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Recent decisions by the Venezuelan and Peruvian agencies: lessons for the export of antitrust

BY A.E. RODRIGUEZ* and MARK D. WILLIAMS**

I. Introduction

Over the past half century, there have been several unsuccessful attempts to devise and implement a single system of international competition regulations.¹ Largely as a result of worldwide politi-

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AUTHORS' NOTE: A previous version of this article was presented at the third congress of the Latin American Law & Economics Association meetings, held in Caracas, Venezuela, June 16, 1997. Opinions expressed here are the authors' and do not necessarily represent those of Price Waterhouse or of the Federal Trade Commission. Claudia Curiel, Alejandro Falla Jara, Eduardo Garmendia, Ken Glazer, Ana Julia Jatar, Karen Mills, Abbott McCartney, Luis Tineo, Jorge Varela and Spencer Weber Waller have been especially helpful. At various points over the last few years, Rodriguez has been an advisor to both ProCompetencia and Indecopi.

¹ The first proposal to harmonize competition policy among countries, undertaken by the United Nations Conference on Trade and Devel-

cal and economic transformations of recent years, there has been renewed interest to enact and enforce competition regulations in developing countries and to harmonize these with competition policies² in developed countries. Promising efforts to strengthen international competition protocols are again underway. Because antitrust is thought to be a key component of economic liberalization and privatization, the development of competition policy regimes is no longer a strictly "Western" concern. As of the end of 1996, seventy countries have instituted competition agencies.³

opment in Havana in 1948, was known as the Havana Charter. The Havana Charter would have created the International Trade Organization (ITO) as a specialized multilateral agency of the United Nations. Due to historical circumstances, the ITO did not become a reality at the time, but was rather amended and transformed into the General Agreement on Tariffs and Trade (GATT)—now the World Trade Organization (WTO). The WTO is the only global multilateral institution governing international trade, but it still has no jurisdiction over international antitrust matters. See Nataliya Yacheistova, *The International Competition Regulation*, 18 WORLD L. & ECON. REV. 99 (1994), for a generally favorable review of the evolution of international competition policy.

² The term "competition policy" broadly refers to regulatory mechanisms that affect the competitive process, including the administration and enforcement of consumer protection matters, antidumping and countervailing duties, securities and banking regulation, utilities regulation, the protection of intellectual property, bankruptcy law, market exit procedures, and antitrust. In the U.S., when it is used at all, the term "competition policy" appears to refer almost exclusively to antitrust policy. The former usage is more popular in newly liberalized and transition economies since it is not uncommon to find one agency charged with administering various regulatory policies. Peru's competition agency, for example, known by its acronym, Indecopi, is a veritable "regulatory holding" agency charged with administering the full gamut of instruments listed above. [Decreto Ley No. 25868 de Organizacion del Indecopi, November 6, 1992] referenced in, EUROPEAN COMMUNITY, DG IV, 1 COMPETITION LAWS OF LATIN AMERICA (BRUSSELS: EU, JULY 1996).

³ Mark A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis* (in this issue).

Throughout Eastern Europe, the former Soviet republics, Latin America and Asia, countries that have opened up previously closed or state-dominated economies to competition have simultaneously adopted legislative measures designed to advance and protect a market economy.

(footnote 3 continued)

Since their inception, the new competition agencies have welcomed collaboration with foreign antitrust enforcement agencies that have longer histories. These new agencies have had the support of supranational institutions and Western governments. The Western academic and policy community has offered no shortage of powerful and persuasive proposals in support of the internationalization and harmonization of competition policy.⁴ While it is

Specifically, governments have revised or adopted competition legislation as a complement to the privatization and deregulation policies that typify promarket reforms; see, e.g., R. Shyam Khemani & Mark A. Dutz, *The Instruments of Competition Policy and Their Relevance for Economic Development*, in REGULATORY POLICIES AND REFORM IN INDUSTRIALIZING COUNTRIES (Claudio Frischtak ed., 1995).

⁴ See, for example, John H. Jackson, Statement on Competition and Trade Policy: Before the U.S. Senate Committee on Judiciary (June 18, 1992), reprinted in 26 J. WORLD TRADE 111 (1992); F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY (1994); John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L. J. 535 (1993) [suggesting consideration of a GATT Antitrust Code (at 550), and that the United States must be willing to accept the full implications of effective and enhanced international institutions and international law (at 561)]; Murray Weidenbaum, *Antitrust Policy for the Global Market-Place*, 28 J. WORLD TRADE 27 (1994); Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 WORLD COMPETITION 2 (1995). Eleanor Fox, *Competition Policy and the Next Agenda for the WTO*, in OECD, NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALISING WORLD ECONOMY (1995); Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Laws*, 18 CARDOZO L. REV. 1111 (1996); *The Internationalization of Antitrust Enforcement*, 77 B. U. L. REV. 343 (1997); JAGDISH BHAGWATI & ROBERT E. HUDEC, I, II FAIR TRADE AND HARMONIZATION (1996); Donald I. Baker et al., *Harmonization of Competition Law Enforcement*, forthcoming in COMPETITION POLICY IN A GLOBAL ECONOMY (Waverman, Comanor & Goto eds., 1997); The International Bar Association's *Global Competition and Trade*, 23 INT. BUS. LAW. 10 (1995); Diane P. Wood, The Internationalization of Antitrust Law: Options for the Future, Address Before the DePaul Law Review Symposium, Cultural Conceptions of Competition: Antitrust in the 1990's; Luis J. Díaz-Canseco Nunez, *Armonización de la Legislación Sobre Tráfico Económico*, Acuerdo de Cartagena (April 8, 1987). Janet D. Steiger, The Crucial Role of Competition Law and Policy

obvious that there is desire to promote and adopt regional and multinational competition codes, it is less clear that there is the complementary readiness to actually enforce these global or regional competition codes by the participating agencies.

In this article, we review two recent cases undertaken by the competition agencies of Venezuela and Peru. These experiences suggest that it is useful to pay close attention to each country's circumstances and their practical needs when assessing whether general competition goals, and harmonization in particular, are likely to be achieved. The examination of these new agencies' experiences may allow us to diagnose potential problems. Once these problems are isolated, they can be discussed, with solutions offered and with contrary opinions discussed.

There are many types of problems that these new competition agencies may face. For example, differences in transitional economic policy and political conditions may give rise to different procedures being implemented by different countries' competition agencies.⁵ Presumably, these improvised procedures will only be a temporary expedient that can be forgotten once these economies reach long-run equilibrium.

Some problems facing the new competition agencies are more structural in nature. For example, many of these new competition

in the New Europe Prepared Remarks of the Commissioner of the U.S. Federal Trade Commission Before the International Bar Association (July 6, 1995).

⁵ Venezuela's agency, for example, conducts its investigations against a backdrop of price controls, currency instability, social and political unrest, and difficulties in gathering adequate data. Peru's experience reveals that as episodes of high inflation drown out changes in relative prices, institutional structures may not be changing at the same pace as macroeconomic phenomena. See Dennis Carlton, *The Disruptive Effect of Inflation on the Organization of Markets*, INFLATION CAUSES AND EFFECTS 139 (Robert Hall ed., 1982); Robert M. Feinberg & Mieke Meurs, *Privatization and Antitrust in Eastern Europe: The Importance of Entry*, 39 ANTITRUST BULL. 797, 808-809 (1994) ("[R]apid changes in the structure of prices, forms of ownership, and sources of demand have made it difficult for . . . profits to operate as a signal for entry in the way they do in the established market-based economies. . .").

agencies may not be adequately staffed. Peru's competition office has only two full-time professionals, whereas Venezuela's has approximately twenty and Mexico's over 120.⁶ To the extent that the thoroughness of antitrust investigations (which may face statutory deadlines) depend on staffing levels, those agencies with more personnel are less likely to overlook important details.⁷ In the long run, staffing levels in each agency are likely to reflect domestic demand for antitrust enforcement, which in turn should be closely linked to the relative political positions and power of national interest groups.

There is one further potential problem with the internationalization of antitrust. Different countries' competition agencies may apply seemingly identical analytical methodologies differently in their investigations. This may lead to the impression of disarray in the enforcement of competition laws. Clearly, these agency actions may affect property rights and ultimately the asset value of parties directly involved. If this is left unchecked, erratic performance may have unintended consequences. For example, the private sector may lose its confidence in the professionalism and the impartial enforcement of competition laws. This could reduce foreign and domestic investment flows as investors demand an

⁶ See A.E. Rodriguez & Mark D. Williams, *Economic Liberalization and Antitrust in Mexico*, 10 REVISTA DE ANALISIS ECONOMICO 165 (1995); A.E. Rodriguez, *Lessons from Mexico's Antitrust Initiative in REGULATION, DEREGULATION & MODERNIZATION IN LATIN AMERICA* (Moises Naim & Joseph Tulchin eds., 1998–forthcoming).

⁷ Another problem that the new competition agencies face is high turnover of the professional staff. While there is no shortage of potential new hires because the novelty and perceived importance of antitrust practice attracts bright and talented professionals, the unique training and knowledge gained by working at the competition agencies leads to early exits. Economic training and insider knowledge of various industries raises each staff member's opportunity cost of remaining with the agency, especially considering the rapidly eroding and low salaries paid by state agencies. For example, none of ProCompetencia's original staff, which trained at the Federal Trade Commission, remain with the agency today. A similar situation has occurred in other agencies, including those of Mexico and Peru. The lack of career antitrust specialists within the agencies prevents institutional continuity.

appropriate risk premium associated with potentially costly investigations of benign business practices. Unpredictable enforcement practices may chill innovation in marketing and distributional arrangements. A rigid application of consumer surplus welfare standard without politically tempered prosecutorial discretion may reduce both the political and popular support of the competition office, which may ultimately undermine its effectiveness.⁸

⁸ An asymmetry of incentives often arises in transition economies between political decision makers and those at the competition agency. Other government agencies often have the incentive to grant highly favorable packages to foreign investors to minimize the social unrest that often accompanies promarket reforms. To fully capture the benefits of liberalized markets, policy makers realize that it is crucial to increase both domestic and foreign investment. Since investors are more likely to commit capital if they are guaranteed a higher return, it is common for governments to grant investors special favors. These favors may range from exclusive concessions or similar set-asides to government-sanctioned entry barriers. These favors often run afoul to the efficiency-based agenda of the competition office. A.E. Rodriguez & Mark E. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994).

Adjusting for normal business risk, investors may require an additional premium to invest in reforming economies to compensate for the added risk of policy reversal. Any probability of a future policy change that results in capital losses will reduce the incentive to commit irreversible capital. Accordingly, entry into reforming economies is likely to occur only if firms, *ex ante*, expect higher returns than those expected for an economy with less policy uncertainty. Thus, an antitrust challenge based on a naive focus on short-run allocative efficiency may adversely affect the long-run investment potential of a reforming economy. For example, the acquisition of Skoda by VW in the Czech Republic was accompanied with demands for increased levels of tariff protection and foreign investment restrictions aimed at limiting import competition and new entry. The competition office, using a short-run allocational efficiency criterion, could recommend such an acquisition be enjoined. Recognizing that a prospective supracompetitive return may be required by investors to reflect political risk, the agency might wish to exercise prosecutorial discretion. For a more comprehensive exposition of the potential problems from conflicting methodological approaches, see A. E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 Hous. J. INT'L 311 (1996). For a brief discussion of the Skoda case and recommendations that the agency oppose the Skoda acquisition, see S. Khemani, *The Role and Importance of Competition*

Lastly, the utilization of dissimilar methodologies and enforcement practices may hinder ongoing efforts to harmonize competition policies among countries.

The recent experience of new competition agencies suggests at least two things: (1) researchers should focus on the particular problems associated with practicing antitrust in transition economies; and (2) Western economies, agencies, and other interested parties should promote initiatives that strengthen professionally administered antitrust programs.

In this article, we examine the history of two competition agencies and two investigations. The Venezuela agency, ProCompetencia, investigated a merger in carbonated beverages. The Peruvian agency, Indecopi, investigated a possible cartel. Both ProCompetencia's and Indecopi's enforcement actions are a consequence of recently instituted competition policy initiatives in each country, which were intended to strengthen each market economy.⁹ Supporters claim that the agencies, by enforcing the law, contribute greatly to economic development by creating a market-based national competition policy.

Discussion of these issues is organized throughout this article in the following manner. The next section discusses the Venezuelan agency's investigation of Coca-Cola's contract with the heretofore Pepsi bottling firms, while section III examines the Peruvian agency's investigation into potential collusion in the broiler chicken market. The last section contains concluding comments.

Advocacy in Promoting Competition, draft, The World Bank (1996) at 8; and, JOHN FINGLETON ET AL., COMPETITION POLICY & THE TRANSFORMATION OF CENTRAL EUROPE 27, 150 (1996).

⁹ For an overview of these developments, see the collection of papers in CLAUDIO FRISCHTAK, REGULATORY POLICIES AND REFORM IN INDUSTRIALIZING COUNTRIES (1995); JOHN FINGLETON ET AL., *supra* note 8; and also Malcolm B. Coate, Rene Bustamante & A. E. Rodriguez, *Antitrust in Latin America: Regulating Government and Business*, 24 U. MIAMI INTER-AM. L. REV. 37 (1992). For a discussion of ProCompetencia's experience with merger enforcement, see Claudia Curiel, *Experience in the Application of the Regime of Mergers in Venezuela: 1993-1996*, draft, ProCompetencia (October 1996) [on file with author].

II. Competition policy in Venezuela

Advanced by the promarket reformers within the government of President Carlos Andres Perez,¹⁰ Venezuela's competition law, passed in late 1991, took effect in January 1992.¹¹ The law created an enforcement agency known by the unsubtle name of Superintendency for the Promotion and Protection of Free Competition. The more palatable name ProCompetencia was soon adopted. The agency is headed by one superintendent, who works closely with a staff of approximately twenty professionals.¹² The agency also contains an internal administrative tribunal. The law charged the agency with conducting merger reviews and enforcing competition laws.

Neither timid nor coy, ProCompetencia's first group of managers, although having a relatively small staff, set out to vigorously promote liberalization through antitrust enforcement.¹³

¹⁰ Janet Kelly, *Life Patterns of Institutions and Policies: ProCompetencia in Venezuela*, IESA, Caracas (September 1995).

¹¹ *Ley Para Promover y Proteger El Ejercicio de la Libre Competencia*, GACETA OFICIAL DE LA REPUBLICA DE VENEZUELA 13 ENERO, 1992; also, EUROPEAN COMMUNITY, *supra* note 2.

¹² The "superintendency" model, in which the agency is headed by one person, is the traditional structure to enforce commercial regulation used by Latin American nations. Venezuela and Colombia, for example, have chosen this approach for antitrust enforcement. The FTC model, in which a group of commissioners sits as a deliberative body, is a recent innovation. Mexico, Chile, and Peru have chosen this latter approach. Ana Julia Jatar, former superintendent of the Venezuelan agency has noted that she would favor a larger group of superintendents (i.e. closer to a commission model) to deflect some of the intense political pressures that accompany the job (source: personal communication). One potential research project would be to determine how such organizational choice affects performance.

¹³ Early actions taken by ProCompetencia, especially during the tenure of Dr. Ana Julia Jatar, were driven by two primary and related objectives. First was the need to legitimize antitrust policy, which had never been a feature of Venezuela's previous economic model. The second rationale was to prove that ProCompetencia was both independent and impartial, an unfamiliar role for a Venezuelan government agency, particularly considering the inexperience of the enforcers.

From the beginning, ProCompetencia had support, training and other assistance from various international agencies, including the U.S. Federal Trade Commission and the Department of Justice. So far, according to a Venezuelan commentator, the agency's achievements have been impressive, especially considering its relatively modest budget.¹⁴

ProCompetencia's antitrust methodology is similar to the analytical approach used by the American agencies and embodied in the Horizontal Merger Guidelines, which were jointly issued by the Federal Trade Commission and the U.S. Department of Justice.¹⁵ The use of common antitrust concepts such as Herfindahl-Hirschman concentration indices (HHIs), sunk costs, and other such terms "alien" to Venezuelan jurisprudence has been repeatedly challenged by investigatory targets on the grounds that these concepts are incorrect interpretations of Venezuelan law and therefore inadmissible.¹⁶ In the example below, Coca-Cola has appealed a recent decision on these grounds, as have other targets of ProCompetencia investigations.¹⁷

¹⁴ See, Kelly, *supra* note 8.

¹⁵ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, ANTITRUST TRADE REG. REP. NO. 1559 (1992). Similar generalities to the Guidelines are stipulated in Venezuela's *reglamento*. Superintendencia Para La Promocion y la Proteccion de la Libre Competencia, *Instructivo Sobre Operaciones de Concentracion Economica* (Resolucion No. SPPLC/0026-94). ProCompetencia also relies internally on the following document: Superintendencia Para La Promocion y Proteccion de la Libre Competencia, *Direccion de Verificaciones y Fusiones, Lineamientos Generales de Evaluacion de Operaciones de Concentracion Economica* (Caracas, Sept. 1995).

¹⁶ Dr. Luis Tineo has been especially helpful and extremely patient in explaining the nuances of Venezuelan jurisprudence. For further elaboration of the legal instruments available to challenge actions taken by the Latin American competition agencies, see Luis Tineo, *Competition Policy & Law in Latin American: From Distributive Regulations to Market Efficiency*, MONTEREY INSTITUTE OF INTERNATIONAL STUDIES, CENTER FOR TRADE & COMMERCIAL DIPLOMACY, WP No. 04 (February 1997) [on illegalities. . . , at 29, 30, and 31].

¹⁷ (Acting) Superintendent Claudia Curiel, personal communication.

Article 11 of the Competition Law instructs the Competition Agency to prevent mergers that restrict competition or that strengthen a dominant position.¹⁸ As opposed to Hart-Scott-Rodino (HSR) requirements in the U.S. and similar premerger obligations elsewhere, merging parties in Venezuela are not required to give advance notice of their intent to merge. After notification of the merger, ProCompetencia has a limited number of days in which to conduct its investigation. At the end of that period or sooner, the agency can indicate that it will not oppose the merger. The agency can make requests for documents and information from the merging parties and third parties. Once the investigation is concluded, the superintendent ratifies the decision. The parties may appeal the decision to a specialized higher court.

In August 1996, Oswaldo Cisneros, Pepsi's long-time Venezuelan bottler and distributor, announced that he was switching his allegiance to Coca-Cola. Venezuela is one of the few

¹⁸ The concept of "dominance" is found in European and Canadian antitrust practice, but not in America. This concept figures prominently in Latin American antitrust, including in Venezuela and Peru. Dominance is roughly equivalent to having unilateral market power. It is unclear whether in practice Latin American agencies rely on a market power test to determine if there may be an abuse of a dominant position. To the extent that they do use such a test as a matter of policy, the presence of the dominance standard in the language of the law may be largely irrelevant since it does not add any additional dimensions to the analysis beyond that outlined in the U.S. Merger Guidelines if one is using a consumer welfare standard, as do Latin American countries. Other jurisdictions, such as the European Union, use a dominance theory when analyzing behavior using a standard other than the maximization of consumer welfare. In the European Union, for example, the rules on competition are an instrument for economic integration. "It was envisaged from the outset that they [competition rules] should provide a means to ensure that regulatory barriers be eliminated in the process of creating a common market and should not be replaced by private behavior which would have the effect of isolating and dividing national markets from another." OECD, *The Objectives of Competition Policy* DAFNE/CLP(92)1/EEC (distributed May 14, 1992) at 3. See also, Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L. J. 55 (1992).

markets in the world where Pepsi has a larger market share than Coke, outselling it four to one. Cisneros' defection effectively left Pepsi without a bottler or a distributor in Venezuela. Pepsi alleged Coke and Cisneros violated several statutes of the relatively novel Venezuelan antitrust law as well as other laws.¹⁹ After an investigation of the Pepsi allegations, ProCompetencia found the Coke-Cisneros alliance to be in violation of Venezuelan merger statutes and fined them U.S. \$2 million. The agency found that the consolidation of assets, which included bottling facilities and Cisneros' domestic brands, reduced horizontal competition. The agency, however, did not seek to dissolve the combination. Furthermore, ProCompetencia did not find evidence to support nonmerger allegations that the Cisneros-Coke contract foreclosed Pepsi from the market. In the following discussion, we comment on ProCompetencia's merger review, with special emphasis on market definition and entry conditions.²⁰

*A. Coke v. Pepsi: background*²¹

In August 1996, after apparently failing to interest Pepsi in acquiring his firm and with no advance notice, Cisneros unilaterally terminated his exclusive franchise agreement with Pepsi. Except for his 50-year history as Pepsi's exclusive distributor in Venezuela, Cisneros had a standard bottling agreement with Pepsi that gave him an exclusive territorial franchise. Under the contract, Pepsi supplied soft drink concentrates and syrups to its licensee, who bottled and sold the branded soft drinks. Cisneros' decision to terminate his bottling and distribution arrangement of products under Pepsi trademark license effectively left Pepsi with no local bottler and distributor.

¹⁹ There is no private right of action in Venezuelan antitrust jurisprudence.

²⁰ The agency must also determine the competitive effects of the merger, including the likelihood of cooperation between market participants and the potential for efficiencies.

²¹ Superintendencia Para La Promocion y Proteccion de la Libre Competencia, *Resolucion No. SPPLC/0034-96*, version corregida y publica (9 de Diciembre de 1996) [hereinafter SPPLC-Resolucion].

Immediately thereafter, Cisneros announced an agreement with Coca-Cola to bottle and distribute Coca-Cola products.²² As part of their understanding, Coca-Cola agreed to acquire 50% of Cisneros' business, which included eighteen bottling plants and a number of soft drink brands, including the popular brand Hit.

Until this time, Venezuela was Pepsi's sixth biggest national market, with sales of about four million cases a month, worth U.S. \$350 million per year.²³ Pepsi promptly filed a complaint with ProCompetencia claiming the Cisneros-Coke agreement violated Venezuela's antitrust laws and therefore the merger should be dissolved.²⁴ ProCompetencia immediately started to investigate both potential merger and nonmerger violations.

ProCompetencia's investigations follow a set of administrative rules (*reglamento*) specifying the agency's interpretation of the Competition Law.²⁵ The *reglamento* is strongly influenced by the U.S. Merger Guidelines and includes a market-definition paradigm (whereby markets are defined based on customer reactions to a change in relative prices),²⁶ a quantitative focus on

²² *Id.* at 60.

²³ Ed McCullough, *Pepsi Plans \$100 Million Claim Against Bottler That Defected to Coke*, Associated Press Wire Reports (Aug. 22, 1996). Newspaper accounts report that Cisneros' Pepsi franchise agreement was scheduled to remain in effect until 2003. Cisneros explained the terms of the contract, "But it also included a clause that establishes if either of the two parties decides to withdraw early, he can do it under the condition of paying a penalty. I'm ready to assume that." It appears that Cisneros agreed to pay liquidated damages, although the newspaper report does not address this directly.

²⁴ Article 32 of the Venezuela Competition Law allows the superintendent to initiate an investigation when there is a presumption of a violation of the law.

²⁵ *Reglamento No. 2 de la Ley Para Promover y Proteger el Ejercicio de la Libre Competencia*, Decreto No. 1311 (02 de Mayo de 1996).

²⁶ ProCompetencia (and the U.S. Merger Guidelines) defines a product market as a product or group of products such that a hypothetical monopolist could profitably impose a "small but significant and non-transitory" price increase.

concentration, an analysis of entry conditions, efficiency considerations and a discussion on aspects of competition that may assist or hinder coordinated behavior among market participants.

Pepsi alleged that by rescinding his agreement with Pepsi and allying with Coca-Cola, Cisneros (and Coca-Cola) had violated various articles of the Competition Law.²⁷ The alleged violations of these articles were similar to anticompetitive practices proscribed under section 5 of the Federal Trade Commission Act and section 7 of the Clayton Act.²⁸ In the end, ProCompetencia found no evidence to support the alleged violations of the *nonmerger* aspects of the law by either Coke or Cisneros.²⁹ However, ProCompetencia did find that the transaction where Coca-Cola acquired Cisneros' bottling and distribution facilities and soft drink brands to be an illegal horizontal acquisition of a competitor's assets. The agency stated that they had reason to believe the transaction in violation of article 11 of the Competition Law, which prohibits mergers that restrict competition or strengthen a dominant position.³⁰

Formally, ProCompetencia's case rested on the following propositions: (1) there were two relevant product markets, regular carbonated soft drinks (CSD) and "light" (or "diet") CSD, and the relevant geographic markets were six regional markets encompassing Venezuela; (2) these markets were highly concentrated, and the proposed merger would increase the levels of concentration substantially; (3) *de novo* entry and product expansion or repositioning by current producers that might otherwise limit the likelihood of supracompetitive pricing was unlikely; (4) voluntarily divested assets failed to eliminate the anticompetitive effects of the consolidation of assets; and (5) the merger was likely to result in a substantial lessening of competition.

²⁷ Specifically, articles 5, 6, 7, 10, §§ 2 & 4, article 13, §§ 2 and 4 and article 17.

²⁸ Federal Trade Commission Act, 15 U.S.C § 45; Clayton Act, U.S.C. § 18.

²⁹ SPPLC-Resolucion, *supra* note 21, at 157.

³⁰ *Id.* at 158.

Surprisingly, market definition was not much of an issue in this case, although, as we shall later show, the parties potentially could have fruitfully advanced a broader product market.³¹ Rather, the decisive issue was the effectiveness of a voluntary divestiture that Coca-Cola sold off to avoid antitrust scrutiny. Knowing that an acquisition of this magnitude and the popularity (or notoriety) of the players involved was likely to invite close scrutiny by Pro-Competencia, Coca-Cola entered into a "fix-it-first" solution that potentially would have alleviated any antitrust concerns.³²

In structuring the fix-it-first package of assets that it voluntarily divested in order to avoid an antitrust suit, Coca-Cola tried to address three issues. First was the increase in concentration of soda bottling facilities and brands. As under the U.S. Merger Guidelines, Venezuela's *reglamento* assesses changes in concentration as a primary determinant of the potential for anticompetitive effects in a merger. A significant increase in the concentration index raises the likelihood that the agency will analyze a transaction more closely. A second issue that Coke's volunteered settle-

³¹ See, for example, Richard Higgins, David P. Kaplan & Michael J. McDonald, *Residual Demand Analysis of the Carbonated Soft Drink Industry*, 22 EMPIRICA 115 (1995) (finding that a market for CSD is too narrow for purposes of merger analysis); and R.D. TOLLISON, D.P. KAPLAN & RICHARD S. HIGGINS, *COMPETITION AND CONCENTRATION: THE ECONOMICS OF THE CARBONATED SOFT DRINK INDUSTRY* (1991); but see F. Gasmi, J.J. Laffont & Q. Vuong, *Econometric Analysis of Collusive Behavior in a Soft-Drink Market*, 1 J. ECON. & MGMT. STRATEGY 277 (1992) (concluding that they are "unable to reject a collusive hypothesis" using data on the Coca-Cola and Pepsi Cola markets), and the following commentary on *FTC v. Coca Cola Co.*, 641 F. Supp. 1128 (1986) by Lawrence J. White, *Application of the Merger Guidelines: The Proposed Merger of Coca-Cola and Dr Pepper*, THE ANTITRUST REVOLUTION (1989) (observing that the court found that the relevant product market was CSD).

³² The Federal Trade Commission has recently recognized that requiring parties to identify buyers in advance of any divestiture settlement negotiations has led to major improvements in the quality of buyers and the speed with which divestitures are accomplished. See, *Merger Remedies*, Prepared Remarks of George S. Cary, Senior Deputy Director of the FTC's Bureau of Competition, before the ABA Antitrust Spring Meeting, Washington DC (April 10, 1997).

ment tried to address was market entry. The agency is more likely to challenge a merger if entry is not found to be timely, likely and sufficient to prevent market participants, acting individually or jointly, from raising prices above competitive levels. Last, the Coke settlement tried to alleviate concerns that the merger would inappropriately exclude a competitor from the market. Cisneros' decision to terminate his franchising agreement with Pepsi and begin one with Coca-Cola could potentially be viewed as a conspiracy to force Pepsi's exit from the market, which potentially could raise prices and reduce output in the carbonated soda market. To support such a theory, the agency would have to find evidence that the parties *intended* to exclude Pepsi from the market.

Anticipating these conflicts, Coca-Cola offered a fix-it-first divestiture. Coke formed and spun-off an independent firm comprised of six formerly Coke-owned bottling plants, twenty-one warehouses and other distribution assets, 575 vehicles having Pepsi logos and 8 million liters of finished Pepsi products. The divested firm was instructed to offer Pepsi a short-term lease that would enable Pepsi to continue short-run bottling and distribution operations. By their design, the divested assets retained sufficient capacity and distribution facilities to enable Pepsi to maintain the same level of production it had prior to the transaction. Pepsi was further offered the right of first refusal to acquire the divested assets. The voluntary divestiture ostensibly maintained the level of competition in the marketplace and facilitated Pepsi's reentry into the market. With the divestiture, the Coke-Cisneros transaction would be "Herfindahl-neutral" (i.e., if all the related transactions were consummated, market concentration would not increase).

The proposed Coke settlement appears to address all of the potential issues that ProCompetencia could raise regarding the Coke-Cisneros transaction: (1) the change in concentration not be excessive; and (2) that the divested facilities could accommodate Pepsi's short-term bottling requirements. The first point addresses the potential concentration issue, while the second addresses both the product repositioning (or entry) and exclusion issues. But ProCompetencia was not to be convinced.

B. ProCompetencia's market definition analysis

The first stage in an antitrust analysis is to properly define the market in which a transaction has the potential for anticompetitive effects. ProCompetencia determined that the appropriate market(s) in which to analyze the Coke-Cisneros transaction was the sale of regular and diet CSD. Potentially, the market could have been more broadly defined to include all CSD, or even all potable liquids. Note that the proposed divestiture of bottling facilities was *not* proposed as a solution to a merger having anti-competitive effects under the theory that Coke and Pepsi would collude to reduce the amount of available physical capacity to bottle soft drinks. Rather, the divestiture was designed to make available facilities for Pepsi or another entrant in response to an anticompetitive, unilateral reduction in output by Coke.

ProCompetencia alleged that there was insufficient evidence to support an antitrust product market broader than regular and diet CSD. A broad potable liquids market, initially considered and rejected by ProCompetencia, included natural and canned juices, malts, beer, bottled water, sports drinks, ice tea, and powdered drinks (e.g. Kool-aid, Tea) in addition to CSD.³³ In contrast, Coca-Cola maintained that the relevant product market should be no narrower than the broad potable beverage market, and, within that market, the acquisition of the bottling facilities and brands would have no anticompetitive effect.

The Venezuelan soft drink market has been historically dominated by Pepsi, which had an 82% share of the CSD market in 1996. Coca-Cola followed with a 10.8% share and a small fringe of competitors accounts for the balance. In table 1 below, market shares by producers in the CSD market and the brands they control are given.

The calculation of a concentration statistic can serve too as a quick measure of the potential competitive concerns raised by a merger.³⁴ Under the U.S. Merger Guidelines and Venezuela's

³³ SPPLC-Resolucion, *supra* note 21, at 68.

³⁴ See, MALCOLM B. COATE & A.E. RODRIGUEZ, *ECONOMIC ANALYSIS OF MERGERS* 34 (1997).

Table 1

Market Share Data—1996 Venezuelan Carbonated
Soft Drink Manufacturers:

<i>Firm and brands</i>	<i>Market share (%) (by brand sales)</i>
Chinnotto	10.1
Seven-Up	0.7
Hit	23.5
Frescolita	7.2
Orange Crush	0.2
Total Cisneros	41.7
Pepsi-Cola	40.3
Total Pepsi	40.3
Total Cisneros & Pepsi	82
Coca-Cola	8.7
Sprite	0.9
Fanta	1.2
Coca-Cola	10.8
Brown Cola	1.4
Laim	0.8
Golden-Cup	2.7
Golden Cup	4.9
Other Brands	2.3
Total	100

reglamento, large market shares carry a presumption of market power (i.e., the ability to influence market prices).³⁵ As shown in table 2 below, Herfindahl indices calculated by ProCompetencia show that the Coke-Cisneros transaction combined with the divestiture of the Coke assets would actually lower concentration, although the industry would remain at highly concentrated levels.

³⁵ Antitrust analysis typically uses market shares, the ratio of individual firm sales to total industry sales, to calculate a concentration index. The concentration index typically used, the Herfindahl-Hirschman index (HHI), is calculated by summing the square of the market shares of all the firms in the market. If that index is greater than 1800, the market is said to be highly concentrated under both the U.S. Merger Guidelines and Venezuela's *reglamento*.

Table 2

Concentration Indices: Carbonated Soft Drink Market (by Brand)

Premerger HHI	6870
Postmerger HHI	4410
Change in HHI	-2460

Because larger firms contribute much more to the Herfindahl index than small firms, it should come as no surprise that the Coke-Cisneros transaction combined with the divestiture would lead to a reduction in concentration. The divestiture, in this analysis, "included" the Pepsi brand, the largest brand in Venezuela. Before these transactions there was one firm with a huge share. Afterward there were two more equal size competitors. This market structure, with two large firms, may be more competitive than the previous quasi-monopoly.

ProCompetencia also calculated concentration indexes based on the capacity shares of bottling facilities. If the proposed market were defined as access to bottling facilities, the proposed acquisition would increase concentration. Table 3 below identifies the capacity shares of the various bottling firms in Venezuela.

Table 3

Bottling Plants: Share of Total Industry Capacity by Firm

<i>Firm</i>	<i>Bottling plants (%)</i>
Cisneros	77.5
Coca-Cola	15.9
Golden-Cup	3.5
Independent	3.1
Total	100.0

Concentration figures based on bottling capacity result in a significant increase in "market" HHIs. Table 4 below shows a postacquisition HHI of 8746 with an increase of 2465 points. As a result of the merger, ProCompetencia argued that Coca-Cola controlled approximately 93.4% of the bottling facilities in the country because divested assets were not deemed sufficiently

independent of Coke even though they were now owned by third parties. Based solely on an assessment of concentration statistics, if the appropriate market could be shown to be the production of CSD at bottling plants and the divested assets were not independent, then ProCompetencia could justifiably challenge the transaction.³⁶

Table 4

Concentration Indices: Carbonated Soft Drink Market
(by Bottling Plant)

Pre-merger HHI	6281
Post-merger HHI	8746
Change in HHI	+2465

In December 1996, Superintendent Eduardo Garmendia, found that the consolidation of bottling facilities and the acquisition of carbonated soda brands was a violation of article 11 of the Competition Law. ProCompetencia argued that the voluntarily divested assets were insufficient to guarantee competition in the market. This refusal was based on grounds that Coca-Cola had failed to demonstrate that the trustees of the spun-off firm were sufficiently independent of Coca-Cola. ProCompetencia fined Cisneros approximately U.S. \$2 million and withdrew approval of the transaction until other remedies were adopted. ProCompetencia ordered the parties to add more brands to the package of divested assets. The agency also sought, *inter alia*, to review distribution contracts between Coca-Cola and its distributors to determine whether these acted as barriers to entry into CSD. Both sides of the dispute appealed the decision and the terms of the divestiture agreement. The court allowed the agency's decision to stand but set aside the monetary sanction until further review.³⁷

³⁶ Note, however, that ProCompetencia did not advance a CSD bottling facility market, but rather a regular and diet CSD market.

³⁷ As an epilogue to this affair, Pepsi and Coke agreed to binding arbitration on the related contract dispute. In September 1997, the International Court of Arbitration awarded PepsiCo U.S. \$94 million as

C. Product market determination: a methodological critique

Antitrust markets are defined as the smallest set of products over which a hypothetical monopolist could profitably impose a small but significant, nontransitory price increase. Market definition is often the most important part of an antitrust analysis. The rest of the analysis is contingent on market definition. Misdefining markets can often lead to incorrect conclusions in later stages of the analysis. Product market definition seeks to identify all the products that can be considered meaningful substitutes for the item under study. Since time and data limitations often define the scope of empirical analysis, analysts often rely on qualitative approaches to market definition.

ProCompetencia concluded that the two relevant product markets in the Coke case were regular and diet CSD. The agency reached this conclusion primarily through two exercises: the agency examined an existing premerger consumer survey of beverage consumption habits, and the agency conducted a *visual* examination of many beverages' price paths over time. The record does not indicate that ProCompetencia conducted any additional tests that could potentially compensate for the implicit weaknesses of either of these exercises.

In determining whether a hypothetical price increase would be profitable,³⁸ one must remember that it is the *marginal consumer* rather than the average consumer that is likely to switch in

compensation for Cisneros' "defection" to Coca-Cola. Nikhil Deogun, *Venezuelan Bottler Must Pay PepsiCo for Coke Defection*, WALL ST. J., Sept. 4, 1997, at B10.

³⁸ In determining whether potential substitutes should be in a relevant product market, the agency needs to determine what percentage of sales would be lost to a hypothetical price increase as a result of the merger. If so many marginal consumers would switch to another product that the hypothetical price increase would be unprofitable, that substitute should be included in the tentative product market. Only when the agency has determined that a hypothetical monopolist could profitably increase prices over a set of products because there are no additional substitutes to which consumers would turn, has the agency reached the correct product market. This requires that there are few marginal consumers in a correctly defined product market.

response to a change in relative prices. In order to identify the proportion of marginal consumers in a market, it is necessary to survey a large sample of customers and determine who is price sensitive. For example, in marketing surveys, someone who is a loyal consumer of one brand may not be so if faced with a heretofore never-seen change in relative prices. As such, a naive approach to these surveys may yield an underestimate of the number of marginal consumers. Similarly, marketing surveys tend to gather information on average consumers rather than marginal ones. Without the ability to gather a properly designed survey, one can fruitfully use existing data, but one should take into account these data's inherent biases and other limitations.

In its investigation, ProCompetencia appears to have made the mistake of relying on the analysis of average consumers. The record shows that the agency placed substantial reliance on the market survey conducted by the Malaguti Company. This survey investigates the market preferences of different demographic groups. The survey does not appear to identify any groups or individuals at the margin, who might switch products in the face of a relative price change.³⁹

From the references made to the Malaguti survey, it is not clear whether customers were asked whether their beverage consumption patterns would change in response to the standard antitrust hypothetical: Would you switch to another beverage if regular (or diet) CSD prices increased by a small and significant nontransitory amount? It is possible that ProCompetencia chose to dispense with the price test since, under the price controls regime, a carbonated soda price increase would have been unlikely.⁴⁰

³⁹ Marginal consumers may be those who are indifferent between two products at current prices, but will choose one product if its price falls. Similarly, a consumer that significantly decreases consumption (with no substitution to another product) if there is an increase in price is also consider marginal.

⁴⁰ While a price increase may not be likely under price controls, that does not rule out asking the hypothetical price increase question. If in fact price controls do prohibit price increases and the industry is such that demand is fully satisfied at a given price level, it is unclear how a merger could result in anticompetitive effects.

Based solely on a graphical presentation of beverage price data, ProCompetencia concluded that the prices of different beverages were not correlated. The agency did not attempt to control for fluctuations in factors that affect either supply or demand. Such cost and demand shifters are an integral part of any multivariate analysis of price determination of multiple products.⁴¹

Furthermore, ProCompetencia did not attempt to correct its market definition to take into account distortions in consumer behavior caused by Venezuela's inflationary environment. Inflation tends to obscure the information content of relative prices. For example, faced with the currency's deteriorating buying power, consumers typically buy their supplies at the beginning of the pay period and hoard goods. On the supply side, since the prices of CSD were fixed by the government, any announced inflationary adjustment would give suppliers the incentive to minimize sales of CSD until prices were raised.

Formally, market definition includes supply-side responses of competitors that occur within 1 year without the expenditure of substantial sunk costs. If a potential supplier can serve the market within a year in such a manner, that firm should be included in the market. This causes problems for potential narrow markets such as diet CSD. Diet CSD cannot be considered as a separate market on the supply-side from regular CSD unless one can show that regular CSD producers cannot supply diet CSD within a year without major expense. Without an anticompetitive theory to explain why suppliers in a broad market would not prevent a price increase in the putative narrow market, a narrow market cannot be supported.⁴² No such theory is discussed in ProCompetencia's decision.

⁴¹ Under the price control regime, relative prices cannot change in response to market opportunities. The 32% average excess capacity in the industry suggests that supply is elastic. A more informative model of the competitive interaction of different beverages might choose to model how the relative quantities of different beverages reacted to cost and demand shifters.

⁴² In fact, Pepsi's announcement that it would reenter the CSD market in an alliance with the Polar Group, a large beer manufacturer, suggests that a narrow CSD bottling market cannot be supported.

D. ProCompetencia's entry analysis

After analyzing the possibility that customers by substituting away from the product could discipline potential anticompetitive effects, one must determine whether the response from other competitors could discipline these effects. Actual and potential competitors can limit anticompetitive effects by entering the product market or repositioning their product offering if they are currently in the market.

An antitrust analyst must determine whether entry will prevent or deter the exercise of market power. If entry is sufficiently fast and easy so that established firms cannot impose or maintain a price above the competitive level for a significant period of time, the investigation should be terminated. Alternatively, if entry is insufficient to discipline a price increase, then transactions that are likely to lead to a unilateral or collusive price increase raise serious competitive concerns. In fact, ProCompetencia's report contains a preamble to the entry section that contains a statement that forcefully recognizes the importance of entry.

There is an important, if arbitrary, distinction between entry and supply-side substitution. If a firm can reposition its product within a year to more directly constrain the exercise of market power, it is considered a market participant. On the other hand, if the firm takes between 1 and 2 years, the firm is considered a market entrant.

Once again, merger analysis requires a prospective approach. In addressing entry and product repositioning questions in discussions with competitors, ProCompetencia appears to have relied heavily on the *current* marketing expectations and plans of these competing firms. For example, rather than trying to determine prospective substitution patterns *in response* to potential anticompetitive effects of the proposed merger, ProCompetencia relied on statements from competitors as to how they currently viewed competition among products in the industry. Again, since merger analysis is prospective, ProCompetencia should have elicited responses from competitors about the potential for product repositioning or entry in response to a postacquisition increase in the price of regular and diet carbonated soda.

An important consideration in Coca-Cola's fix-it-first divestiture is the perception that de novo entry into CSD is difficult and unlikely to discipline anticompetitive effects in that market. Offered this admission, it is not surprising that ProCompetencia reached the same conclusion. That stated, ProCompetencia still appears to confuse the supply-side analysis. The main "barrier-to-entry" cited by ProCompetencia in preventing entry into CSD is the need to invest in brand-name advertising. While this may be true, the relevant question is not what it would take for a de novo entrant to discipline a price increase in CSD, but rather what would it take for the "closest" likely entrant or repositioner to discipline the price increase. Since the anticompetitive theory in this case is that Pepsi would be forced to become a marginal player in or completely exit the CSD market, ProCompetencia should have determined the likelihood that Pepsi could reposition or reenter to continue a price increase led by the Coke-Cisneros combination. Because Pepsi's brand reputation would not diminish because of the acquisition, the brand name barrier-to-entry will not affect Pepsi's ability to discipline a CSD price increase.

Immediately following ProCompetencia's decision, Pepsi announced it was reentering the CSD market as a partner in a joint venture with the Polar Group, a large beer manufacturer. Pepsi's departure from CSD marketing appears to be very temporary. Thus, it appears that one cannot support a foreclosure theory whereby Pepsi can be excluded from the CSD market in the long run as a result of the Coca-Cola-Cisneros agreement. This also suggests that an appropriate analysis of entry would suggest that any anticompetitive CSD price increase could be disciplined (and, perhaps, that breweries be considered uncommitted entrants in a CSD bottling market). Unfortunately, although aware of the possible Polar-Pepsi collaboration, ProCompetencia appears unable or unwilling to address these issues.⁴³

⁴³ Pepsi's plan of reentering the market in January was reported in November by at least one of Venezuela's mass circulation daily newspapers. Giuliana Chiappe, *Pepsi Regresa en Enero al Mercado*, EL UNIVERSAL (05 de Noviembre, 1996).

The last substantive issue in ProCompetencia's decision to oppose the merger involved the legal control of the divested assets. The ProCompetencia decision notes that the superintendency remained unconvinced that Coca-Cola had granted effective control to the designated trustees. Of course, without complete independence, the not-so-independent bottling capacity might not actually be available for Pepsi to reenter CSD. Similarly, if the bottling capacity were not independent, then potentially Pepsi could be foreclosed from contracting for bottling. Coke, on the other hand, takes the position that by putting the assets to be divested under a trustee, it is going beyond the American standard, whereby these assets are just "held separate." In any event, if in fact, the divested firm's independence were in question, it is unclear why ProCompetencia did not suggest acceptable alterations. Had Pepsi's subsequent entry through the joint venture with Polar or Coca-Cola's fix-it-first attempts to resolve the antitrust objections been seriously considered, ProCompetencia's conclusions in this case might have been different.

III. Competition policy in Peru

In the early 1990s, President Fujimori proposed various market reforms, including a new competition law.⁴⁴ Peru's enforcement agency, Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) was established on November 6, 1992.⁴⁵ Unlike Venezuela and most other Latin American countries, Peruvian law contains no merger review statute.

Indecopi has seven commissions (the Free Competition Commission, the Commission for Control of Dumping and Subsidies,

⁴⁴ Peru, Decreto Legislativo No. 701, *Disponen La Eliminacion de las Practicas Monopolisticas, Controlistas y Restrictivas de la Libre Competencia* (7 de Noviembre de 1991). EUROPEAN COMMUNITY, *supra* note 2.

⁴⁵ Peru, Decreto de Ley No. 25868, *Ley de Organizacion y Funciones del Instituto de Defensa de la Competencia y de la Proteccion de la Propiedad Intelectual* (6 de Noviembre 1992). EUROPEAN COMMUNITY, *supra* note 2.

the Commission for Consumer Protection, the Commission for Restriction of Unfair Competition, the Technical and Commercial Regulations Commission, the Market Access Commission, and the Market Exit Commission), each charged with enforcing various aspects of the competition law. It has three "offices" (the Office of Distinctive Symbols, the Office of Inventions and New Technologies, and the Office of Copyrights) that regulate intellectual property issues.⁴⁶ Indecopi also has two tribunals or administrative courts (the Intellectual Property Tribunal and the Competition Tribunal), whose members are appointed by the president.

One of the first actions of the Competition Commission (Commission) was to conduct a series of studies to identify market "irregularities." Staff compiled various market parameters, including concentration indexes, the presence of entry barriers, and the importance of the commodity to the "basic basket" of consumer goods, across many industries. In conducting these studies, staff examined publicly available materials and conducted interviews with industry participants, including consumers, producers and suppliers. Although other geographic regions, such as Cuzco and Puno, were examined, the Commission's staff focused mainly on metropolitan Lima.

A. *Background*

Around the same time period as Venezuela's Coca-Cola case, in an action no less controversial albeit less well known in the U.S., the Peruvian competition agency concluded that it had reason to believe that a broiler chicken⁴⁷ cartel existed in the country's largest market and capital city, Lima, but was active in surrounding regions as well. The Commission staff, finding pricing irregularities in broiler chickens, decided to conduct a more

⁴⁶ This information on Indecopi's organizational structure comes from an informative, but undated, brochure published in English entitled *Indecopi*. Indecopi makes this brochure available to the public. See also the text of the enabling statute, Decreto Ley 25868, *supra* note 45.

⁴⁷ Chickens raised for their meat are called broilers.

extensive study of that industry. Staff believed that documents that they requested indicated anticompetitive activity. In September 1996, the Competition Commission opened a formal investigation. The Commission stated that it had reason to believe that producers of live broilers in Metropolitan Lima and Callao had engaged in anticompetitive prices between May 1995 and July 1996. The investigation was not limited to establishing whether the producer cartel colluded to fix prices, but also included determining whether entry barriers were present, whether supply allocation mechanisms were designed to punish chiselers, and what other market conditions abetted collusion.

The investigation ultimately targeted sixteen broiler producers, the member firms of the Committee of Broiler Producers (CPPC), a producers' association under the broader umbrella of the Peruvian Aviculture Association (APA).⁴⁸ The cartel appears to have become more active as a Peruvian producers' response to the intense price pressure brought about by Chilean export of broilers into the Peruvian market.⁴⁹ The formation of the Peruvian cartel may have been facilitated by business practices common under Peru's old statist economic model, whose practices have not yet been overturned in the promarket reform process.

On January 1997, based on the recommendations of the Technical Secretariat, the Competition Commission issued a decision that found the CPPC and APA had cartelized the market for live

⁴⁸ There is often a conflict between a competition agency and producer interest groups that lobby the government for special favors. By its very nature, a promarket competition agency should advocate against direct government subsidies and tariff and nontariff barriers for producer interest groups. See Rodriguez & Williams, *supra* note 8. This is because lax antitrust standards and government protection are substitute methods by which producers can achieve anticompetitive price increase. Mark D. Williams & A.E. Rodriguez, *Antitrust and Liberalization in Developing Countries*, 9 INT. TRADE J. (1995).

⁴⁹ As explained by Alejandro Falla Jara, the technical secretary of the Competition Commission, 85% of Peruvian sales of broiler chickens were live birds, an oddity compared with other Latin American markets. The Peruvian highlands are an exception, where no poultry is raised and therefore most of the sales are imported frozen birds.

broilers in violation of articles 3 and 6 of the competition law. The parties were fined U.S. \$5 million.⁵⁰ The parties contend that the activity question was the result of early attempts to merge various broiler producers and, because Peru has no merger law, sanctions against these activities are outside the scope of Indecopi's purview. The case is under appeal at the Competition Tribunal. The parties have the right to appeal to the supreme court of the country.

B. The broiler case: two issues

This case demonstrates the special dilemma the Peru Commission faces because it has no merger review law. The lack of a merger law was fortuitous for the parties, who argued that Indecopi has no authority to prosecute actions resulting from pre-merger due diligence. Although the Commission spent significant time and effort in rebutting this defense, Secretary Falla continues to view the lack of a merger law as a serious loophole in Indecopi's enabling legislation. According to Secretary Falla, nothing would prevent any firm from disguising cartel activity as pre-merger due diligence, which would immunize the parties to the "merger" from prosecution.

Aside from questions about Indecopi's standing, the broiler price-fixing case seemed sound. In his report submitted to the Commission, Secretary Falla assembled copious amounts of detailed evidence that went significantly beyond what would be required under a *per se* standard. The secretary presented his case as if a full-blown rule-of-reason standard were required by discussing both possible efficiencies and other mitigating circumstances. He undertook this enormous and costly effort for two reasons. First, the secretary chose this case to clarify and explain the Commission's antitrust methodology and procedures, which are similar to those at the U.S. and European Union competition agencies. Second, he was trying to preempt a potential legal challenge by the APA alleging that the Peruvian competition law does not recognize a *per se* legal standard, as do the U.S. and E.U.

⁵⁰ Indecopi, Resolución No. 001-97-INDECOPI-CLC, January 15, 1997 (Indecopi-Resolución).

The broiler chicken case also reveals the remaining ties that the cartel retains with the current government. The cartel is a legacy of the Import Substitution Initiative (ISI) years.⁵¹ Faced with increased market penetration by Chilean rivals, Peruvian broiler producers responded by increasing cartel activity. The producer cartel actively solicited state assistance to raise entry barriers. The cartel members found that institutional relationships formed under previous governments greatly aided their current efforts to collude and raise entry barriers by lowering the costs of cartelization.

The administration of the ISI economic model required large amounts of timely industry data, and so naturally required explicit and persistent relationships between the Peruvian government and producers. The state wished to collaborate with a limited number of interest groups because this minimized the direct costs to the state of administering ISI programs. The APA, as an intermediary between broiler producers and the Peruvian government, was

⁵¹ For a long period of its recent history, Peru based its economic policy not on market competition, but on an industrial policy characterized by intense state control. The ISI model (or variant thereof), prevailed from the 1950s to the late 1980s. In earlier periods, there existed other extensive government-sponsored antimarket policies. The Peruvian legacy of a state-controlled economy adversely affected the structure, conduct and performance of the economy. During the ISI period, imports were restricted through numerous mechanisms, including tariffs, permits, import licenses, export drawbacks, foreign exchange controls, and the institution of "official prices" as a basis for setting tariffs. For example, tariffs were set by active collaboration between the government and domestic producers. Thus, trade policy either severely restricted or altogether eliminated the disciplining effect of imports on inefficient firms and anticompetitive pricing. Not surprisingly, the expectation of continued government protection did not encourage domestic firms to maintain or enhance their competitiveness. As a whole, these statist policies created an increasingly inefficient and noncompetitive industrial sector. For an examination of the ISI, *see* DIANA HUNT, *ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS* (1989); or, JOHN SHEAHAN, *PATTERNS OF DEVELOPMENT IN LATIN AMERICA* (1989). For a general discussion, *see* ANNE O. KRUEGER, *POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* (1993); ANNE O. KRUEGER, *DEVELOPMENT WITH TRADE* (1988).

designed to collect and evaluate data on current and future conditions in the broiler market. The APA also managed the producers' cartel and thereby helped "stabilize" the prices for an important foodstuff. Politically, the government also benefited from this price "stabilization." Besides giving producers the ability to set anticompetitive prices, the relationship between the state and its clients allowed producers to lobby the state for an increasing share of available state resources. State-client relationships were also mutually convenient arrangements to reduce the adjustment costs associated with responding to unexpected economic shocks.⁵² Naturally, trade associations, regional interests, labor unions and other interest groups became defenders of any policies that would benefit their industry relative to others. Thus, members of state-client relationships gained influence and prominence because of their value to both the government and business interests.⁵³ On the one hand, these intermediary cartels reduced the number of participants present in price-setting and other negotiations with the state while, on the other hand, providing an effective medium for furthering their members' interests.⁵⁴ Institutions

⁵² Consider the characterization of the institutional environment of 19th-century Mexico in John H. Coatsworth *Obstacles to Economic Growth in Nineteenth Century Mexico*, 83 AM. HIST. REV. 80, 94 (1978), "The interventionist and arbitrary nature of the institutional environment forced every enterprise, urban or rural, to operate in a highly politicized manner, using kinship networks, political influence, and family prestige to gain privileged access to subsidized credit, to aid various stratagems for recruiting labor, to collect debts or enforce contracts, to evade taxes or circumvent the courts, and to defend or assert titles to land. Success or failure in the economic arena always depended on the relationship of the producer with political authorities." Although this reference is to Mexico, the historical similarities between the two countries suggest that the observation is also applicable to Peru.

⁵³ Nathaniel H. Leff, *Industrial Organization and Entrepreneurship in the Developing Countries: The Economic Groups*, 26 ECON. DEV. & CULTURAL CHANGE 661 (1978).

⁵⁴ Historically, it was necessary that these interest groups act not only as agents of the government, but as cartel ringleaders as well. Generally, the groups carried out two of the three cartel functions: monitoring the agreement and disciplining cheaters. A private cartel's function of finding and setting the monopoly price is, of course, not required of a

often outlive the policies that create them and these groups continue to exert political pressure today.

The legacy of ISI regulation imposes inefficient buyer/seller relationships and other costs on Peru's transition economy that would not exist today if Peru had always had free markets. Throughout the ISI period, numerous institutions specific to ISI emerged to minimize transaction costs associated with private investment and specialization. Producers, workers and consumers made investment decisions in capital and know-how that reflected the rules of the game. Because the liberalization programs were expected by so few, Peruvian companies and workers were unprepared to compete in an economy driven by free and open competition. Not surprisingly, many private firms still try to solicit preferential treatment from the state to remain profitable. Politically vulnerable policy makers recognize the political power remaining in those companies and people who wish to return to a state-dominated economy. Because competition policy decisions can affect the overall success of Peru's economic liberalization program, it should not be surprising that many view the once-fashionable antitrust program as a political liability. In the case of Peruvian antitrust, these chickens have not yet come home to roost. However, we would not find it surprising if the tribunal dismisses the broiler case on the available technicality that the broiler cartel activity is protected premerger behavior.

state-sanctioned cartel where the state sets prices. Thus, an interest group had to concentrate only on monitoring and disciplining its members, which was facilitated by years of association and collaboration with state agencies. The institutionalization of the interest group lowers the costs of anticompetitive activity. First, it facilitates cooperation among members, which in turn aids the cartel in the collective exercise of market power. Second, the institutionalized relationship with the state encourages the development of exclusionary devices to keep out new entrants. Finally, the institutionalized interest group facilitates the disciplining of members who chose to diverge from group practices. The threat of rescinding an import permit or a special subsidy often suffices to prevent any violation of cartel discipline.

IV. Concluding comments

In this article, we critically review recent decisions by Venezuela's ProCompetencia and Peru's Indecopi, and reach a few conclusions. First, although there seemingly exists a transparent methodology by which antitrust issues are analyzed, these decisions suggest that methodological transparency is a necessary but not sufficient requirement for antitrust enforcement to be efficient. Second, antitrust programs in Venezuela and Peru may benefit from a close monitoring of agency performance by both domestic and international parties. An independent, multinational monitoring and reporting system may minimize distortions caused by political influence from domestic and other special interests. Third, it is important to have forums designed to offer commentary and criticism on competition enforcement and advocacy in different countries. While such checks and balances and other feedback are important in creating effective and beneficial competition policies, the development of professional journals and associations to provide this commentary unfortunately seems to be lagging in the countries that have established enforcement agencies. Fourth, these difficulties faced by the new competition agencies suggest the wisdom of delaying the harmonization of competition policy between countries. Harmonization of competition policy may not be as critical as its advocates suggest. The WTO was established to provide a framework to reconcile conflicts between domestic policies and foreign interests stemming from competition in a globalized economy. If the WTO initiative is successful, it will reduce the benefits associated with having a global or regional antitrust authority.