings	Licences	UTA consultations	Mergers	Total	% of Total
1995	12	0	2	0	0	0	0	0	14	3.1%
1996	36	3	6	0	0	0	0	1	46	10.2%
1997	62	12	4	0	0	0	0	0	78	17.3%
1998	20	12	20	0	0	0	0	1	53	11.8%
1999	16	26	20	0	0	0	0	1	63	14%
2000	13	32	14	0	0	0	0	0	59	13.1%
2001	17	36	6	12	1	3	1	1	77	17.1%
2002	13	10	5	13	0	2	18	0	61	13.5%
Total	189	131	77	25	1	5	19	4	451	100%
% of Total	41.9%	29%	17.1%	5.5%	0.2%	1.1%	4.2%	0.9%	100%	

Sources: COPROCOM and UTA archives.

As indicated in Krakowski's work, the low number of mergers dealt with during these years can be explained by the structure of the Law, which does not stipulate the pre-notification of concentration.⁶² In the same report, the increase in consultations is seen as a positive aspect since it probably reflects the people's growing awareness of the existence of the Competition Defence Law.

Table 18: Classification of the presented cases between 1995 and 2002.

	1995	1996	1997	1998	1999	2000	Total	% of total
Absolute practices	3	8	7	12	10	6	46	15%
Relative practices	3	10	9	0	2	11	35	11%
Concentrations	0	1	0	1	1	0	3	1%
Deregulations	4	10	1	2	1	12	30	10%
Markets surveys	0	2	1	13	0	2	18	6%
Others	4	15	60	24	49	28	180	58%
Total	14	46	78	52	63	59	312	100%
% of total	4%	15%	25%	17%	20%	19%	100%	

Source: COPROCOM and UTA.

Table 19 reflects the number of settled cases per year. Particularly, during 1998, the number of complaints from users was extremely high due to the Department of Economy, Industry and Commerce of Costa Rica transferring various cases of refusal by companies to transmit information.

Table 19: Cases per year settled by COPROCOM 1995–2003.

Year	Denunciations	Consultations	Own initiative enquiries	Opinions	Price settings	Licences	UTA consultations	Mergers	Total	Solved/received
1995	8	0	1	0	0	0	0	0	9	0.64
1996	12	4	1	0	0	0	0	1	18	0.39
1997	40	1	4	0	0	0	0	0	45	0.58
1998	57	15	21	0	0	0	0	1	94	1.77
1999	19	21	17	0	0	0	0	1	58	0.92
2000	9	32	15	0	0	0	0	0	56	0.95
2001	17	36	6	12	1	3	1	1	77	1.00
2002	13	10	5	13	0	2	18	0	61	1.00
Total	175	119	70	25	1	5	19	4	418	0.93
Received/solved	0.93	0.91	0.91	1.00	1.00	1.00	1.00	1.00	0.93	

Source: COPROCOM and UTA.

Main cases presented

The most relevant actions of the Competition Promotion Commission⁶³ have been those related to the markets of liquors, medicines, cosmetics, pharmacies, petrol stations, professional schools, telecommunications, electricity and insurances.

In the liquor market, COPROCOM's Technical Support Unit investigated *ex-officio*, in 1999, the distortions of the liquor market, particularly the legal regime of liquor monopolies, mentioning the activities in which the National Liquor Factory (FANAL) maintains the monopoly. Such activities included fixing maximum sale prices in production and purchase contracts of liquor for enterprises producing and marketing liquors.

⁶² Krakowski, M (2001) "Competition Policies in Latin America: A first approximation" Project MIFIC-GTZ, Managua.

⁶³ COPROCOM "Competencia Boletín Informativo" Various issues.

In the medicines market, an enquiry carried out by COPROCOM revealed the existence of institutional barriers in the manufacturing of medicinal products. In this case, the dispensation of various articles of different regulations was pleaded for and the motion was taken and executed by the corresponding authorities.

In the cosmetic market, the existence of institutional barriers for the marketing of cosmetic products was identified. COPROCOM recommended the Administration not to demand authorization for the manufacturing laboratory for imports, commercialization and distribution of these products. It also found that distributors in the pharmaceutical market were supplying their customers with products already labelled with the retail price. In this instance, pharmacies were encouraged to compete in terms of prices in the market.

As for the petrol stations market, due to a complaint it was found that the large number of requirements established by the Public Administration, under the norm for the regulation of the National System for the Commercialization of Fuel, had facilitated monopolies, which constituted a barrier to effective competition in this service. Facing this situation COPROCOM made relevant recommendations to eliminate regulations that were hindering competition. Following the recommendations, a new regulation was revised and approved to regulate the National System for the Commercialization of Fuel, which did not include the identified barriers to entry. An approach made to COPROCOM, to make a request to the Office of the Republic's Attorney General led to the abolishment of fee setting by professional schools as it was considered that the parties should be able to freely set the fees of professional services.

Equally, in the telecommunications, electricity and insurance markets, recommendations were made to eliminate norms or dispositions that could undermine the process of competition. Particularly in the case of the insurance market, a recent report by COPROCOM⁶⁴ considers that the liberalization of this market should be complete and fully transparent.⁶⁵ Other surveys have also been conducted in the milk, chicken, onions and beans markets where barriers and distortions to the competition process were identified. These investigations have helped the authorities to take pertinent measures, such as the deregulation of tariffs in these sectors. Within the framework of economic deregulation, some examples of the results achieved in this field by the National Commission of Deregulation, together with COPROCOM have been: the simplification of the registration and recording system for agrochemicals, the simplification of operation licences, the abolishment of generic labelling for non-alimentary products, the abolishment of obsolete technical regulations and the reform of the regulation concerning dangerous products.

COPROCOM has received requests from the Ministry of Foreign Trade concerning the establishment of import quotas for farming products such as rice, beans, cocoa and white corn, alleging that supplies in the local market were insufficient, and which were based on estimates of existence, production and imports and consumption calculated by the competent entities.

In all the previous requests, COPROCOM has provided unfavourable opinions on the statements made regarding insufficient supply since it considered⁶⁶ that it has not modified the price for the consumer, since the total supply has not overtaken national consumption. Thus, consumers have not benefited from a tariff decrease. Of the four consultations received relating to cases of concentration, all the resolutions issued by COPROCOM declared that the concentration presumptions were out of place in every single case absolving the accused companies from any responsibility and sanction.

⁶⁴ Report of the Commission for the Promotion of Competition, Article 4 of the act 26-03. File C-008-03.

⁶⁵ Such considerations were as follows: (i) The continuous decrease in the participation of the State as entrepreneur has given economic agents access to activities that were traditionally State monopolies, monopolies that are presently legal without any foundation in economic terms and that should be eliminated; (ii) the point previously made is fully applicable to the insurance market, where the State monopoly should be eliminated for the benefit of the consumer; and (iii) the initiatives oriented towards the full elimination of this monopoly and all those legal monopolies that lack foundation.

⁶⁶ See COPROCOM *"Guía Informativa de Competencia"*.

Main sanctioned cases

The cases sanctioned by COPROCOM have been practices, and the justification for them, that violated the law. These were identified in the bean market, in the sector of containers for surface transportation, leather, rice industry, pork meat and finally in the palm oil market.

In 1999, COPROCOM undertook an investigation in the bean market involving the members of the National Chamber of Bean Processors and other related products. The practices examined in this investigation were classified as absolute monopolistic practices as they violated Article 11, Clause (a) of the LPCDEF by setting the price of the 900 gram bean bag and for exchanging information to set the price of beans purchased in bulk.

Furthermore, the violation of Article 11, Clause (c) of the same Law was also evident in the alleged division by the agents of the territory for the purchase of beans in bulk.⁶⁷ Subsequently, when analysing these acts, COPROCOM declared the existence of evidence of discussions held during meetings of the Chamber regarding the purchase price of the raw material (beans in bulk). Members of the National Chamber of Processors and officers from other competing companies attended such meetings. On the other hand, the evidence regarding the practice of market division did not conform to the factual reality.

Sanctions were applied for fixing the price of the 900 gram bean bag, and for the exchange of information to fix the purchase price of black beans in bulk. Moreover, all the people participating in the absolute monopolistic practice of information exchange were ordered to stop or to abstain from any violation in the future.

As for the surface transportation of containers sector,⁶⁸ after an investigation undertaken by COPROCOM it was decided to initiate a simple administrative proceeding against various companies working in the field of surface transportation of containers due to the supposed agreement to raise the fares charged for their services, which amounted to an absolute monopolistic practice. The relevant tests were based on the fact that some economic agents from the transport sector published an anonymous article in order to communicate the existence of fare fixing in the surface transportation of containers for foreign trade with a view to increasing the prices of surface transport. Consequently, sanctions were imposed on the economic agents who participated in the illegal acts.

In December 1999, the existence of a possible agreement in the leather market was discovered⁶⁹ whereby several leather tanning businesses set the maximum purchase price for a type of leather. Before the evidence of the presumed agreement, COPROCOM started a simple administrative proceeding against these businesses and their representatives for pursuing possible absolute monopolistic practices.

In the rice industry, the Commission decided to initiate an enquiry which led to a simple administrative proceeding against members from the National Association of Rice Industries for alleged violations of the Law for the Promotion of Competition and the Effective Defence of the Consumer through an agreement not to buy rice from national producers and to pressurize them into preventing other economic agents from accessing the market. When such practices are verified they constitute absolute monopolistic practices. Thus, violation having been demonstrated, the Commission imposed sanctions.

⁶⁷ The act dating from 20th February 1998 agreed upon sending a note to each member of the Chamber informing them that from Monday 23rd February the new price for a 900g bean bag would be ¢230 (see leaflet No 31). As a matter of fact, on 23rd February the note 013-CF-1998 (leaflet No 46) informed the Members, among others, of the following: *"this Chamber in Ordinary Session Number 13 held on 20th February agreed that from Monday 23rd February 1998, the new price for the 900g bag of black beans will be 230 colons"*.

⁶⁸ Ordinary Session Act No. 33-00 of the Competition Promotion Commission held on 12th September 2000.

⁶⁹ Ordinary Session Act No. 43-00 of the Competition Promotion Commission held on 21st November 2000.

In the pork meat market,⁷⁰ COPROCOM's Technical Support Unit carried out an investigation and decided to initiate a simple administrative proceeding against the Costa Rican Chamber of Pig Breeders and others, for a presumed agreement to restrict the supply of pork meat, which was considered an absolute monopolistic practice, violating the Law for the Promotion of Competition and the Effective Defence of the Consumer, Law No. 7472.

On 18th September 2001, an enquiry was initiated into the palm-fruit oil market, in order to investigate the agents involved in buying palm fruit and in the commercialization of its by-products for the assumed violation of the LPCDED Article 11.⁷¹ The evidence was obtained from the minutes of the meetings of Coopeagropal RL's board of directors, which revealed that the companies in that sector had organized meetings on various occasions, and that one of the subjects discussed had been the price of palm fruit and production quotas.

Sanctions were imposed on both the companies and on the individuals who participated in the agreements (the manager of one company and the members of the Board of Directors).

1.4.4. Identified limitations and needs

On the basis of the growing number of cases investigated and sanctioned by COPROCOM, such as those described above, this important Costa Rican institution has acquired legitimacy among the public, which has become aware of its functions. It represents one of the most successful examples among those institutions promoting conditions for competition. This can be seen from all the former obstacles faced by COPROCOM, when the legislation on competition was passed.

COPROCOM's function can also be assessed through the growing number of received requests. The procedures to process the requests have been revised thus improving their support among the public. The task of COPROCOM is to reach consensus among the parties and, if this is not possible, the cases are brought to court.

However, despite the above, COPROCOM experiences in its work three fundamental types of limitations, i.e. (i) a lack of competition culture, (ii) limitations of regulatory type and (iii) limitations in terms of human resources and infrastructures. These limitations result in COPROCOM encountering the following critical needs.

Need to implement a competition culture

Another obstacle faced by the agency is the lack of a competition culture on the part of some public institutions and economic agents. This has made the work of the Commission difficult, as some decisions of other public organizations are detrimental to competition.

Need to modify the current COPROCOM legal and regulatory regime

A fundamental requisite to promoting competition is the existence of a coherent legal framework to enable its application transversally. Therefore, one of the Commission's objectives is to make competition legislation applicable to all the agents participating in the market.

One of the difficulties encountered by the Commission for the Promotion of Competition in the implementation of competition legislation is that most of the legal bodies have opposing objectives. Namely, there are regulations that specifically forbid the application of competition legislation. Currently, one of the most striking examples of this can be found in the public services.

⁷⁰ Ordinary Session Act No. 36-02 of the Competition Promotion Commission, held on 26th November 2002.

⁷¹ Actually, the investigation was carried out on the most important company of the sector and the Agroindustrial cooperative of Palm-tree oil producers RL (Coopeagropal R.L) concerning the exchange of information and a subsequent agreement on the purchase price of palm fruit. In addition, there were also agreements on price and volume of sales of palm-fruit by-products. These acts constituted practices of absolute monopoly.

According to Article 9 of the Law for the Promotion of Competition and the Effective Defence of the Consumer⁷² and the special Laws in these sectors, public services and state monopolies are exempt from the application of competition legislation. Undoubtedly, this is one of the main limitations faced by the Commission in applying competition policy uniformly to all the economic agents participating in the market. There are many other sectorial regulations that can be mentioned which exempt some markets from the application of competition legislation.⁷³

Therefore, the work of the Commission for the Promotion of Competition together with the National Deregulation Commission has focused on initiating either processes of regulatory reform to eliminate barriers to entry or some regulations to be able to apply competition legislation. However, the process has been relatively slow and most of the competition problems in the country continue to result from the same barriers established by the legislation and the state.

Moreover, another issue related to the limitations of the current legislation concerns concentrations and the Commission's ability to prevent anti-competitive mergers and acquisitions.

In fact, the regulation of concentrations is rather limited for two reasons: (i) it does not establish the mechanism of previous notification, i.e. there is no obligation to notify acts of economic concentration, which makes the organization's capacity to take action more difficult, since its intervention is *post-facto* and (ii) it does not establish the possibility to apply corrective measures, since COPROCOM has to abide by the legal procedure of the General Law on Public Administration, which slows down any procedure of this type.

The current legislation has thus diminished the scope of application since it exempts public service companies and state monopolies in sectors such as insurance, alcohol distillation, telecommunications, electricity distribution and water and municipalities internally and in relation to third parties. Additionally, although COPROCOM can give its opinion on new rules, laws and other governmental dispositions and their impact on the conditions for competition, its influence is limited to giving advice and not to delivering binding decisions.

Need to strengthen human resources and infrastructure

The number of staff working in the Commission is insufficient to be able to carry out investigations in a systematic way. For this reason, the Commission's strategy has consisted of carefully selecting cases that it already knew. Finally, mention must be made of the need to improve the technical competence of the competition agencies' officers. In the case of Costa Rica, it is difficult to find adequate training in the field of competition policy.

Need to strengthen international cooperation

COPROCOM considers international cooperation in the field of competition as an essential tool. This has motivated COPROCOM to learn from the experience of other competition agencies that have norms similar to those of Costa Rica.

⁷² "Article 9 of the Law on Competition Promotion and Effective Consumer Defence.

The regulations seen in this chapter apply to all the economic agents, with the exceptions and the limitations indicated in this chapter:

Are exempt of the application of the regulations described in this chapter. (i) agents providing public services by virtue of a concession, in the terms mentioned in the Laws to undertake the necessary activities to provide these services, according to the limitations established in the concession and special regulations. (ii) State monopolies created by Law, while they are maintained under special Laws ".

⁷³ An example of the former is the Case of the Law of the Sugar Cane League No. 7818 dating from 22nd September 1998 and the Law on Cooperative Associations and creation of the INFOCOOP, No. 4179 dating from 22nd August 1968.

Consequently, agreements have been signed with countries such as Mexico and Chile and international cooperation projects have been promoted. The enforcement of such projects has enabled COPROCOM, and especially its Technical Support Unit, to acquire a greater knowledge as well as technical material. This has made it more operational and has provided working mechanisms to facilitate the process of decision making related to complaints, investigations and consultations received at the Commission.

Final considerations

The Law for the Promotion of Competition and the Effective Defence of the Consumer suffers from a series of inadequacies, which hinder COPROCOM's capacity to react in terms of competition. One of the limitations is that the Law does not foresee pre-notifications when companies intend to merge, which limits the capacity to control and avoid concentrations that will restrain competition. Moreover, this Law has a restricted field of action since it excludes public services agents enjoying a state concession. Nevertheless, COPROCOM has been one of the most successful examples among those promoting competition.

The most prominent facts in terms of implementing competition legislation at the level of the productive and entrepreneurial sectors are: (i) a change in entrepreneurial style and in the commercial practices of many companies to adapt to the new legislation, (ii) as for the Commission, it has made and continues to make great efforts towards prevention and the education of economic agents to develop a competition culture in various sectors, especially in the entrepreneurial and productive sectors, (iii) large participation of the state has been achieved in key areas contributing to the development of the competition process and free competition, and bringing more transparency to the market, thus benefiting the consumer. Consequently, the above-mentioned Law was established without adequate discussion and circulation though nowadays the importance of such a regulatory body in terms of promotion and protection of the competition process is becoming evident, and (iv) there has been a change in the behaviour of the economic agents to adapt their actions to the market.

CHAPTER II

Identification of Needs and Priorities in the Area of Competition Policy in Bolivia and Peru

2.1. Economic context

The needs of Bolivia and Peru in terms of competition are closely related to their socio-economic realities, which are summarized below.

2.1.1. Economic aspects related to competition law in Bolivia and Peru

Bolivia

Bolivia is characterized as being an economy with little diversification and a low level of industrialization. The country registers high percentages for poverty,⁷⁴ low years of schooling, illiteracy, and general backwardness in social development, whose consequences are evident in the difficulties encountered in developing adequate competition and consumer protection policies.

The economy started to grow moderately from 2000. In 2003,⁷⁵ the growth in GDP reached 2.5%, stimulated by exports of natural gas and soya. According to estimated figures, the GDP registered an increase at the beginning of 2004. Investment, however, fell. The most dynamic activities were agriculture (5.8%) and the extraction of hydrocarbons (10.7%). In 2004, a moderate growth was registered.

Relying on the figures available in 2002, the economy of Bolivia is mainly concentrated in the services sector (52.4% of GDP, followed by the primary (25.7%) and the secondary (21.9%) sectors). While in the past Bolivia's government was an important supplier of services, most of these activities have now been privatized. In addition, important steps have been taken to strengthen the institutional and legal framework in the financial, transport and telecommunication services, as well as the establishment of new supervisory bodies. Moreover, new legislation has been adopted in the electricity, hydrocarbon and basic sanitation sectors, but the transport sector still lacks legislation.

The Bolivian economy is characterized by a high level of informal activities, mainly trading, that take place in the street through, among others, street sellers that have migrated from the country to the city in search of remuneration to allow them generate a subsistence income.

There are two types of informal work in the industrial sector: micro-enterprises and crafts. On the one hand, there is the entrepreneur who partly produces for the informal sector in order to avoid taxes, and on the other hand, craftsmen that legally or illegally practice some manufacturing activities.

⁷⁴ The census undertaken on 5 September 2001, registered 8,274,325 inhabitants, out of which 5,165,882 (62.4%) were recorded in urban areas and 3,108,443 (37.6%) in the rural area. According to information from the 2001 census, 58% of the population in Bolivia is poor. This percentage represents 4,695,464 inhabitants that live in housing lacking appropriate facilities such as water and sewage systems, that use unsuitable combustibles, that have low levels of education and that show little regard for health care. The poor represent 41.4% of the total population, which amounts to 3,318,916 persons. www.ine.gov.bo.

⁷⁵ ECLAC, Economic Study of Latin America and the Caribbean. 2003-2004, Pages 141 and following.

Informal activities are also evident in the farming sector, particularly in the way inhabitants of rural areas organize productive processes (agriculture, fishing, livestock, harvesting, etc.), which is done outside the norms established by local and central government authorities. Such a situation arises from the lack of access to credit and the manner in which participation takes place in the consumer market, i.e. through intermediaries who are also informal or through enterprises legally established but that take on informal activities.

The service sector also records informal activities, such as in transport and in other services using basic infrastructure.⁷⁶

Peru

Following a strong fall of GDP in 2001, Peru's GDP subsequently recovered in the following years (5.4% in 2002 and 4.1% in 2003⁷⁷). The increase was due to favourable external conditions, the expansive macro-economic policy adopted, improved exports and private investment. These factors seem to have stimulated the economic recovery during 2004, especially the investment in the mining sector and the exploitation of natural gas in the Camisea region, and to a lesser extent the export activities in the industrial-agricultural sector.

Peru, similarly to Bolivia, has a high level of activity in the informal sector, which is mainly attributed to the migration from the countryside to the city. Based on the figures from the National Authority of Tax Administration (SUNAT), the informal sector contributed 60% to the GDP in 2004 compared to 50% in 1990.

It has been argued that one of the main reasons for the increased informal sector in the last decade, both in Peru and in other countries in Latin America, is the high cost involved in entering the formal sector. Among these are the excessive bureaucracy, tax charges and regulations.⁷⁸

2.1.2. Economic and commercial opening, deregulation and privatization

The countries to which this report refers have their own experience in commercial opening, deregulation and privatization, and are set within the framework of their respective programmes of structural reforms.

Bolivia

In 1985 Bolivia started a programme of structural reforms to modify the role that the state played in economic activity. The reforms were undertaken in two phases. The first phase (1985-1993) included the unification of the exchange rate and the elimination of restrictions to imports and to the free movement of capital. It also offered concessions to foreign investment, simplified the tax and customs systems, and eliminated official prices and liberalized interest rates. The second phase (1994 onwards) considered the administrative decentralization of the state, the privatization of public enterprises, the modernization of private and state pension schemes, legal reforms, the reform of the state and the reform of the education system.

Among these changes, the reform of the legal system and the institutionalization of the Council of Judicature and the Constitutional Court are the most interesting for competition policy given their relevance. Similarly, consumer protection was reformed.

⁷⁶ See Lorenzini, Juan Pablo. Bolivia. Report on the Needs and Priorities in the Area of Consumer Protection, February 2004.

⁷⁷ ECLAC (2003-2004) Op. Cit . Pages 191 and following.

⁷⁸ See Loayza, Norman. The Economics of the Informal Sector. A simple model and Some Empirical Evidence from Latin America. World Bank (1997).

With regard to privatization, the Capitalization Law No. 1544 of 21 March 1994 encouraged private investment in sectors that had traditionally been closed to the participation of private interests. Following the programme of reforms, the System of Sectoral Regulation (SIRESE) was created with the aim of controlling and supervising activities in the telecommunications, electricity, hydrocarbon, transport, water and other sectors that had been incorporated into the system by law.

The role of SIRESE is to ensure that the activities under its jurisdiction are efficiently carried out and contribute towards the development of the national economy as well as guaranteeing the population access to regulated services. In addition, SIRESE must promote competition and economic efficiency in the regulated sectors and investigate possible practices of monopoly, anti-competitive or discriminatory nature that may take place in enterprises and bodies operating within the sectors. Finally, SIRESE must protect the interests of users, enterprises and the state.

The issues discussed in the previous paragraphs would indicate that Bolivia has two types of sector. On the one hand, there is a sector where several financial⁷⁹ and basic services predominate, and which could be grouped under the general definition of "regulated services". The other sector is composed of all the remaining economic activities: mining, manufacturing, industrial and services, which are characterized by the lack of regulations guaranteeing the rights of consumers. It also lacks public bodies with active participation in the promotion and protection of consumer interests. In the area of competition, there is a draft bill proposal currently under discussion, which is the result of several attempts initiated in 1997 when the idea of a Code for Regulating the Market was considered.

Peru

During the 1990s, the Peruvian Government initiated a series of adjustment measures and structural reforms. The government reconsidered the interventions of the state in the economy, assigning it the role of promoting private initiative. This was in contrast to the notion of the state as a producer and as a planner of economic activity, which was predominant during the 1980s.

Within this context, three processes were undertaken in parallel to adapt the state to the new environment. First, privatization of enterprises in the public sector began in 1991. Second, an institutional framework was developed to regulate and expand public services (telecommunications, electricity). Third, free competition was promoted.

Part of the mentioned reforms, were also the introduction of some legal changes, such as the Legislative Decree to Promote Foreign Investment (1991) and the creation (1992) of the National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI).

In addition, in order to support the process of privatization, several Legislative Decrees were promulgated, such as the Legislative Decree No. 674, which stipulates the creation of the Commission for the Promotion of Private Investment (COPRI).⁸⁰ Through this process, several institutions disappeared and were replaced by new bodies such as the Supervisory Body for Transport (OSITRAN), the Supervisory Body for Energy (OSINERG) and the Supervisory Body for Telecommunications (OSIPTEL). These institutions have had an important role in contributing towards the implementation of adequate judicial regulation, specifically in the regulation of public services (water, light, infrastructure and telecommunications).

⁷⁹ In Bolivia, financial services are subject to regulation, control and supervision by the respective Superintendents under the Superintendency of Financial Regulations (SIREFI).

⁸⁰ See UNCTAD. Analysis and Investment Policies Peru. 2000.

Parallel to the privatization process, the state created a regulating body to oversee the concession contracts signed with private enterprises and to set tariffs for the provision of services. In spite of the efforts made, additional measures are required to increase the autonomy of these entities as well as the reformulation of certain norms to clarify and avoid the duplication of functions among the regulating bodies and INDECOPI.

Finally, it is worth noting that Peru's process of privatization and deregulation ended abruptly towards the end of the 1990s, affecting the configuration and structure of the markets that provided public services. In addition, the above-mentioned adjustment measures contributed to establishing open commercial and investment regimes, which resulted in a considerable increase in GDP, employment, trade and foreign investment. Several social policies were also issued to undertake labour reforms and the reform of pension schemes as well as strategies to alleviate poverty and to reform the health system. In spite of these efforts, however, according to the United Nations Development Programme (UNDP),⁸¹ socio-economic inequality and high levels of poverty continue to be a structural problem in Peru.

2.2. Bolivia: identified needs in the field of competition

In Bolivia, since SIRESE has chosen a reliable competition policy for the regulated sectors, this section first identifies the needs in the regulated sectors of the country, and then the needs in the non-regulated sectors, where the most urgent need is to adopt a competition law.

2.2.1. Strengthening competition law in the different regulating bodies

In the case of Bolivia a distinction must be made between competition policy and norms in the sectors regulated by SIRESE and the non-regulated sectors (industry, trade, etc.). In the former, there are certain aspects of competition policy that have their own characteristics and create a special legal framework that takes into account the nature of each specific sector.

Nevertheless, certain problems were identified among the different regulatory authorities functioning under SIRESE. Specifically, in regard to the fulfilment of anti-monopoly measures and defence of competition, the need was found to strengthen certain aspects that add to the influence of natural monopolies present in some of the regulated services provided by SIRESE.⁸²

Another of the identified problems relates to the continuity and availability of services. In this regard, both the law that has created SIRESE and the sectoral legal norms establish certain attributions for the regulatory authorities to ensure that the services they provide are continuous and without interruption.

⁸¹ UNDP. Human Development Report Peru - 2002 "Profiting from Potentials". http://www.pnud.org.pe/idh/idh03_cap2.pdf

⁸² In order to solve problems posed by natural monopolies, the work of SIRESE's regulatory authorities has consisted in simulating competition in those services through measures that establish the price and quality of services in the enterprises functioning within the activities of natural monopolies. Additionally, it is important to mention the legal framework established for SIRESE, which has as a basis to ensure that the regulatory activities of SIRESE's authorities have a direct relationship with the promotion and defence of competition.

Although the main objectives of competition are oriented towards encouraging enterprises and individuals to be efficient, to charge adequate prices and to provide good quality products, it is considered that excessive competition can destroy the competitive process in a determined market. In this regard, the regulatory authorities of SIRESE⁸³ have taken steps to prevent the kind of competition that is destructive for the respective sectors and that endangers the provision of services.

In addition, if we consider that the attributions and power granted to SIRESE's regulatory authorities are aimed at promoting the defence of competition in their respective sectors, these bodies have acquired a certain degree of experience and specialization in the area of competition. Equally, the information available to the authorities has facilitated their work related to solving problems arising from anti-competitive practices.

To summarize: (i) competition policy in SIRESE has its own characteristics applicable to regulated sectors, and this is essentially due to the problems presented by the implementation of anti-monopoly dispositions and the defence of competition in such sectors; (ii) competition policy in the sectors regulated by SIRESE cannot be implemented without guaranteeing coherence among the different legal bodies as well as the creation of independent regulatory entities with attributes and responsibilities clearly defined; (iii) both the SIRESE regulations and the sector legal regulations establish in a specific way a series of dispositions related to the promotion and defence of competition within the sectors regulated by SIRESE.

2.2.1.1. Identification of anti-competitive practices in markets regulated by SIRESE

This section describes the way in which anti-competitive practices have been identified in Bolivia. To this end, it analyses the case of sectoral regulators on the basis of how sectoral bodies have dealt with the anti-competitive practices that they have confronted.⁸⁴

It is worth mentioning that, although Bolivia does not have Competition policy, the SIRESE Law and the sectoral legal regulations establish a series of anti-monopoly dispositions regarding competition which grant SIRESE's regulatory authorities the relevant power to promote and defend competition in their sectors. Reference is made in Table 20 to the manner in which SIRESE has identified and dealt with anti-competitive practices.

⁸³SIRESE was created with the aim of regulating, controlling and supervising activities in the telecommunication, electricity, hydrocarbon, transport and water sectors. The regulatory framework created through the SIRESE Law, and complemented by sectoral laws, has established, on the one hand, new institutions to regulate control and supervise the activities of people and enterprises functioning in the regulated public sectors. On the other hand, it has created a common system of regulations applicable to the sectors integrated within SIRESE.

⁸⁴ Information provided by Mario Ballivian (SIRESE) with the coordination of Maria Cecilia Martinez (Ministry of Foreign Affairs – Bolivia).

Table 20: Bolivia: anti-competitive practices in the sectors regulated by SIRESE.

Resolution number	Subject	Complaint or investigation
RA 351/2001	Anti-competitive agreements and abusive practices	Declare proved the infraction of Articles 16 and 17 of the SIRESE Law (anti-competitive agreements and abusive practices, respectively) formulated within the administrative investigation process of the complaint against the firm Petrolera Andina, the firm Petrolera Chaco and Maxus Bolivia Inc.
RA 15/06/01	Anti-competitive agreements and anti-competitive practices	Determine that DISCAR S.R.L. should only be the plaintiff and not part of the investigation process for infraction of Articles 16 and 17 of the SIRESE Law relating to anti-competitive agreements and abusive practices, respectively, on the part of the Compañía Logística Boliviana de Hidrocarburos, rejecting the trial proposal.
RA 663/97	Anti-competitive and discriminatory practices	Declare unproved the complaint presented by TELECEL S.A. against ENTEL S.A. for anti-competitive and discriminatory practices to the detriment of other telecommunications operators.
RA 236/99	Anti-competitive and discriminatory practices	Declare unproved the investigation of the complaint by TELECEL S.A. against ENTEL S.A. for anti-competitive and discriminatory practices in the roaming service provided by ENTEL as part of their mobile telephone services.
RAR 2002/0343	Anti-competitive practices	Orders TELEDATA S.A. to immediately 1) desist and abstain from making offers such as the one, defined as "Line 12", offered in Tarija, under conditions considered to be anti-competitive, abusive and contrary to the legislation, and 2) to only apply to subscribers tariffs under the list of prices that have been informed to the Authority of Communications.
RAR 2002/1000	Misleading advertising	Orders TELECEL S.A. to immediately desist and abstain from false and misleading advertising concerning the international roaming service.
RA 044/02	Excessively low tariffs	It is decided to declare approved the unionization requested by LLOYD Aéreo Boliviano against AeroContinente, within a process of controversy between the firms, started by LLOYD Aéreo Boliviano, for charging excessively low tariffs with the intent of excluding the plaintiff from the aeronautical Peru–Bolivia market.
RA 0086/2003	Defence of competition	Approval of the agreement to have a shared code between Aerosur and Taca Perú.

Source: self-elaboration based on the resolutions ordered by the sectoral authorities of SIRESE.

2.2.1.2. Needs identified by SIRESE

In spite of the efforts made by SIRESE to deal with anti-competitive practices, certain aspects need to be strengthened.

Concerning the needs related to purely regulatory aspects, and taking into consideration the characteristics of the regulated sectors, it would seem necessary to elaborate the Regulation of Chapter V of SIRESE's Law to complement and enforce anti-monopoly and competition policy in the sectors regulated by SIRESE.

With regard to the need to strengthen the capacities of officials from SIRESE's authorities, it is suggested that courses, seminars, and workshops be organized on issues related to the analysis of: (i) conditions for competition and anti-competitive practices in general, and (ii) conditions for competition and anti-competitive practices in regulated sectors (electricity, hydrocarbon, basic sanitation, telecommunications and transport).

In addition, study tours are proposed for SIRESE officers in foreign agencies and competition authorities, particularly those agencies responsible for the identification and resolution of anti-competitive practices in regulated sectors.

For investigative needs and the undertaking of studies, it is suggested that the structure of sectors regulated by SIRESE should be evaluated and the main analytical mechanisms or outlines required to investigate and resolve anti-competitive practices in the regulated sectors should be assessed.

In terms of awareness raising in the field of competition, the following should be considered:

- a. Training workshops on SIRESE's role in promoting competition policy and consumer protection within their respective sectors for the media, policy makers and executives from strategic public and private enterprises.
- b. Training for the judiciary on issues concerning defence of competition and consumer protection in sectors regulated by SIRESE.
- c. Design of a national strategy to integrate competition issues in sectors regulated by SIRESE into the academic curriculum.
- d. Development and implementation of a system to provide information on cases resolved by SIRESE and on issues concerning competition and consumer protection in the sectors also regulated by SIRESE. Create a library and specialized material on competition and consumer protection concerning issues within the sectors regulated by SIRESE.

2.2.2. Implementation of competition law and policy in non-regulated markets in the presence of presumed anti-competitive practices

Competition constitutes the main component in the structure of an economic system that makes the market a fundamental driver of development. Therefore, it is of paramount importance that countries have clearly defined competition policies and institutional and legal frameworks that guarantee adequate implementation and functioning. In the same way, competition policies must be consistent with the public policies of a country and their objectives must take into consideration international experience and advances made in this field.

Nevertheless, there are certain obstacles in Bolivia to implementing competition legislation: (i) the perception of competition policy in relation to industrial policy and other objectives for development, (ii) obstacles that the productive sector and enterprises would face, and (iii) the cost implications of such legislation.

The obstacles faced by the productive and entrepreneurial sector originate in the lack of a competition culture among economic agents, that is, little knowledge about which practices fall within competition legislation, which violations must be sanctioned, and how. Additionally, during the assessment mission, which served as the basis for preparing the report on the needs and priorities of Bolivia, the need to have a core of specialists in the fields of economics and law to support the legislation became apparent.

Since SIRESE exists as a "Competition Authority" only in the regulated sectors, establishing a competition authority in the non-regulated sectors is also required. To this end, an analysis should be made of the existence of presumed anti-competitive practices in non-regulated sectors and of the implications for national competition legislation.

2.2.2.1. Existence of anti-competitive practices in non-regulated sectors⁸⁵

In order to preserve competition as a mechanism to protect the freedom of enterprises for the common good, competition legislation does not deal with conflict resolution between two economic agents. Instead, it deals with public conflict threatening the market when one or several agents act against it. "It is the market and not the competitors that legislation protects, and only when unfairness among agents is of such magnitude or intensity that it threatens the market altogether, and can be considered illicit antitrust."⁸⁶

Competition law does not protect competitors themselves but the general economic interest, and specifically consumers' interest whenever their freedom of choice is affected. In this regard, taking into consideration the political and economic principles that guide markets, authorities must apply regulation to restrict anti-competitive practices without affecting the functioning of competition among different enterprises or actors.

The limitations of competition originating from successful companies must not be confused with those originating from a practice specifically aimed at distorting the conditions of competition in a market. The first are the essence of the competition system, the success of whomsoever offers the best services in the market. The latter are a real corruption of the system and are the principal reason why competition law must be in place.⁸⁷

The aforementioned concepts have been introduced into the Bolivian legislation, applicable to sectors regulated by SIRESE, through anti-monopoly provisions and competition. In such regard, it warns that anti-competitive practices not only cause harm to competitors but they also weaken judicial goods such as free competition and consumer interests.⁸⁸

Nevertheless, the same does not apply to the case of non-regulated sectors that do not follow competition rules and do not have any legal context in which to challenge anti-competitive practices. In this regard, in the case of Bolivia, there is no legal development to challenge these practices in a systematic and articulated way, except for unfair competition, which is part of the Code of Commerce. Nor is there a competent authority to investigate and sanction anti-competitive practices in non-regulated sectors.

Some business practices have been detected which, if competition legislation had been in place, the authority responsible for its enforcement could have treated them as anti-competitive and eventually sanction them.

As the above practices could not currently be considered illegal, hence anti-competitive, it was necessary to identify some evidence that may be relevant to the legal and or/economic analysis of certain behaviours. Some of the evidence could not be corroborated during the assessment missions undertaken to the aforementioned countries, and must therefore be referred to as simply presumed or alleged anti-competitive practices.⁸⁹

In general, entry barriers should be identified and stopped. Moreover, in cases of suspected abuse of a dominant position in the market it is important to evaluate the relevant market before determining whether an abuse has actually taken place. Nevertheless, to be able to identify presumed anti-competitive practices, other factors such as the maturity of the market and the market position of other competitors need to be considered. Therefore, reference should be made to the formulation of evidence and or/ alleged acts.

⁸⁵ Section sent by Mario Ballivian, SIRESE (March 2004).

⁸⁶ Soriano García, José Eugenio (1998). "Derecho Público de la Competencia". Editorial Marcial Pons. Madrid – España, pp. 20 – 21.

⁸⁷ Hernández Rodríguez, Francisco (1997). "Precio Predatorio y Derecho Antitrust". Editorial Marcial Pons. Madrid – España, p. 24.

⁸⁸ Therefore, arising from the last part of article 15 of SIRESE Law, enterprises that provide services in the SIRESE-regulated sectors are required to adapt their activities to principles that guarantee free competition, thereby avoiding acts that hinder, restrict or distort it.

⁸⁹ For evaluation purposes it is important to bear in mind the difference between alleged and evidence of pertinent factors if certain behaviours weaken the process of competition (market position, market position of competitors, market position of buyer, barriers to entry, maturity of the market, level of trade, nature of product, other factors).

To determine the existence of anti-competitive practices, primary sources were consulted to identify potentially anti-competitive practices in the sectors not regulated by SIRESE. Table 21 presents the evidence found in specific markets.

Table 21: Bolivia – evidence of allegedly anti-competitive practices.	
Relevant market	
Cement	The cement market in Bolivia is extremely concentrated, with one firm having a high share of the market, which hinders the entry of other competitors
Beer	In the beer market, the Paceaña firm is the only supplier in the Bolivian market and there is no room for competition.
Professional services	Historically, professional services in Bolivia have been the subject of self-regulation by professional associations that have generated barriers to entry to markets, prohibited advertising, and required the application of minimum tariffs by members of associations that deliver services.
Other restrictive behaviours	There exist certain types of unions, groupings, associations, chambers, etc. that prevent or constitute obstacles to the access or the continuation of individuals in the respective markets when they are not registered or are not members of those entities.

Since evidence of anti-competitive practices was not found in regulated sectors, it became apparent that additional factors must be taken into consideration to guarantee the success of the Competition Law Project.

2.2.2.2. Needs requiring attention prior to the adoption of competition regulation

Whether or not anti-competitive practices are present in non-regulated sectors and considering the characteristics of competition law in sectors regulated by SIRESE, the following are the major needs related to the adoption of a competition law.

(a) Aspects related to the existing regulatory framework

In the case of Bolivia, competition law should be compatible with the legislation regulating the market according to the juridical and economic conditions, either public or private. In this regard, it is important to recognize the basic functions of the sectoral authorities under SIRESE, which are established in SIRESE's Law and the sectoral regulations.

For example, SIRESE's Law and the sectoral laws regulating Electricity, Hydrocarbons, Basic (Health) and Telecommunications Law as well as the Supreme Decree No. 24178 for the transport sector, give each of SIRESE's sectoral authorities basic functions to promote competition in their respective sectors and investigate monopolistic, anti-competitive and discriminatory conduct carried out by enterprises operating in sectors regulated by SIRESE. There is, therefore, a need to support the Regulation of the Competition and Consumer Protection Law.

(b) The need for a clear definition of the jurisdiction and the functions of regulated sectors and a potential competition authority

Any competition law would need to clearly establish the jurisdictional basis and functions to be performed by the institutions that are to be in charge of its implementation in the sectors regulated by SIRESE and in the non-regulated sectors. In this regard, it is important to ensure an adequate degree of coordination among the different regulated sectors.⁹⁰

Regarding the need to ensure effective coordination among the various regulated sectors in case the Competition Law is passed, the following aspects need to be taken into consideration:

⁹⁰ See UNCTAD Model Law on Competition (revised version) (2003a). New chapter on the relation between competition authorities and regulatory bodies. Geneva, 2003.

- (a) In general, the regulation will confront market failures and the absence of markets. Here economic regulation is a substitute for market discipline. According to the classic model of regulation established for public services, "the regulator – that substitutes the market - takes most decisions, that is, planning, investment, financing, the accounting regime, all types of pricing, the general direction of the firm, and even the smallest decisions of the firm are determined, conditioned or simply ordered by the Authority".⁹¹
- (b) However, regulation can also have another purpose. Its goal need be not to establish control of the market or its operators, but to promote competition wherever possible. In the latter case, it protects the interests of the users (the security, quality and price of the service), especially where the market is a natural monopoly. The magnitude and pace of technological change in some sectors has introduced new aspects to regulation, often undermining traditional monopolies. The dynamism in the public service sectors made competition policy possible for them.
- (c) In parallel with the redefinition of the extent of regulation, competition law and policy have also experienced substantial changes. Competition law and policy are also part of the regulation of the public service and, therefore the limits between public sector regulation and competition policy are more permeable and their coordination vs. complementation become essential for the development of public services. Regulation and competition are complementary activities that require specific frameworks, and the functions of the organs and institutions in charge of implementing it are clearly defined. In this sense, "the ambiguity in the scope of law enforcement regarding the role of the regulator and that of the competition authority could entail a conflict of decisions and general confusion."⁹²

In the case of Bolivia, it is important to distinguish between the norm applied in the sectors regulated by SIRESE and the authorities in charge of its application in sectors regulated by SIRESE and those of the non-regulated sectors. In the first case, in conformity with SIRESE's Law and sectorial laws, SIRESE's regulatory agencies not only have regulated norms but also responsibilities in the field of competition.

(c) The need to undertake research and studies

It is important that the draft Bolivian Competition Law takes into account the predominant market failures in Bolivia. For example, informal market, smuggling, and dominant positions in those sectors that limit the natural forces of the market.

As highlighted before, informal trade is common in Bolivia. Most products are smuggled, attempting to escape the control of authorities. In this regard, it would be useful to carry out a study and an analysis of the products legally produced in Bolivia, imported products and those that are smuggled and informal. This is key to determining the scope of a possible competition law and its impact on society.

Besides the aforementioned problems, it is worth adding the almost non-existent culture in Bolivia of paying taxes. In fact, tax evasion on the part of consumers and producers is thought to distort competition. The consumer tries to find the lowest price in the market and does not consider the quality of the product or service, becoming a passive agent in smuggling activities and associated tax evasion and illicit competition.

Therefore, Bolivia's research requirements are urgent and include sectoral studies to determine the structure of the economy and the attributes of each sector, namely, the market structure, the level of competition and the role of informality among others.

⁹¹ De Castro López, Lucia and Ariño, Gaspar (2001). "Derecho de la Competencia en los Sectores Regulados". Editorial Comares. Granada – Spain, pages 7-8.

⁹² George, Rebecca. "Independent Regulatory Authorities and Competition Authorities – Competitors or Partners in Change?". Page 4.

Similarly, research needs in the field of competition and its dissemination within the academia were also highlighted.

(d) The need to disseminate and sensitize stakeholders: the promotion of a culture of competition

The following activities are destined to promote and sensitize a competition culture and were mentioned in the discussions undertaken during the exploratory missions:

- (i) two training workshops per year informing the press and policy makers on the advantages of having competition law and policy;
- (ii) design a strategy to incorporate competition issues in the national educational and university system;
- (iii). strengthen the academic curriculum on competition through educational activities and specialized courses and post-graduate courses and by extending invitations to renowned professors to come to Bolivia;
- (iv) seminars targeting students and professors of both pre- and post-graduate levels with the participation of international experts;
- (v) a specialized library using INTERNET resources that focuses on negotiation, competition and consumer protection;
- (vi) seminars, workshops, and comparative studies aimed at finding similar situations and opportunities for a harmonization of the draft competition legislations in the case of the Andean sub-region.

(e) Need to strengthen human resources

With regard to the need to enhance human resources as a means to develop a proper competition environment, the following activities were proposed:

- (i) training of the office officials to be designed as a focal point for the subject of competition through seminars, internships in foreign competition agencies and research support;
- (ii) internships for senior analysts in agencies, courses and post-graduate studies abroad. Training of the Judiciary;
- (iii) training of international negotiators, through training courses, and workshops at national, regional and multilateral levels;
- (iv) development and implementation of an information system on the resolved cases;
- (v) support for bilateral, regional and multilateral negotiations (such as CAN, ALCA, WTO). Resources for the participation of international negotiators within the framework of UNCTAD, WTO, OECD and the International Competition Network (ICN).

2.3. Peru: identified needs in the field of competition policy

As Peru has a competition law and an enforcement institution, the needs in this field are different to those of Bolivia. In spite of its progress, there are aspects that need to be strengthened, in particular the regulatory framework, the reinforcement of capacities, research needs, and the dissemination and awareness of the benefits of a competition culture. Similarly, it is also important to improve the relationship between INDECOPI and the sectorial regulators, particularly OSIPTEL for the telecommunication sector where different objectives may exist.

2.3.1. Strengthening INDECOPI's legal and institutional framework⁹³

The following presents the needs identified during the exploratory mission carried out in Peru.

2.3.1.1. Regulatory framework

The current regulatory framework on competition in the case of Peru contains some loopholes that undermine its effectiveness. Even though they have been reviewed by INDECOPI (under the framework of other projects identified during the exploratory mission), there are aspects of the framework that need to be revised.⁹⁴

The first aspect is the administrative regulatory framework of the competition agency, which does not confer sufficient budget resources to effectively enforce competition laws. In this sense, the need to provide INDECOPI with more autonomy and financial resources has been highlighted.

Over the last few years, the number of complaints dealt with by the Competition Commission has diminished (from 26 cases in 1993 to five in 1999). This was partly due to the financial and human constraints that the Commission faced over the period 1993–1999.

A second issue concerns the existing mechanisms for the appointment of competition agencies and regulatory bodies, as well as the possibility to confer these bodies with constitutional status, as is the case with other regulatory bodies (for example the Bank and Insurance Regulatory Agency). Indeed, OSINERG's and INDECOPI's Boards of Directors are appointed by the Executive Authority, which may reduce the autonomy of these bodies. It is also worth noting that even though within INDECOPI the Directors do not have the mandate to issue resolutions, they do have the right to appoint Commission members who are in charge of settling disputes regarding the task of regulating tariffs and quality.

The third aspect relates to the creation of new mechanisms that would allow the Competition Commission to provide opinions on issues regarding the impact of privatization and reforms. In concrete terms, this would strengthen INDECOPI's role in promoting competition in the public services. Although the privatization process has been suspended, when it comes to new acquisitions, INDECOPI could contribute with a preliminary assessment of the effects of competition that would result from the change of ownership of firms and infrastructure services.

2.3.1.2. Strengthening capacities

As regards capacity-building needs, although activities have been carried out in the Andean Community sub-region (such as experts visits and the like), it has been noted that the theoretical tools applied to the European or North American realities (mature market economies) are not easily adaptable to realities such as those found in Latin America. Hence, during the exploratory mission, the Peruvian authorities insisted on training programmes adapted to their specific circumstances.

⁹³ Gonzalo Ruiz (INDECOPI) and Diego Petrecolli (UNCTAD consultant on competition): exploratory mission to Peru November 2003.

⁹⁴ See *infra* Chapter 3.

A programme of (inter-agency) cooperation on competition policy, such as the one that could be launched in Phase II of the present project, should prioritize the exchange of experiences among Latin American countries and the participation of international experts as regards the evaluation of concrete cases undertaken in these countries. Such a programme should involve the participation of INDECOPI and Regulatory Body officials.

2.3.1.3. Needs in the field of investigation techniques

One of the most important aspects of the exploratory mission was the relationship between regulatory bodies and competition authorities in relation to the treatment of anti-competitive practices.

According to the Peruvian National Report on Competition, a lack of uniformity across sectors, especially the telecom sector, has been demonstrated. The latter has brought about difficulties in achieving certain competition goals, thereby ensuring that an overall application of the competition laws throughout all regulated sectors is problematic.

As can be seen from Box 2, there is a need for further research regarding the role of the competition authority and regulatory bodies in the case of the telecom sector in Peru. Alternatives have emerged as regards solutions to this problem.

The first alternative recognizes the importance of keeping a unified system of Competition Policies in which a single body is to be in charge of evaluating, challenging, and sanctioning anti-competitive practices. The latter implies the establishment of an institutional framework in which the combined tools of economic regulation and competition policies will play a crucial role. Hence, a possible reform of the current competition legislation should involve the strict definition of responsibilities and functions of each body, thereby avoiding overlapping and ensuring the most effective applicability of the regulation.

The second alternative includes the establishment of competition authorities in different sectors, therefore creating the need to design mechanisms to ensure closer coordination between regulatory policy and competition defence policy. In this sense, it is argued that in certain segments in which competition exists and because of which they are not subject to the scope of the regulatory bodies, the Competition Authority supervision is of crucial importance to improve the conditions of competition and make it sustainable

The third alternative is a hybrid position in which OSIPTEL's role in challenging anti-competitive practices could be maintained temporarily as long as INDECOPI faces a shortage of human and technical resources and cannot assume the additional mandate for the case of challenging anti-competitive practices in the telecom sector. However, the *sectorization* of competition policies may generate a lack of clarity for the consumers, as well as a lack of coherence between implemented competition policies by regulators and by competition authority.

In Peru, the best option is that OSIPTEL regulates competition in the telecom sector and any other sector involved in a complaint provided that it includes a telecom company.

There was a case in Peru that illustrates the problem of lack of clarity regarding competition authority and regulator functions.⁹⁵ The regulation of sectors in which competitive and monopolist segments interact (for instance the telecom sector) constitutes a challenge for state action. The regulatory bodies and competition authorities have an enormous task. To this end, the UNCTAD Model Law on Competition (2002) includes a chapter on the relationship between sectoral regulators and competition authorities.

⁹⁵ The case involving Fox and Turner (firms broadcasting film signals), Magic Cable (cable firm) and Telecable (cable firm), generated controversy concerning the authority of OSIPTEL and INDECOPI. In December 1999, Telecable complained to the Competition Commission about Magic Cable and the firms broadcasting signals (Fox and Turner), for anti-competitive practices consisting of making exclusive agreements for broadcasting. The Competition Commission declared that it did not have the authority to deal with the case as OSIPTEL was the body that should be dealing with this complaint. This decision was appealed by Telecable under the advice of INDECOPI. INDECOPI's Court for Competition decided that Fox and Turner were not operative in the market for the telecommunications services and, therefore, that the Commission had to deal with the complaint regarding the practices adopted

The latter brings the application of the specialization principle in the public function, which illustrates the manner in which a competition authority must act at a “transversal” level and a regulator only in cases of economic regulation. Despite what has been said, OSIPTEL assumes the role of competition authority within the telecom sector.

The Peruvian National Report on Competition highlights the limited emphasis on cooperation activities in relation to the need to count on market studies that allow analysis of the conditions of competition as well as the generation of impact indicators of competition policies in terms of efficiency and consumer welfare.

As regards market studies, there are a selected number of sectors in which the competition agencies as well as regulatory bodies require further analysis and knowledge with respect to the industrial organization of the sector and potential competition problems that may emerge. In addition, the need to undertake impact studies on competition policy, which are indispensable to regulatory bodies, has been argued. It is also important to provide a tool that allows the measuring of the economic performance and of the cost-benefit effects of its decisions in the economy.

**Box 2: The role of INDECOPI and the sectoral regulators:
The case of telecommunications in Peru**

As opposed to other sectors, OSIPTEL regulates competition in the telecommunications sector, based on Legislative Decrees 701 and 702. The former entitles INDECOPI to ensure that competition regulations are duly respected in all economic sectors, while the second provides OSIPTEL with exceptional entitlement to regulate competition in the telecommunications sector. Furthermore, OSIPTEL Resolution 3-2000 establishes general guidelines for the application of competition rules and the main anti-competitive practices in this sector.

OSIPTEL:

Functions. According to the Supreme Decree No. 020-98-MTC (August 1998), OSIPTEL established general guidelines and criteria about free and fair competition as a means to guide economic agents in relation to the telecommunication sector. OSIPTEL acts as a regulator and oversees competition in this sector.

Entitlements: OSIPTEL undertakes measures aimed at preventing the development of conduct that may affect competitors and, hence, consumers. Moreover, it is entitled to adopt measures aimed at sanctioning the so-called anti-competitive conduct. Procedures for the promotion of free competition in the telecommunications market: First, the specific regulation for the sector (as per the rules established in the Telecommunications Law Supreme Decree No. 013-93 and in the guidelines for the Opening of the Telecommunications Market No. 020-98; as a secondary source norm) additional norm, the general rule on free competition (Legislative Decree No. 701 establishing the elimination of monopolistic and restrictive practices of free competition, the Legislative Decree No. 807 about Entitlements, Norms and Organizational matters regarding INDECOPI). In this regard, although the initial stage is the regulation of free competition, there are problems not covered by the specific legislation of the telecommunications sector that require general competition legislation.

Functions as an institution dealing with competition defence. In December 2000, the Congress of the Republic established Law 27336, entitling OSIPTEL (Article 36) to have knowledge of all cases where an enterprise of the telecommunications sector is involved.

Source: PERU: Report on the needs and priorities in the field of competition policy. February 2003.

by those companies. In this regard, practices by Magic Cable had to be dealt with by OSIPTEL. Thus, in practice the separation of authority between INDECOPI and OSIPTEL resulted in both bodies examining in a separate way a practice that involved firms outside the communications sector and others that were within the sector. In October 2000, based on the resolution by the above-mentioned Court, the Commission processed the complaint from Telecable. OSIPTEL, on the other hand, processed the complaint against Magic Cable and sanctioned this firm, forcing it to stop the exclusive agreement with Fox and Turner. In 2003, the Competition Commission declared the complaint from Telecable against Fox and Turner unfounded.

2.3.1.4. Dissemination and sensitization on the benefits of a competition law and policy

A major problem faced by the Peruvian competition policy is the lack of a promotion and dissemination culture to inform the various segments of the population and civil society in general (enterprises, consumers, the academia, etc.) about the benefits of competition for the market. In view of the lack of state resources, it is crucial to promote competition in coordination with non-governmental organizations or associations that have the necessary means to ensure the self-sustainability of these activities.

CHAPTER III

Establishment of Needs and Priorities in the Area of Consumer Protection in Central America

3.1. Legal and institutional context in the area of consumer protection

Unlike competition policy, in the case of consumer protection all the Central American countries have legislation and institutional frameworks. Table 22 reflects this situation.

Table 22: Legal and institutional context of consumer protection in the Central American countries.

Countries	Consumer Protection Law	Institutions	Additional information
Costa Rica	Law 7472, Competition Promotion and Consumer Defence Law Regulation Decree 25234-MEIC	National Consumer Commission	Modifications to Law 7472: Law 7623 and Law 7854
El Salvador	Decree No. 666: Consumer Protection Law Executive Decree No. 109: Regulation of the Consumer Protection Law	General Directorate for Consumer Protection (DPC)	
Guatemala	Legislative Decree No. 06-2003 Consumer and User Protection Law	Directorate of Attention & Assistance to the Consumer (DIACO)	No regulation so far
Honduras	Decree 41-69-89 dated 7/4/1989 Consumer Protection Law and its regulation	Production and Consumption General Directorates. Consumer Protection Department	There is also the Public Ministry of Consumer and Senior Citizen Protection
Nicaragua	Law No. 182, 1994 Decree of the National Assembly No. 2187, 1999.	Consumer Defence Directorate. (DDC)	

Since consumer protection has become relevant in all the Central American countries in terms of public policy, it is necessary to analyse the efficiency and effectiveness of the norms in this field to assess their impact on the defence of consumer rights.

Another aspect that needs to be taken into consideration is the function of consumer associations in Central America. Despite their lack of means and economic resources, these organizations have been more active than governmental agencies and this is reflected in their achievements. As a response to the active participation of consumer associations, it is worth outlining the experience of INDECOPI (Peru), which has been consistent in encouraging inter-institutional cooperation with consumer associations through a resolution in which it is agreed that the levy of fines should financially benefit the affected or complaining consumer association.⁹⁶

3.2. Need to strengthen existing regulations and institutions and their effectiveness to respond to consumer concerns

As a result of analysing the effectiveness of the legal and institutional framework for consumer protection and the way in which consumer protection agencies have dealt with complaints received from consumers/users, it is worth making a diagnosis of the current situation, summarizing the main institutional needs in consumer protection and the participation of civil society.

3.2.1. Costa Rica⁹⁷

The issue of consumer protection can be improved if certain institutional aspects are strengthened. This would not require legal modifications but would be oriented to the managing actions and resources necessary to carry out proactive work in market monitoring as well as establishing operative and management systems which would facilitate the task of settling disputes. Mechanisms of interinstitutional cooperation could be considered in the business sector to promote self-regulation and with public organizations to increase the multiplier effect of legal actions

As a matter of fact, it is considered that the modification of the legal framework is important but not determinant to strengthen consumer protection. Indeed, there are several fields of action that can be strengthened and which do not necessarily require modification of the Consumer Protection legislation but rather concrete programmes and actions, which can boost the participation of current actors within the existing legal framework

To prioritize the approval of the perfect legal framework or the promotion of the optimum law for strengthening consumer protection, can signify in practice, freezing the process before boosting it. The improvement of the legal framework is one strategic target but not the only one.

Consequently, the proposed strategy consists of strengthening the other components within the current framework, in order to achieve greater development without subordinating its implementation to significant legal changes. Starting from the existing legal framework, there have been proposals for action and specific programmes which would contribute to the effective strengthening of consumer protection activity at the level of institutions, civil society and the business sector. Within the above-mentioned approach, the following general outline details the main challenges presented by the Consumer Protection programme in Costa Rica, together with proposals that could contribute to strengthening each of its four components.

Legal needs:

The following needs were identified in the exploratory mission:

⁹⁶ See Resolution No 048-2001-INDECOPI/dir. Norms for the formulation and implementation of cooperation agreements with consumer associations (Article 45 of the Unique Ordered Text of the Consumer Protection Law).

⁹⁷ See Maguiña, Ricardo. Costa Rica. Report on the Needs and Priorities in the Area of Consumer Protection 24th November 2003. Paragraphs 139-189.

- Strengthen the regulatory framework in order to facilitate preventive work on the protection of consumer rights;
- Implement a procedure adapted to the tripartite nature of consumer conflicts, based on the principles of celerity, simplicity and efficiency within the procedural framework of the privilege called "due process";
- Grant the National Commission for Consumers (CNC) the ability to initiate its own enquiries and to provide consumer associations with the capacity to defend widespread and collective interests; to widen the knowledge of the CNC to know about the complaints among competitors regarding unfair competition; to give the CNC the power to solve cases of abusive clauses; to grant the CNC the status of a permanent administrative tribunal of multidisciplinary nature; without neglecting other aspects;
- Widen the framework regulating unfair competition to include other general hypotheses, factual assumptions and clauses, to enable companies to inform the CNC of acts of unfair competition affecting consumers and fair competitors.

Institutional needs

At the institutional level, it is necessary to:

- Formalize processes and elaborate manuals of best practices in this field;
- Adopt a quality policy in services, apply management and impact indicators to the Technical Support Unit (UTA), the National Commission for Consumers (CNC) and the Support Policy Unit (UPAC), as well as the elaboration and implementation of a database and a management information system in the area of conciliations, denunciations and preventive actions.
- In the business sector disseminate information on solved cases in order to communicate the criteria used for the elaboration and dissemination of general guidelines to handle consumer conflicts.
- Give priority to the proactive activity of market supervision, through UPAC, by reorienting its strategic work to this function. In this way, a greater quantity of human resources could be available to carry out preventive actions and educational work and to consolidate consumer associations.
- Create a Consumer Protection System, in which consumers, the business sector, the media, regional and municipal governments and academic institutions could participate as well as generate institutional spaces and implement the mechanisms for them.
- Introduce market mechanisms to promote the implementation of consumer protection regulation through efficient means so that economic agents can take advantage of its benefits, while providing the Consumer Protection System with the necessary economic resources to achieve its objectives.

Other identified needs

The needs established by the civil society include:

- Encourage the development of professional consumer associations so that they can participate actively in the elaboration of technical proposals with a constructive vision, sufficient knowledge and technical capacity to exercise their rights within the areas of private products and public services; contribute to the training and education of consumers as well as design and implement mechanisms and tools that could contribute to increasing their technical, financial and operative capacity and allowing them to become economically self-sustainable in time;

- Strengthen and increase the institutional mechanisms of private participation in consumer protection by emphasizing the implementation of concrete programmes for their development. Moreover, promote the prepublication of regulatory projects not only in public services but also in the area of consumer protection for the formulation of proposals and subsequent integration into public hearings and the creation of other inter-institutional spaces for the participation of civil society.

For the participation of the business sector, the needs include:

- Design programmes to strengthen companies' social responsibilities and good corporate government policies, with particular emphasis on respecting consumer and user rights;
- Promote self-regulation mechanisms in the business sector, such as consumer protection services within companies and/or at the level of trade associations. Implement a certification programme for good commercial and consumption practices;
- Develop programmes and concrete actions so that the business sector and the media participate actively in strengthening consumer protection through the training of its members, companies' social responsibilities, consumer education and information, improvement of goods and services, which lead to the establishment of a true culture oriented towards respecting consumer rights, paying due attention to consumer claims, the development of self-regulation and identification mechanisms in the market – such as the certification of good commercial and consumption practices, and training courses for journalists (media);
- Develop and consolidate inter-institutional cooperation mechanisms between the Directorate, the CNC and the private sector in order to increase the accomplishment level of consumer protection norms;
- Strengthen the active participation of the academic sector. This is fundamental not only for the training of human resources at institutional, entrepreneurial and civil society levels, but also to provide voluntary participation, which helps to increase the technical and operative capacity of consumer associations, the CNC and the Directorate.⁹⁸

3.2.2. El Salvador⁹⁹

The exploratory missions in 2003 revealed that the main needs in consumer protection within the institutional framework and civil society (consumer associations and business sector) do not necessarily imply legal modifications to the legislation. Such legislation, though it obviously contains some limitations, can evolve in other areas, inducing a positive impact and contributing to accelerating the process of implementing consumer protection.

There are some fields of action that can be strengthened and which do not necessarily require a modification of the Consumer Protection Law, such as programmes and concrete activities that could boost the actions of the current actors within the existing legal framework.

Legal needs

The identified needs include the following:

⁹⁸ For additional information see: Maguiña, Ricardo. Costa Rica, *op. cit.*

⁹⁹ See Maguiña, Ricardo. El Salvador. Report on the Needs and Priorities in the Area of Consumer Protection. 24 November 2003.

- Strengthen the regulatory framework in order to define the reach of the consumer concept, include the general clauses of the universal rights of consumers and the UN Directives that have not yet been implemented, as well as the obligations on the part of consumers and the objective responsibility of suppliers (reversion of the responsibility test).
- Incorporate incentives for the application of resolutions issued by the Consumer Protection Directorate (DPC), such as, for example, to obtain the implementation of administrative resolutions for their efficient and immediate enforcement before the tribunals.
- Include the necessary dispositions to increase the budgetary, economic, and functional autonomy; without prejudice to the analysis of viability and suitability to create an independent entity for consumer protection and another for competition with a unique and autonomous Administrative Court for both institutions.
- Create the regulatory framework that controls unfair commercial practices in the domestic market as well as legal tools for its efficient running.

Institutional needs

The main identified needs are as follows:

- Elaborate a National Consumer Protection Policy with the participation of all the agents involved in order to contribute to making consumers more informed and responsible, businesses more competitive and a State that, without supplanting the will of consumers and business initiative, will play a proactive role in the defence of consumer interests and promote healthy competition with the active participation of all the agents involved thus facilitating integration processes and contributing to the development of the country.
- Create a decentralized consumer protection system, involving the participation of consumers, the business sector, media, regional and municipal governments and academic institutions, to generate spaces and implement the relevant mechanisms.
- Strengthen the institutional framework in order to encourage preventive work in consumer rights protection, increase the participation of the business sector and civil society and promote autoregulation in the market.
- Consolidate the work of the DPC as a technical body, by strengthening its structure and institutional organization in order to improve the planning, managerial and operational systems. In addition, increase technical capacity by strengthening its preventive work and implementing quality policies in its actions thus generating greater trust among the market's agents, orienting work towards proactive mechanisms of consumer protection supervision in El Salvador.
- Strengthen the DPC technical, functional, economic and administrative autonomy and consolidate the coordination and inter-institutional mechanisms with public organizations related to consumer protection to offer a more efficient protection in this field.
- Develop cooperation programmes with local consumer protection organizations, facilitate the accomplishment and setting of standards for trade among the countries of the region, elaborate training mechanisms and exchange of experiences and cases harmful to consumers and promote mechanisms which promote global business competition and reduce cross-border frauds. In this respect, the support of external sources is expected.

Other needs

Consumer associations in Central America have perhaps evolved the least in Latin America. However, for several years, the Consumer Defence Centre (CDC) in El Salvador has accomplished excellent work in this country, working intensely and filling the gaps left by the state in this area.¹⁰⁰

There are other needs in this area, such as:

- Promote the creation and consolidation of professional consumer associations, which actively participate in the elaboration of technical proposals in a constructive way, offer efficient services and contribute to the training and education of consumers. This will make companies more competitive and will create a more efficient protection system against the abuses and unfair practices of companies. Design and implement mechanisms and tools that contribute to increasing their technical and operative capacity and that facilitate their self-sustainability in time.
- Strengthen the participation of the academic sector not only for the training of human resources, as much in institutions and companies as in civil society, but also for the provision of volunteers, who would help to increase the technical and operational capacity of consumer associations and of the DPC.
- Create a Consumer Service Centre to provide consumers and consumer associations with advisory services training and education not only in the area of consumer protection but also in the management, organization, and creation of consumer associations, in project analysis and in design. In addition, services with technical aspects necessary for consumer protection work (engineering, health, communications, economy, etc.), whose cost would be almost impossible to finance through the programme or the state, or even less likely through consumer associations themselves.
- Increase the knowledge of the rights and the value of the role that consumers have in the market in order to make companies more competitive and contribute to the development of the country. This should be done by implementing education programmes, training, dissemination and consumer participative programmes, with particular emphasis on those with least resources and goods. For example, through didactic material, anecdotes, comics, etc.
- Increase the mechanisms for private participation in consumer protection, not only from a legal aspect, but also in the implementation of concrete programmes for its development, such as (i) incorporate mechanisms that encourage the creation of consumers associations in El Salvador, within the framework of a proactive system of consumer protection; (ii) incorporate mechanisms for the promotion of consumer associations and their activities on consumer protection, dissemination and education; (iii) establish the prerequisites – based on the international standards in the UN Guidelines – so that consumer associations may benefit from such law. Assess the mechanisms of participation with the DPC, the regulating bodies and the consumer associations that have legitimacy for defending collective and social interests before the DPC and the regulating bodies.
- Implement mechanisms for anticipated publication of norms, public hearing and civil society consultations, concerning consumer protection and public service sectorial legislations, linked to consumer rights under Decree No. 666, in order to lead to technical proposals on the debated subjects.

As for the business sector, the identified needs were as follows:

¹⁰⁰ In fact, the CDC also offered support and training to other Central American organizations. The CDC is very active and the quantity of claims received was higher than the number of claims received by the DPC. The CDC has a strong influence in the areas of public services, food products and Law proposals related to consumer protection. The organization manages to be self-financed and receives support from international cooperation, mainly from OXFAM, and the Heinrich Böll Foundation, among many others. It is a full member of Consumers International and is part of its Council.

- Promote its participation as cooperative agents through its trade associations within the Consumer Protection System, in order to develop joint programmes for training its members on consumer protection norms, and thus generate awareness of the benefits of its enforcement among businesses. In addition, to undertake activities for the education, training and dissemination for the benefit of consumers, in order to let them know their rights and duties as agents of change.
- Implement market mechanisms to provide the Consumer Protection System with the necessary economic resources to accomplish its goals.
- Develop concrete programmes and actions so that the business sector and media actively participate in strengthening consumer protection through: the training of its members, education and information of consumers, the improvement of goods and services, the implementation of a real consumer protection culture, paying due attention to consumer claims, the development of self-regulating and signal mechanisms in the market – such as the certification of proper trading and consumption practices and training courses for journalists, implementation of self-regulating mechanisms – for example in marketing so that suppliers may take advantage of the benefits granted by a culture fighting for the respect of consumer rights as a valid instrument to improve its domestic and global competitiveness, with particular emphasis on micro and small enterprises. Additionally, we consider that the adoption of legislation that controls unfair competition in the market could bring greater protection to consumer rights and a healthy competition in the market.
- Develop and consolidate inter-institutional cooperation mechanisms between the DPC and the private sector in order to increase the enforcement level of consumer protection norms and promote self-regulation.

The Presidential Commission for Consumer Protection

The Commission was created in June 2004 after the new Government in El Salvador was appointed. The propositions mentioned in the aforementioned paragraphs form part of the activities that the Commission has been undertaking from its inception until the publishing date of the present report.

The high-level entity works as an advisory commission to fine-tune the bill draft proposal for consumer protection while awaiting the creation of a new national framework for consumer protection that has the following characteristics:

- A system where all the entities working for the public can participate and where the coordinator of the systems is a member of the Presidential Commission;
- A system with a new framework for sanctions that responds to their gravity rather than their quantity;¹⁰¹
- A system that can deal with conflict resolution and complaints from users.

¹⁰¹ More efficient sanctions: the Law shall establish procedures to resolve conflicts or complaints from users. The aim is not to have protection legislation based on sanctions, because the Commission believes that the current system of sanctions is "inefficient". According to the Commission's highest authority, it is not possible to continue applying sanctions that respond to the number of times the fault has been committed rather than its "gravity". The Consumer protection project has been refined in order to include a classification of sanctions according to their gravity. Hence, the purpose is to have a system with a more preventive and proactive nature that will create a consumer protection culture while reducing the situations whereby firms prefer paying a fine rather than solving the problem. At present, whenever there is a first fault or violation of consumer rights, the regulations establish that the entity is verbally warned. Sanctions would only be applied in the case of business companies but not to public bodies offering massive services. See Ramos, Karla. Defensoría alista normas para restaurantes y supermercados. Source visited on 22 November 2004, available from <http://www.laprensagrafica.com/economia/51577.asp>.

It is worth noting that towards the end of 2004, the Presidential Commission plans to present for approval the draft bill project for consumer protection. While the new legislation is under discussion, the Commission actively continues to stimulate the national system for consumer protection.¹⁰²

3.2.3. Guatemala¹⁰³

For Guatemala, the enforcement of regulations for consumer and user protection constitutes a relatively new issue. Although the first law for the defence of consumer rights and interests by the state has been valid since 1985, it was not until 2000 that a formal effort was made to make effective the state's obligation, as outlined in Article 119, Clause (i) of the Constitution of the Republic. In fact, this article states that the defence of the consumers and users is a fundamental duty of the state to preserve the quality of domestic and export consumables and to guarantee their safety and legitimate economic interests.

In order to establish the main cooperation needs in Guatemala, important factors need to be considered such as the short existence of DIACO, the non-existence of an organized consumer movement in Guatemala, which is considered a key element in raising the awareness of consumers, and turn them into active defenders of their own rights, thus strengthening the whole national consumer defence system.

The main needs in consumer protection concerning the institutional framework and civil society (consumer associations and business sector) are not necessarily modifications to the legislation. In fact, such legislation, although limited, can evolve in other areas generating positive impacts and contributing to the acceleration of the process of implementing consumer protection.

Training and budgetary needs

Although DIACO's work could be considered successful during 2003, it has many limitations to attaining the assigned functions with greater efficiency. These include:

- Train the personnel to efficiently accomplish the assigned functions. The reason being that most of the personnel previously worked in the Ministry of Economy, and were hired a relatively long time ago when it was not considered necessary to have highly educated personnel. Obviously, this is related to the low budget available for hiring new personnel with higher qualifications. Besides the hiring of qualified people for the central offices, it is also necessary to recruit new personnel to cover the national environment, as stipulated in the Law.
- Obtain the assistance of international experts and organize training of officers in governmental agencies in countries with higher levels of development.

Need of a physical infrastructure

The functions as established by law require that:

- A sufficient and adequate means of transportation is made available. Currently, it is inadequate and the maintenance budget is especially limited.

¹⁰² At present, the Presidential Commission continues to work with the Ministries of Health, Agriculture and Environment in a programme aimed at disseminating norms for food labelling and hygiene. It is also considering the idea of creating an accreditation system for restaurants, supermarkets and markets, though work in the latter, evidently, will be slower. To this end, several meetings have taken place with governing bodies to propose the creation of the letter of rights for users and to establish a system to verify the price of fruits and vegetables. What would be required is to create a system that allows setting prices that fit the reality as in the markets there is a lot of bargaining.

¹⁰³ This section is based on the information sent by Francisco Byron Ismar Morales Lopez. Dirección de Atención y Asistencia al Consumidor (DIACO) Guatemala. November 2003.

- Its own laboratory is created to enable DIACO to carry out the necessary analyses to certify the quality of products reaching consumers and users. In fact, the Law for the Protection of Consumer and Users confer DIACO with various tutelary functions, among them being the investigation of markets and final consumption products, and dangerous and risky products for consumption. In order to accomplish this task, DIACO needs to carry out laboratory analyses of selected products to determine their suitability for human consumption. However, laboratory analyses are extremely expensive and neither the Ministry of Economy nor DIACO have the financial resources for such analysis. Therefore, the fulfilment of this function and many others is limited due to insufficient financial, physical and human resources.

- Controls are established as in the case of water meters, petrol pumps, etc. Currently, there is no equipment available for this; therefore it would be valuable for DIACO if equipment could be procured through the state or international cooperation, as it would then be able to fulfil its functions.

Final considerations

As indicated in the previous paragraphs, the dissemination work being done on the legislation and consumer rights has resulted in increased numbers of claims received by DIACO, especially in the last four months of 2003. Consequently, a larger and better physical infrastructure is being considered for DIACO to meet people's needs on dispute resolution, consultations and general advice on aspects of the law. The issue of consumer and user education and information is an important aspect in order to be able to take better and more rational decisions. In this respect, DIACO still has a long way to go.

3.2.4. Honduras

The Honduran General Directorate of Production and Consumption tried to implement consumer protection law by developing some activities and specific actions, which have been carried out over the period 1998–2001. Nevertheless, these have been constrained quantitatively as well as qualitatively by the lack of resources and other institutional weaknesses. In this sense, the Directorate insisted on the need to control the minimum and maximum prices based on the purchase of a bag of 30 basic food products according to a survey carried out in the markets and supermarkets of Tegucigalpa and San Pedro Sula.¹⁰⁴

Legal and institutional needs

- Issue modern legislation for consumer protection that would enable the General Directorate of Production and Consumption, consumer associations and other bodies related to this field to have the necessary legal and administrative elements to fulfil the needs of Honduran consumers. It would consist of a modern Consumer Protection Law and other basic laws such as Standardization, Certification and Metrology.

- Grant more autonomy to the governmental body in charge of protecting consumer rights.

Moreover, contrasting these guidelines with the Honduran legal and institutional framework in search of instruments and mechanisms to assert consumer rights, procedures, the objective and scope of the law, the universally accepted notion of what is meant by consumers and their rights, i.e. the active subject of the law and the object of supervision, is substantially divergent. Since the latter is considered important, a comparative analysis between the United Nations Directives and Consumer Protection Law in Honduras is included in the national report.¹⁰⁵

¹⁰⁴ See Lacayo, Liana: Honduras. Report on the Needs and Priorities in the Area of Consumer Protection. 25th November 2003.

¹⁰⁵ See Lacayo, Liana. Honduras, *op. cit.*

Need to strengthen the participation of civil society

There is a single entity encompassing all the organized consumers, called the Honduran Consumer Defence Committee (CODECOH). Among its objectives is the promotion and defence of rights to fulfil the basic needs of consumers and to ensure that they have access to essential goods and services. Once again, several weaknesses have been found, as it would seem that the sphere of activity of this organization is limited to a range of goods that only comprises what falls under the concept of basic needs and essential goods and services. In the management and running of CODECOH, a traditional struggle method is evident in the disputes and struggles that occur in a high number of social rights claims. This results in ineffective management that neglects objectives aimed at overcoming the asymmetry of information available to take care of members, to advise them and keep them informed, so that they are educated consumers capable of responsible consumption and of sanctioning the inefficient supplier.

3.2.5. Nicaragua¹⁰⁶

Consumer protection in Nicaragua has certain legal limitations and the following needs are observed:

- Elaborate a National Consumer Protection Policy with the participation of all the involved agents in order to contribute to making consumers more informed and responsible, companies more competitive and to provide the state with a proactive role in the defence of consumer interests without supplanting consumers' will and business initiatives; to promote healthy competition with the active participation of all the agents involved in order to facilitate the integration processes and contribute to the development of the country.
- Create a decentralized Consumer Protection System, in which the consumers, the business sector, the media, regional and municipal governments, and academic institutions participate, generating institutional spaces and implementing mechanisms for this purpose.
- Consolidate the work of the DPC as a technical body to strengthen its structure and institutional organization and improve its systems of planning, management and operation. It is also necessary to increase its technical capacity to strengthen the preventive work and to implement quality policies. This will increase the trust among market players, orienting work towards proactive mechanisms for the monitoring of consumer protection in Nicaragua.
- Strengthen its technical, functional, economic and administrative autonomy. Moreover, market mechanisms must be implemented in order to provide the Consumer Protection System with the necessary economic resources required to achieve its goals.
- Among the mechanisms suggested is the programme for "Good Commercial and Consumption Practices", which consists of a voluntary system, through which the supplier (a shop, a travel agency, a carpentry workshop, a supermarket, a private clinic, etc.) commits itself to comply with determined established practices, oriented to consumer protection. This would imply, among others: providing information on the offered product, meeting deadlines and delivery on the terms agreed, abiding by a refund policy of faulty products, having a minimum system of claim support and be affiliated to the conciliation service of the Consumer Protection System. These practices that have been established objectively are audited by an independent organization, which is supervised by the state agency.

¹⁰⁶ See Maguiña, Ricardo. Nicaragua. Report on the Needs and Priorities in the Area of Consumer Protection. 24th November 2003.

- Develop and consolidate coordination mechanisms and inter-institutional cooperation with public organizations linked to consumer protection to avoid duplication or lack of actions that may result in increasing costs in the market or that would encourage breach of contracts, leaving consumers in a defenceless situation.
- Develop collaboration programmes with consumer protection organizations in the region to fulfil and set standards for trade between countries in the region. Elaborate training mechanisms and exchange experiences and cases affecting consumers. Promote mechanisms that would increase the global competitiveness of business and reduce cross-border fraud.

In Nicaragua, the main and oldest consumer organization is the League of Consumer Defence (LIDECONIC), a member of Consumers International. In effect, LIDECONIC is very active in organizing and conducting training for women leaders throughout the country. Its work focuses on the areas of food and public services and it has a customer claim support service. Nevertheless, the following needs should be mentioned:

- Strengthen and increase institutional mechanisms of private participation in consumer protection, focusing on the implementation of concrete programmes and their development.
- Promote the previous publication of regulatory projects in the area of consumer protection to formulate proposals or get feedback from public hearings as well as to create other inter-institutional spaces for the participation of civil society.
- Increase the level of knowledge of consumer rights and the importance of the role played by consumers in the market in making companies more competitive and in contributing to the development of the country. This can be done through educational, training, dissemination and participative programmes for consumers, with particular emphasis on the poor. For example, through educational material, anecdotes, cartoons, etc.
- Strengthening the participation of the academic sector is fundamental not only for the training of human resources from institutions or businesses, but also to provide volunteers and to help to increase the technical and operational capacity of consumer associations and the DPC.
- Propose the set-up of a Service Centre for Consumers, which offers to consumers and consumer associations orientation, training, education and advisory services not only in the area of consumer protection but also in aspects such as management, organization, creation of consumer associations, project analysis and formulation and technical aspects for consumer protection work (engineering, health, communications, economy, etc.), This should be implemented through universities as otherwise it would be impossible to finance the development costs and resources required to make it available to all the consumer associations out of the state programme or even less likely from consumer associations.
- As for the business sector, concrete programmes and actions should be developed so that the business sector and the media may participate actively in strengthening consumer protection through the training of its members, consumer education and information, improvement of the goods and services, the establishment of a true culture of respect for the rights of consumers, paying due attention to consumer claims, the development of self-regulation and signal mechanisms in the market – such as the certification of good commercial and consumption practices, training courses for journalists, implementation of self-regulation mechanisms – for example in marketing so that suppliers may take advantage of the benefits from a culture that respects the rights of consumers as a valid instrument to improve domestic and foreign competitiveness, with a particular emphasis on micro and small enterprises.
- Adopt a legislation, which controls unfair competition in the market, which could result in major protection of consumer rights and healthy competition in the market.

- Develop and consolidate inter-institutional cooperation mechanisms between the DPC and the private sector in order to increase the level of accomplishment of consumer protection regulation and to promote self-regulation.

CHAPTER IV

Defining Needs and Priorities in the Field of Consumer Protection in Bolivia and Peru

The issue of consumer protection in Bolivia and Peru needs to be approached by first describing the existing institutional and legal context in both countries. The report will then discuss the specific needs identified during the exploratory missions to both countries.

4.1. Legal and institutional context in the field of consumer protection

Bolivia

Bolivia is one of the few countries in Latin America that does not have consumer protection legislation, and whose application can generally be extended to all consumer activity. Likewise, it lacks public institutions with the exclusive aim of promoting, protecting and defending consumer interests.

In the same way as competition, consumer issues also have two diverse realities, which are disassociated from each other. On the one hand, there is the judicial framework for consumer protection within the regulated sectors under SIRESE,¹⁰⁷ and on the other, the non-regulated sectors composed of the remaining goods and services, which lack systematic regulation for consumer protection.

In spite of the experience gained by users with the implementation of the SIRESE model, in general, and specifically ODECO's, the need has not been felt in consumer activity within the non-regulated sectors to have a regulation and institutional framework that would satisfy the same objectives or fulfil the functions of SIRESE's regulatory authorities. This is attributed to not having reached a degree of social consensus on the need to have legislation and institutions responsible for consumer protection.

There are important pressure groups, such as commercial and industrial management, who do not see the use of having institutions responsible for those issues, or who are directly opposed to consumer protection becoming an imposed regulation in the country's internal economic activity. Nevertheless, draft bill proposals have been formulated over the years aimed at fulfilling this lack. However, due to the absence of political will, they have not materialized.

As previously mentioned, a project proposal for competition and consumer protection is currently under discussion. Nevertheless, the political conditions the country is undergoing cast doubts over the model for economic development and constitute obstacles in the short term for the materialization of the project initiative. Consensus must be reached but this would require a substantive amount of dissemination work to convince Bolivian society.

¹⁰⁷ In this regard, it is necessary to note that due to the lack of consumer culture in Bolivia, there are few initiatives for the structure of consumer organizations. Nevertheless, there are other organizations, such as the federations of neighbour committees (FEJUVE) that group neighbours from cities in Bolivia, civil committees and others; these organizations interact continuously with the sectoral Regulatory Authorities and with neighbours, who are the real consumers. Edited comments sent by the Bolivian Regulatory Authority for Electricity (April 2004). See *Supra* Chapter I.

Peru

Peru has been the pioneer of consumer protection within the Andean countries by creating INDECOPI. This institution has decentralized its scope of application making itself available to all consumers in Peru. Indeed, INDECOPI has developed a role to promote and support consumers in order to reduce the uneven availability of information they face against entrepreneurs. This is done through educational programmes, publications and electronic bulletins, thus reducing the existing information gap. Within its promotion role, INDECOPI has not been limited to solving complaints and claims presented by consumers against enterprises and to imposing financial sanctions. The institution's work has also involved applying corrective measures whenever it was not possible to provide indemnification to consumers.

4.2. Bolivia: identified needs in the area of consumer protection

Based on the report on needs and priorities in the field of consumer protection, institutional and legal needs were identified. In brief, greater consensus is required to achieve consumer protection legislation and to reach all the sectors. In addition, the Government needs to intensify its support of consumer organizations. This could be achieved through the following activities:

- Involving the existing consumer organizations in the formulation of the draft bill and all the other social activities proposed in this field.
- Establish joint diffusion activities between SIRESE's Consumer Offices (ODECO) and consumer associations.
- Validate and promote consumer organizations as an appropriate and ideal way to safeguard consumer interests.
- Eliminate mistrust between the authorities and consumer organizations.

At institutional level, the general lack of professionals and technicians trained in issues related to consumer protection was noted. In addition, given the large proportion of informal providers and the significant quantity of goods entering the country through smuggling, it is of paramount importance to adopt an alternative approach to sensitizing policy on the mechanisms with which to defend consumer rights. This could be done through dissemination campaigns and promoting the participation of the entrepreneurial sector. These activities should facilitate the creation of a culture favourable to the rights of consumers and users and would integrate public and private institutions as well as the political and social arenas and academia.

4.2.1. Dissemination and sensitization on a consumer protection culture

During the exploratory mission to Bolivia, it could be observed that even if consumer activities are not inclined to be extended beyond public services (due to the smuggling and informal trade activities), illegal commerce offers similar market conditions and guarantees to those offered by the formal trade within a framework of consumer protection generally applied to all consumer activity.¹⁰⁸ Without prejudice to what has just been said, it should be noted that any manifestation of informality brings about a series of risks to consumers as they cannot be protected in a situation of vulnerability of their rights within an eventual general legislation.

On another note, it is interesting to see that entrepreneurs do not accept the draft bill proposal¹⁰⁹ as a tool to challenge illegal trade. Therefore, it is most probably necessary to demonstrate that the law can contribute towards ensuring that the current level of informality gives way to a higher level of a formalized economy in Bolivia. This could happen after the advantages are demonstrated

Likewise, although it is perhaps convenient to address both topics in a single legal framework (competition and consumer protection¹¹⁰), the shortcomings that emerged from this comprehensive approach need to be borne in mind. In essence, the objectives of a competition policy may differ from those related to consumer protection. Whereas the protection of consumer rights is common in different economic models, the preservation and promotion of competition are associated with market liberalization in any given economy. For this reason, the more interventionist the economic model is to adopt, the less significant the market and competition will be.

The aforementioned report clearly defines the need to have legislation and an institutional framework that protect the interests and rights of consumers, and this need should be "*internalized*" into *Bolivia's society*. To this end, it is proposed that the political authorities, and in particular, the Executive¹¹¹ and Legislative¹¹² Authorities are convinced of the need to promote legislation in this field. It would also be appropriate that Phase II of the UNCTAD/SECO project includes activities that allow the support of countries in terms of lobbying institutions within the legislative and judicial areas.

It is also necessary that the society as a whole and the groups that represent it agree on the willingness to create the necessary conditions for a consumer culture. Legislation for consumer protection can be vertically implemented by judicial authorities as long as consensus exists among them on the need for it and on the contents of the legislation. However, the existence of such legislation is not sufficient to guarantee a consumer protection culture in the country. Nevertheless, the existence of appropriate legislation is imperative as, without it, it is impossible to start creating a social habit that favours the rights of consumers.

It is expected that as soon as the political and social conditions make it possible, it would be necessary to study again the proposals that served as a basis for the draft bill proposal. At

¹⁰⁸ The degree of guarantee offered by licit and formal trade activities is always higher than those offered by illegal commerce. It is higher in the first as it grants "rights" to consumers, while the second grants "bonus" or "presents", which can also stop at will. In spite of the different guarantees provided to consumers by these two sectors, it is not surprising to observe that the illegal consumption within SIRESE's framework of services is neither the general norm, nor the condition for which users are inclined.

¹⁰⁹ See Lorenzini, Juan Pablo. Bolivia, Report on the Needs and Priorities in the Field of Consumer Protection, February 2004.

¹¹⁰ With a view to facilitate the legal viability in the field of competition, whose importance is usually more difficult to explain and assimilate by the Congress, compared to the daily nature and predisposition towards consumer.

¹¹¹ Concerns the Executive, a draft bill proposal exists which is currently being discussed and seems to show interest in this field, though some criticisms can be made of the contents and the links to more exhaustive efforts previously made than the current ones.

¹¹² Concerns the Legal Authority, certain reasons of internal nature generate doubts as to the feasibility of an initiative for legislation in the field of consumer protection.

such time, the feasibility to pass a law on competition and consumer protection can be evaluated.

4.2.2. Strengthening regulation and institutions: efficient responses to consumers

There are certain weaknesses present in sector regulation, which were identified during the exploratory mission. Among those, the lack of or insufficient regulations stand out, as well as the ignorance of users about their rights and obligations. An issue particularly worrying is the mistrust that consumer organizations have of the SIRESE system in general, and specifically of ODECO, as they question their fidelity to the interest of users, resulting, in some cases, in harm to the reputation of the regulatory entities.

4.2.3. Establishing general guidelines to deal with unfair competition practices that affect consumer interests

In Bolivia, unfair competition is not dealt with by legislation or by a public institutional framework. On the contrary, only sector regulation under SIRESE considers the necessary provisions in this field.

This lack is difficult to understand as there are several draft bill proposals, which were referred to before, that deal with this subject in a specific and more or less satisfactory way. Indeed, the draft bill proposal on competition dedicates Article 12 to the regulation of unfair competition considering it unlawful. The Code for the organization of the market is more explicit by dedicating Title II of Book II to unfair competition in a total of 11 articles (Articles 35 to 45). Among these, unfair competition is defined in general terms and the following are also dealt with: confusion, deceit, denigration, imitation, violation of non-disseminated information, commercial non-fulfilment and breach of contract.

4.2.4. Need to strengthen consumer associations

The consumer organizations interviewed during the exploratory missions undertaken to Bolivia were in agreement over the fact that the treatment of consumer rights has been abandoned and has not been included in the process to modernize the economy. This leaves Bolivia as one of the few countries in Latin America without legislation for consumer protection. However, having appropriate legislation does not guarantee that the rights of consumers will be respected, unless such legislation prevails daily and is included in each decision. With regard to the issue of communal education, it is clear that according to consumer organizations, such as CODEDCO (Bolivia's Consumer Movement), there is little interest on the part of the Bolivian Government and agencies of international cooperation to initiate certain activities aimed at developing critical knowledge.

In general, consumer organizations demand the representation of their rights, interests and participation to ensure that social and consumer protection policies are properly integrated into the commercial and political agenda at both national and international levels. The opportunity for participation offered by ODECO and the regulated sector is, in the opinion of consumer associations, insufficient as they are more identified with the interests of the industry than with those of consumers.

Moreover, it is common in the case of consumer organizations to lack human resources qualified in the management of consumer protection. Another factor worth highlighting is the absence of the infrastructure needed to undertake a process. This prevents the development of mechanisms for the dissemination of consumer information and other information that constitute a daily tool for social control. Also highlighted has been the fact that the structures and the technology to analyse products entering the country are either insufficient, lacking or obsolete. This makes it difficult to have appropriate alternative preventive measures and to deal with questions concerning the quality, security and harmfulness of products and services sold in Bolivia.

Consumers are worried that non-regulated services are more problematic in terms of consumer protection than the regulated services. This is attributed to the lack of mechanisms to complain about the services such as in health, education, specialized services and others that generate a climate of dissatisfaction, disillusion and conformism on the part of users.

4.3. Peru: identified needs in the area of consumer protection¹¹³

In the case of Peru, according to the report on the needs and priorities in the area of consumer protection, INDECOPI needs to introduce a series of improvements to advance towards a model able to strengthen the achieved capacities and to reach the standard of other countries more advanced in this field.

Within the Latin American context, INDECOPI is among the most developed institutions. This does not prevent it from needing some improvements in its mandate and the functions it has to fulfil. The following needs have been identified (i) to foster a common understanding within the Peruvian government in the area of consumer protection, aimed at developing a consumer protection culture at the level of INDECOPI and other public institutions (regulatory bodies); (ii) the unification of the legislation in the area of consumer protection so as to apply it to both regulated and non-regulated sectors; (iii) to review the INDECOPI budget and increase its allocation in Peru's General Budget, so as to accomplish its mission; and (iv) to be given the mechanisms and resources to provide consumer associations with resources, thereby assuring that it maintains a balanced relationship with both the consumer and business interests.

4.3.1. Strengthening the existing regulatory and institutional framework and the effectiveness to respond to consumer concerns

The Peruvian law on consumer protection is one of the best structured in Latin America. It is renowned for its comprehensive approach and appropriateness in its dealings with the issues. It has undergone various changes, which have served to improve concepts and institutions that were absent in the original version. However, the law has certain deficiencies such as, first, the legal vacuum related to the impossibility of abdicating one's consumer rights. Second, the law establishes mechanisms to coordinate with other norms of similar hierarchy. Third, the lack of a legal framework for consumer associations has resulted in the absence of clear rules on the access to justice on behalf of consumers. Consumer associations and other groups related to the civil society can undertake collective actions to support consumer rights following authorization by INDECOPI.

4.3.2. Improving INDECOPI's work in the promotion of a consumer protection culture

INDECOPI's role in the field of competition and consumer protection is somewhat asymmetric. This is explained by INDECOPI's decreasing authority as regards consumer protection.

The needs in the exploratory mission are related to the current situation facing INDECOPI while others are related to the need to reinforce capacities in spite of the efforts of INDECOPI in this regard.¹¹⁴

¹¹³ See Collado, Claudia. Peru. Report on the Needs and Priorities in the Field of Consumer Protection. 24 November 2003.

¹¹⁴ *Loc. cit.*

4.3.3. Strengthening consumer associations

Consumer organizations need to comply with two major requirements in order to continue and benefit from their credibility: they must be independent of economic and political power. In this regard, most Peruvian associations have scarce resources as regards membership and sources of cooperation. Human resources are mainly voluntary workers or students. This reflects the crucial need for strengthened international cooperation.

CHAPTER V

Cooperation in Terms of Competition Policy and Consumer Protection and the Needs of Central American Countries

As is the case in other Latin American countries, Central American countries have made efforts to strengthen the cooperation with other countries of similar levels of development as well as with industrialized countries. These efforts faced a series of obstacles due to the lack of implemental capacity of policies at national level. Additionally, these countries faced a series of shortcomings in meeting the objectives in the fields of competition and consumer protection within the bilateral and plurilateral agreements and the FTA proposals at regional level.

5.1. Scope for bilateral, plurilateral and regional cooperation in the field of competition policy

In the case of Central America, strong motivation is evident in promoting international initiatives in the area of competition law and policy. With the opening of domestic markets, there is the risk that small economies may be exposed to the detrimental consequences of monopolistic or oligopolistic actions from companies located abroad. Indeed, this is even more important since deregulation is progressing and the competitiveness of the local industry is questioned. Hence, bilateral, plurilateral or regional cooperation in the area of competition policies is expected to contribute to the sensitization of the business sector towards collaborating in dealing with anti-competitive practices.

It was argued that the effective implementation of competition laws and policies is necessary to profit from the benefits of integration. Moreover, as long as such policies promote competitiveness, they can be turned into a tool for commercial integration. However, significant differences remain in the area concerning experience and capacity to implement competition law and policy. This reinforces the role that technical assistance and institutional strengthening must have in the integration efforts.

In October 1993, the signatories of the Protocol of Tegucigalpa,¹¹⁵ which established the Central American Integration System (SICA), agreed upon the Guatemalan Protocol in order to adapt the integration scheme to the needs of the sub-region.

Central American integration reached its climax when the Treaty for the establishment of the Customs Union¹¹⁶ was signed between El Salvador and Guatemala, on 13th February 2000. The two countries achieved noticeable progress in terms of custom tariff reduction, custom harmonization, sanitary register and tax harmonization. The Customs Union process continued until August 2000 when the Nicaraguan and Honduran governments expressed their decision to formally join it. Moreover, in June 2002, Costa Rica decided to join too and this could now turn this group into an economic union.

Central American countries have also supported bilateral and plurilateral integration initiatives, which include competition issues (see Table 20). Among the most prominent is the FTA between Canada and Costa Rica, which comprises a cooperation treaty to deal with the harmful effects of anti-competitive practices. It is worth mentioning in this respect that the difference in economic development did not constitute an obstacle to signing the treaty.

¹¹⁵ The Tegucigalpa Protocol, which established the System of Central American Integration – SICA, was joined by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, and became effective in El Salvador, Honduras, Nicaragua and Panama on 22nd July 1992, Guatemala on 13th August 1993 and Costa Rica on 26th June 1995.

¹¹⁶ *Op. cit.* Paragraph 68.

When negotiating the competition chapter of the FTA, both countries took into consideration that the contract could serve both as a model¹¹⁷ of international cooperation and a framework for cooperation and coordination between the Canadian and Costa Rican competition authorities, respectively. Moreover, both parties agreed on the role of competition policy to ensure that the liberalization benefits would not be harmed by the presence of anti-competitive practices.

With regard to the obligations envisaged within the Canada-Costa Rica Treaty, chapter XI observes a provision to adopt or maintain legal measures in order to prohibit anti-competitive commercial activities. These provisions include cartels, the abuse of dominant position and anti-competitive mergers. Another provision consists of the establishment or maintenance of a neutral competition authority, which would be independent of the political interference of each country and would be authorized to carry out its own enquiries (Competition Advocacy). Moreover, the chapter contains compromises on transparency and includes the obligation to make public the information regarding the adoption or adopted measures to deal with anti-competitive activities. The chapter also requires that the measures taken to proscribe anti-competitive activities be applied under a non-discrimination criterion. It contains provisions of due process, which include the need to have fair and equitable legal and quasi-legal processes as well as the principle of double instance. Another significant characteristic refers to the inclusion of mechanisms for cooperation, in the sense that each party must be informed of the anti-competitive practices that occur in their respective territories. There are also notifications, consultations and exchange of information regarding the investigations to be carried out according to the law of each country (for example, the confidentiality and the disclosure of information) and finally the mutual legal assistance in different areas.

As for the implementation of the law, the chapter states that neither party has the possibility to appeal in any way on issues discussed and decided on originating from the FTA chapter on competition. Any bilateral consultation will need to be done at least once every two years, providing the opportunity for any dispute to be solved in terms of functioning, implementation, application and interpretation of the chapter. Should consensus not be achieved in the above-mentioned consultations, a Free Trade Commission (CLC) would be in charge of solving such issues. Each party is free to apply its own competition policies according to its national priorities. In summary, an FTA is the first example of cooperation that can exist between two countries of different economic levels of development in a purely commercial context.

Guatemala, Honduras, El Salvador and Mexico signed an FTA, which was enforced between March and June 2001. This FTA is supposed to facilitate the increase of exports to Mexico benefiting the industrial sectors, agriculture and commerce. In the same way, FDI is expected to grow in the Central American markets.

In the FTA between Central America and Chile, signed in October 1999, only Costa Rica and El Salvador have met the 2002 negotiations. The FTA between the countries of the Central American Common Market and the Republic of Chile establishes the mechanisms to promote the development of competition policy and it guarantees the application of its rules and provisions. Moreover, it ensures that the benefits obtained through the FTA are not obstructed by anti-competitive practices.

The FTA between Central America and Panama became effective in May 2001. It aims at creating a tool to update the existing bilateral-type preferential agreements on trade liberalization. The FTA includes market access to services and investment opportunities.

¹¹⁷ Working group on the interaction between Trade and Competition WTO WGTC/W/173, July 2003.

The FTA between Guatemala, Honduras, El Salvador, Nicaragua and Costa Rica and the Dominican Republic was enforced in October 2001 and September 2002. Its most important objectives are (i) to boost trade expansion and diversification in goods and services between the parties; (ii) the promotion of free trade conditions within the area constituted by the FTA through the reciprocal elimination of goods and services trade barriers originating in the parties' territories; (iii) the promotion and protection of direct investment to make intensive use of the advantages offered in the markets located in the parties' territories, and (iv) the establishment of effective procedures for the application and implementation of the FTA for joint administration and dispute resolution originating within the agreement. With regard to competition policy, a Free Competition Committee was created to be responsible for the control and prevention of anti-competitive practices. Moreover, this committee will create mechanisms to facilitate the development of this policy.

Finally, the Central American countries take part in the ALCA negotiations. They participate in the discussions on the chapter on competition and the negotiation group on small economies.

In 2004, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua announced the end of negotiations on the United States-CAFTA Agreement, in order to eliminate custom tariffs and other barriers to trading goods, agriculture, services and investment between the United States and Central America. This agreement is expected to be approved and implemented by the legislation of the signing countries at the end of 2004.¹¹⁸ Five negotiation groups covered topics such as market access, services and investment, government purchases, intellectual property, work and the environment as well as institutional topics such as dispute resolution. There is a sixth group on strengthening capacity. The Central American countries have elaborated national action plans. Although competition policy is not considered to be a negotiation topic, the countries have asked for institutional strengthening in this field,¹¹⁹ mentioning, among others, the need for a Competition Law and a governmental or private sector agency, which ensures the application of such legislation. For example, in the case of Costa Rica, the required issues for institutional strengthening are managed by COPROCOM.¹²⁰

Table 23 reflects the technical cooperation received by Central American countries to strengthen their projects in terms of competition laws and policy. Undoubtedly, important efforts were made to create a competition culture. Moreover, the training activities should contribute to forming a multidisciplinary team, which would be in charge of enforcement of the law, whenever each country decides upon it. In the case of Costa Rica, the agency has been the centre of training practices to the advantage of other countries in the sub-region.

5.2. References to cooperation in the area of consumer protection

Cooperation in the area of consumer protection includes both governmental and non-governmental institutions. It is worth outlining the role of Consumers International (Regional Office for Latin America and the Caribbean – ROLAC) in the Central American area, through their Panama-based office.

¹¹⁸ See <http://www.uscafta.org/about/agreement.asp>.

¹¹⁹ See US–Central America Free Trade Agreement. National Action Plan for trade capacity building. Honduras (June 2003).

¹²⁰ See US–Central America Free Trade Agreement. Integral Cooperation Agenda. Conceptual Proposal for a National Action plan. Costa Rica (December, 2002).

Among the support activities at regional level, was the Meeting Forum II of consumer protection organizations, organized by CLICAC (Panama) in 2002. In 2003, a MERCOSUR consumer forum was organized, also under ROLAC regional direction.

Also under ROLAC regional direction, is the Euro-Latin American Consumer Dialogue, which promotes integration at regional and international levels.

Table 23: Technical assistance in the area of competition policy and consumer protection received in Central American countries (based on Primary Sources provided by the countries).

Countries	Source(s) of technical assistance (period when it was received)	Main intervention area. Main achievements
Costa Rica	<p>Mexico (2004)</p> <p>Chile (Oct-Nov 2001)</p> <p>Canadian Competition Agency and Embassy of Canada in Costa Rica</p> <p>CEPAL –sub-regional headquarters – Mexico, COPROCOM and CRDI</p> <p>Competition Defence Court – Spain and AECI</p>	<p>- Intervention of two officers from the Technical Support Unit of the Commission for the Promotion of Competition (August 2003 at the latest).</p> <p>- Request for an expert in industrial organization and economic competition at the level of the CIDE professors of the College of Mexico or other academic training centre, which offers the required training in this field (first semester 2004 at the latest).</p> <p>- Project “Strengthening the Competition Process between the National Economic Public Ministry of Chile, the Costa Rican Competition Promotion and the Pontifical Catholic University of Chile”.</p> <p>- First phase: intervention of two officers from the Technical Support Unit of the Commission for the Promotion of Competition in the National Economic Public Ministry of Chile to strengthen the institutional management on topics such as: relevant markets, substantial power, handling of asymmetric information</p> <p>- Second phase: request for an expert in industrial organization for the Pontifical Catholic University of Chile, so that it may offer training in this area to COPROCOM in Costa Rica and to the officers of its Technical Unit</p> <p>Cooperation agreement to carry out interventions and organize joint seminars within the framework of the FTA with Canada.</p> <p>Training aimed at officers of the Costa Rican and Central American offices related to issues of competition defence in Central America, Ministries of Economy, regulating organizations and other bodies</p> <p>Strengthening the institutional management of the organizations in charge of the application of competition law.</p>
El Salvador	World Bank (1997-2004)	Salvadoran State Loan within the National Competitiveness Program, key element for the improvement of the trading climate, the development of competition law and the elaboration of seminaries and workshops
Honduras	FIAS (2003)	Competition policies: revised the last version of the law proposal to support the government by designing macro-policies on better competition policy practices.
Guatemala	<p>FTC (2001)</p> <p>CEPAL (Mexico)</p> <p>FTC (April 2001)</p> <p>PROCOMPETENCIA</p> <p>Venezuela</p>	<p>The reason was to revise the Competition Law Proposal prepared by this Ministry</p> <p>Consists of a regional cooperation programme. Two working meetings were organized in Santiago de Chile and in Mexico.</p> <p>Moreover, two investigations were carried out in Central America for CEPAL.</p> <p>Exploratory mission</p> <p>The objective consisted of revising and assessing the experiences of the PROCOMPETENCIA staff. Obtain their suggestions for our</p>

Table 23: Technical assistance in the area of competition policy and consumer protection received in Central American countries (based on Primary Sources provided by the countries).		
Countries	Source(s) of technical assistance (period when it was received)	Main intervention area. Main achievements
	<p>UNCTAD-WTO (June, 2001)</p> <p>World Bank (June 2001)</p> <p>BCIE-WTO-.BID (Sept 2002)</p> <p>CEPAL-CRDI - COPROCOM (June 2003)</p>	<p>Competition Promotion Law Proposal.</p> <p>Participation in the Intergovernmental Group of Experts and in the WTO visit.</p> <p>The objective is for the National Program of Competitiveness (PRONACOM) to negotiate a loan with the World Bank and competition will be one of its components.</p> <p>Participation in the regional course "Competition Policy, Economic Development and the Multilateral System", organized in Guatemala 17-18-09-2002.</p> <p>Participation in the "International Course on Economic and Legal Competition Aspects", organized in San José Costa Rica, 3-6 June 2003.</p>
Nicaragua	<p>GTZ (96-01)</p> <p>FIAS (2003)</p> <p>BM/PROCOMPE (2003)</p>	<p>Promote competition:</p> <p>Analysis of competition legislation</p> <p>Design of the drafting for the proposed law on competition</p> <p>Legislation and policies on competition promotion</p> <p>Competition policies: concept and reality in Latin America</p> <p>Competition policies and institutions in Latin America.</p> <p>Competition policies: diagnosis on (i) revision of the competitive context and competition conditions and obstacles for FDI. (ii) Analysis of the trade-market-investment structure to identify the entry barriers to domestic markets based on studies of four markets. (iii) Analysis of the last version of the legislation to promote and protect competition. (iv) A national action plan proposed and discussed with the authorities.</p> <p>Assessment of the DGCTM capacities, i.e. infrastructure, materials, law and its application to consumers through seminars to promote the competition law.</p> <p>Information disclosure and distribution, and education and promotion of competition culture among the consumers.</p> <p>Assistance to revise the legislation, external and internal training.</p>

Chapter VI

Cooperation in the Field of Competition and Consumer Protection Policies in Response to the Needs of Bolivia and Peru

As in other Latin American countries, Bolivia and Peru have made efforts to strengthen cooperation on issues related to competition and consumer protection. These cooperation efforts have taken place with countries at the same level of development and with other developed countries.

As regards competition policy, by the Andean Community has received significant and praiseworthy cooperation and support from the European Community. This cooperation embodies a Competition Project aimed at harmonizing free competition rules in the Andean region. The objectives of this Project are to define and implement regulatory, administrative and judiciary frameworks at Andean level as well as to support national and regional institutions of the Member States in charge of protecting free competition rules. In that regard, it is worth noting that in the Andean region, there are two countries (Bolivia and Ecuador) that do not have competition law.

Likewise, both Bolivia and Peru participated in the FTAA negotiations regarding the chapter on competition. Table 24 (below) includes the international cooperation received by Bolivia and Peru in the area of competition and consumer protection. As can be seen, the cooperation on competition is greater than that on consumer protection.

Furthermore, Peru is also engaged in international cooperation in the area of consumer protection. This cooperation, promoted by INDECOPI, consists of concluding inter-institutional agreements with different institutions at local level.

6.1. Scope for cooperation in the area of competition policy

Bolivia

Regarding Bolivia, by 2003, SIRESE participates in the Adjustment Program for Regulatory Reform, supported by the World Bank. Under this framework, the Bolivian government has undertaken, among others, the passing of regulations that promote competition in the telecom and energy sectors. This has involved SIRESE participation. The World Bank has supported the elaboration of the Draft on Competition Law (2000), which unfortunately was not approved by the Bolivian Congress.

In addition, with the support of the Andean Community/European Community Project, a new Draft on Competition Law was prepared, which was discussed in the 2003 Congress.

Bolivia benefits from the cooperation received under the UNCTAD/PNUD Globalization, Liberalization and Sustainable Human Development Global Program, whose underlying concept are social efficiency, energy and competitiveness.

Peru

Currently, Peru is negotiating a Free Trade Agreement with the United States, which eventually would include a chapter on competition as in the case of Chile.

Peru has received technical cooperation under the Competition Project framework, which is supported by the Andean Community and the European Community. More specifically, the objectives and activities foreseen are as follows:¹²¹

- Improvement of the administrative and legislative framework at national and sub-regional levels. This activity aims to propose a coherent set of community regulations and domestic laws on competition-related issues, such as agreements and other restrictive practices as well as merger-oriented and state aid provisions. This is summarized in the amendment or passing of national legislation and regulations on competition issues and the alternative of adopting a community regulation on competition that could substitute Decision 285.
- Support for the sub-regional and national institutions responsible for implementing and sanctioning competition laws. The objective of this activity is to achieve sound competencies in competition enforcement laws within those institutions involved in competition.
- Promotion of a competition culture in the Andean Community territory. In this regard, discussion forums to analyse Andean regulations have been established so as to encourage turnover of specialists and to promote research work on this matter.
- Elaboration and publication of studies on competition issues in the region.

6.2. References on cooperation in the field of consumer protection

Bolivia

The cooperation in the field of consumer protection relies on an IADB sectoral loan whose objective is to boost productivity in Bolivia. This cooperation includes some aspects related to consumer protection rights. In addition, some contributions to support the role of ODEDCO and CODEDCO in consumer protection have taken place.

The aforementioned is viable because CODEDCO maintains close connections with a variety of international organizations that provide technical and economic support. Among those organizations, it is worth mentioning Consumers International.¹²²

Peru

INDECOPI has participated in cooperation agreements with different entities, organizations and bodies at local level for the purpose of undertaking joint tasks related to consumer protection (e.g. Chamber of Commerce of Lima, ASPEC). At international level, cooperation agreement with the Free Competition Commission and Consumer Affairs of Panama (CLICAC) has begun, and is aimed at exchanging information and cooperation between agencies.

¹²¹ For more information, see Peru National Report on the Needs and Priorities in the Field of Competition Policy. February 16, 2004. Various authors.

¹²² See Lorenzini, Juan Pablo. Bolivia. National Report on the Needs and Priorities in the Field of Competition Policy. January 17, 2004.

Table 24: Technical cooperation received in the area of competition policy and consumer protection in Bolivia and Peru.

Country	Source(s) (period that was received)	Main field of work. Main achievements
Bolivia	<ul style="list-style-type: none"> - World Bank, Executing Unit - EU/CAN Project on Competition 2003/2004 	<ul style="list-style-type: none"> - The financial proposal presented to the World Bank aimed at elaborating the Draft Competition Law, which was forwarded to the National Congress. However, that draft was not approved. - The project activities (being executed) attempt essentially to develop a national legislation for the defence of competition and the consumer through reflective activities and studies. The latest version of the draft competition and consumer legislation will be sent to the National Congress for approval.
Peru	<ul style="list-style-type: none"> - USAID-FTC-DOJ Oct. 2001-Aug. 2002 - UE-CAN 2002-2005 - CAN-USAID 2004 - UNCTAD 2003 	<ul style="list-style-type: none"> - CAN and its member states have organized workshops in which INDECOPI officials participated. Exchange of experiences and information took place with other entities of the Andean region and the United States. <ul style="list-style-type: none"> - The training programmes organized were as follows: <ul style="list-style-type: none"> - Investigation techniques on abuse of dominant position. 29 October – 2 November 2001. Buenos Aires, Argentina. - Competition Policies in the Infrastructure industry. 8 – 21 February 2002. Caracas, Venezuela. - Cartels and anti-competitive agreements. 10 – 14 June 2002. Lima, Peru. - Strengthening the institutional capacity of Competition Agencies. 23 – 25 July 2002. Bogota, Colombia. - Carrying out effective methods in merger investigations. 12 – 16 August 2002. Lima, Peru. - The competition project entitled "Harmonizing competition rules in the Andean Community whose objective is to consolidate the Andean common market, providing with legal and administrative modern and efficient tools, thereby strengthening its international capacity, facilitating exchanges at national and inter regional levels. <ul style="list-style-type: none"> - Among its activities are <ul style="list-style-type: none"> - 21 – 24 July 2003: Sub-regional Seminar on Abuse of dominant position. 14 trained INDECOPI officials coming from the free competition commission, tribunal and economic studies unit. - August 2003: Michael Krakowski undertook a consultancy work concerning the institutional environment of the competition authorities in the Andean sub-region. - October 2003 (Bogota, Colombia): Sub-regional Seminar on Cartels. 3 INDECOPI officials participated in this event. - 23 – 26 March 2004 (Bogota, Colombia): Sub-regional Seminar on Mergers. 2 INDECOPI officials attended. - Under the framework of the Agreement CAN –USAID (Competition), INDECOPI has participated in the following Seminar: <ul style="list-style-type: none"> - Seminar/workshop on Competitive agreements detection. 01 –05 March 2004 (Quito, Ecuador). Attendance of 3 INDECOPI officials. - February 2003: Meeting on the revision of the Model Law on Competition and meeting of the Working Group on the interaction of trade and competition at the WTO. The participation of one INDECOPI official was financed by UNCTAD. - April 2003: Regional Meeting on Latin America and the Caribbean on Competition Policy in the Post –Doha Agenda at the WTO (Sao Paulo, Brazil), organized by UNCTAD, the Administrative Council for Economic Defence (CADE) and the foundation Getulio Vargas. The participation of one INDECOPI official was financed by UNCTAD.

Table 24: Technical cooperation received in the area of competition policy and consumer protection in Bolivia and Peru.

Country	Source(s) (period that was received)	Main field of work. Main achievements
	<ul style="list-style-type: none"> - ICN 2003 - BID-INTAL 2003 - APEC 2003 - APEC 2004 - USAID-FTC June 2003 - Consumers International June 2003 	<ul style="list-style-type: none"> - July 2003: Meeting of the IGE 5th period of sessions (Geneva, Switzerland) organized by UNCTAD. The participation of one INDECOPI official was financed by UNCTAD. - June 2003: First Annual Meeting of the Ibero–American Forum on Competition and Annual Conference of the International Competition Network (ICN) took place in Merida, Mexico, organized by the Ibero–American Forum on Competition and ICN. The participation of one INDECOPI official was financed by ICN. - June 2003: Regional Seminar on Competition Policy, economic development and Multilateral System: Doha Mandate and perspectives. Buenos Aires, Argentina, organized by WTO and IADB-INTAL. The participation of one INDECOPI official was financed by IADB-INTAL - August 2003: Program on Competition Policy for APEC member economies. Hanoi, Vietnam, organized by APEC. The participation of one INDECOPI official was financed by APEC. - October 2003: Fourth Workshop APEC/OECD, Cooperation Initiative in Regulatory Reform. Vancouver, Canada, organized by APEC and OECD. The participation of one INDECOPI official was financed by APEC. - 1 – 3 March 2004: Third Training Program on Competition Policy and Law. Kuala Lumpur, Malaysia. APEC. Participation of one INDECOPI official was financed by APEC - 18 – 20 June 2003 (INDECOPI auditorium) Seminar on Consumer Protection: Institutions, Analysis and Implementation, organized by FTC and INDECOPI, with the support of USAID. Several participants from Latin America. 3 Speakers from FTC (US) - Participation in the Second Forum on Consumer Protection Agencies, organized by the Consumer National Service (Chile) – SERNAC, the Free Competition Commission and Consumer Affairs (CLICAC) and Consumers International (11-13 June 2003). The President of the Commission of Consumer Protection of INDECOPI participated financed by Consumers International.

Source: Original preparation based on primary sources.

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