



Peru is a developing country located on the central-western coast of South America, that includes coastal plains, the high peaks of the Andes mountain range and the forests of the Amazon basin. As a result of the diversity of the geographic and climatic regions included within its territory, Peru is a country plenty of natural resources.

Furthermore, due to its condition of heartland of the ancient Inca civilisation, its role as administrative centre of the former Viceroyalty of Peru – one of the two original enormous Viceroyalties in Spanish America- and numerous immigration waves during the second half of the nineteenth century and the first half of the twentieth century, Peru is a multiethnic country with a rich and complex cultural and historical heritage.

#### Political and Economic History

Since its independence from the Spanish Empire in 1821-1824, by virtue of the numerous constitutions enacted since 1823 – Peru is an Unitarian Democratic Republic. Political turmoil and poverty characterised the first decades of the Republic, with warring warlords – known as *caudillos*, which means fighting each other and bitter discussions among supporters of free trade and protectionists.

Also, the period from 1824 to 1850 witnessed a major contest between the government at Lima and regional leaders based in Southern Peru, mainly in Arequipa. The end of the struggle came under President Castilla, at the beginning of the decade of 1850, with the victory of free trade and Lima's centralism, as the revenues from *guano* – the excrement of seabirds used as fertiliser- filled the National Treasury.

The Peruvian nation suffered a major blow at the end of the nineteenth century with its defeat in the Pacific War (1879-1884) at the hands of Chile, Peru's current southern neighbour. The defeat meant the loss of the southern province of Tarapaca, full of saltpetre mines, the ruin of Peru's agricultural infrastructure and the collapse of the

PROFILE	
Population:	27.4 million***
GDP (Current US\$):	81.1 billion**
Per Capita Income: (Current US\$)	2990 (Atlas method) (at PPP.)
Surface Area:	1.3 million sq. km
Life Expectancy:	70.9 years***
Literacy (%):	87.5 (of ages 15 and above)*
HDI Rank:	73 (♦)
Sources:	
- National Institute of Statistics; Central Bank of Perú.	
♦ Human Development Report Statistics, UNDP, 2001.	
(*) For the year 2001	
(**) For the year 2004	
(***) For the year 2005	

government. After the war, Peru began a period of economic and institutional rebuilding that gave shape to the history of the first half of the twentieth century.

The first half of the twentieth century witnessed a process of modernisation – new roads were opened and new urban infrastructure improved the cities – and industrialisation. During this period, the northern coast of Peru was in the hands of few sugar barons, the railroads, mining and oil facilities and utilities were controlled by foreigners. It is worth to note that the Peruvian government of that period was a sort of night-watchman State, with little presence in the economic sphere.

The second half of the twentieth century marked an inflection towards the strengthening of the government's capacities in all fields, including the economic sphere. As a result, public intervention in the economy progressively increased from the 1950s and, during the decade of 1970 – under the military government of General Juan Velasco – a wave of nationalisations of existing companies – previously in the hands of foreigners – and creation of

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new public enterprises, was intended as an attempt to reduce poverty and inequality. The military government adopted the import substitution model and strengthened ties with the communist world, becoming an important client of Soviet military equipment. The legacy of the military government was a huge public sector that comprised many ministries related to productive and economic activities and a lot of public enterprises (many of them, legal monopolies).

The decade of 1980 began with the return of the democratic regime and a slow process of liberalisation of the economy. However, under President Garcia (1985-1990) the government's involvement in the economy was substantial. The economic policies implemented by the Garcia Administration rapidly deteriorated the general situation, ending with a four-digit inflation rate and the need of a new currency – the *Nuevo Sol* – at a 1:1,000,000 exchange rate. It is worth to note that Garcia began his Administration with a new currency – the *Inti* – and that said currency was so depreciated at the end of his term that there were bank notes of five million *Intis*.

The critical economic situation and the menace posed by the terrorist activities of Shining Path, determined that at the beginning of the 1990s, it was necessary to attempt some structural reforms. Among those reforms were the privatisation of the remnants of the state-owned enterprises, the removal of access barriers for new investments, the rationalisation of taxes and the enactment and implementation of competition legislation.

## **The Legal and Institutional Framework of Competition Policy**

### ***Substantive Law***

Legislative Decree 701 – Peruvian competition law was enacted in 1991 as part of the 1990's reforms. The law was clearly written taking into account EU competition law and policy, since its provisions mirror those of articles 81 and 82 of the Treaty of Rome. As a consequence, Peruvian competition law was intended to promote competition and forbid anticompetitive agreements and abuse of dominance. In the same way as its European antecedent, Legislative Decree 701 included ex-ante singular exemptions for certain agreements and it did not include any provision regarding merger control.

The next year, 1992, the Peruvian competition agency – INDECOPI was created, opening its doors in 1993. In the competition-related field, INDECOPI was given responsibility over the Competition Law, the Law against Unfair Competition, the Consumer Protection Law and the Law for the Elimination of Bureaucratic Barriers. It was also given competence over Bankruptcy, Standardisation, Accreditation and Intellectual Property.

It is important to acknowledge that the mandate of INDECOPI is promoting and ensuring competition in all industries, with the exception of those ones subject to regulation. In order to complement INDECOPI's efforts where competition was not possible, several regulatory bodies were created during the 1990s. Those regulatory agencies predominantly supervise – and simulate competition conditions – utilities (water and sewage, electricity and telecommunications). In the telecommunications industry, the regulatory agency is, at the same time, the competition agency for the industry.

Finally, in 1997, the Anti-monopoly and Anti-oligopoly Law for the Electricity Industry (Law 26876) was passed, implementing merger control in the electricity industry. INDECOPI was empowered to enforce the said merger control law also.

### ***Legal Proceedings before INDECOPI***

INDECOPI could be generally divided in two sections, the Administration and the Quasi-jurisdictional bodies. The latter is divided in two areas: Competition and Intellectual Property. Among the competition-related quasi-jurisdictional bodies is the Free Competition Commission that decides cases regarding conducts under Legislative Decree 701 and merger control cases under Law 26876. All Free Competition Commission's decisions can be appealed before the Competition Chamber of the Tribunal for the Defence of Competition and Intellectual Property. The Chamber issues the final administrative decisions on competition cases.

It is worth mentioning that, since INDECOPI is an administrative body, its decisions –in this case, the Competition Chamber decisions- can be challenged before the Courts. The legal proceedings against INDECOPI's decisions begin at the Lima High Court and end at the Supreme Court.

### ***The Implementation of Competition Legislation in Peru***

As mentioned, Legislative Decree 701 – Peruvian competition law – deals with two kinds of conducts: (i) anticompetitive agreements; and, (ii) abuse of dominance. The main criteria used by the Competition Chamber in both fields are described below.

### ***Anticompetitive Agreements***

In *Free Competition Commission v. Peruvian Association of Insurance Companies and Insurance Companies* (a price-fixing case in the Mandatory Traffic Accident Insurance, also known as the *SOAT* case), the Competition Chamber established a new precedent of mandatory compliance related to the prohibition of agreements. This decision was issued in 2003.

The Chamber held that, under article 3 of Legislative Decree 701, all agreements among undertakings which restrain competition and have anticompetitive effects are generally forbidden. However, it was recognised that, under the same provision, defendants must be given an opportunity to prove that, on the balance, their agreement did not have a net negative effect on the general economic welfare. This decision mirrors the application of article 81(1) of the EC Treaty, regarding the general prohibition of anticompetitive agreements, and article 81(3) under the procedural rules of EC Regulation 1/2003, regarding the ex-post singular exemptions to the general prohibition.

This interpretation of article 3 of Legislative Decree 701 superseded a former one established in 1997 via two decisions:

- (i) In *Miguel Segundo Ciccía Vásquez E.I.R.L v. Empresa Turística Mariscal Cáceres S.A.*, the Competition Chamber had adopted the U.S. Supreme Court ancillary restraints doctrine. According to the said doctrine, if the agreement had only the object of restricting competition, it shall have been qualified as a naked agreement and, then, it would have been subject to the *per se* rule; but, if the agreement that restrained competition had been part of a whole agreement aimed at enhancing productivity, then it shall have been qualified as an ancillary restraint and it would have been subject to a rule of reason analysis.
- (ii) In *Free Competition Commission v. Asociación Peruana de Avicultores et. al.*, the Competition Chamber ruled that price-fixing, fixing supply conditions and market allocation were to be subject to the *per se* rule. Thus, in those cases, no defence on effects grounds could be admitted. It should be noted that this decision was issued some time after the one described above.

There were many problems with the 1997 interpretation. The most evident for any Peruvian competition practitioner was the direct contravention of the requirement of article 3 of Legislative Decree 701 of a net negative effect on general economic welfare as condition of the prohibition. The decision issued in *Free Competition Commission v. Asociación Peruana de Avicultores et. al.*, literally stated that there was no matter if the agreement caused a net negative effect on general economic welfare or not.

Moreover, the decision issued in *Free Competition Commission v. Asociación Peruana de Avicultores et. al.*, was contradictory with the ancillary restraints doctrine adopted by the Chamber in *Miguel Segundo Ciccía Vásquez E.I.R.L v. Empresa Turística Mariscal Cáceres S.A.* because – recalling the US Supreme Court BMI case of 1979 – even a conduct prosecuted as a price-fixing agreement could actually result, at the end, an ancillary restraint, therefore, it should be subject to a rule of reason analysis. Then, in such a case, under the terms of *Free*

*Competition Commission v. Asociación Peruana de Avicultores et. al.*, the *per se* rule must be applied, but, under the terms of *Miguel Segundo Ciccía Vásquez E.I.R.L v. Empresa Turística Mariscal Cáceres S.A.*, the rule of reason must be applied. This situation clearly needed to be solved and clarified.

The 2003 decision eliminated the confusion created by the contradictory interpretations of 1997 and replaced both of them by a clear and simple rule, supported not only by the literal mandate of article 3 of Legislative Decree 701 but also by the long history of application on article 81 of the EC Treaty.

The message contained in the 2003 decision was clear: all agreements that have a negative net effect on the general economic welfare are forbidden and must be prosecuted and heavily punished, while those exceptional agreements that have a positive net effect on the general economic welfare are exempted of the prohibition. The exemption of the prohibition is exceptional and the efficiencies required by the law must be sufficiently proved on economic grounds before it can be granted.

#### ***Abuse of Dominance***

In *CUT & Javier Diez Canseco v. Private Pension Funds Administration Companies* (also known as the AFPs case), the Competition Chamber set a new interpretation regarding the scope of the prohibition of abuse of dominance as stated in Legislative Decree 701. This decision was issued in 2004.

The Chamber held that, under articles 3, 4 and 5 of Legislative Decree 701, the prohibition of abuse of dominance covered both exploitative and exclusionary conducts. It also ruled that, whenever the dominant position arose from governmental formal intervention and there was a regulatory agency, then, the said regulatory body shall be regarded as the authority in charge of the investigation and prosecution of any misconduct of the undertakings subject to regulation.

Any discussion regarding the scope of the prohibition of abuse of dominance may seem useless, since, at least in the EC practice, there is no doubt that both, exclusionary and exploitative conducts, are clearly regarded as abusive under article 82 of the EC Treaty. However, in Peru, there were some attempts to boldly read Peruvian competition law as if it was mirroring US antitrust law (e.g., the attempt to adopt the *per se* rule and the ancillary restrictions doctrine, described in the precedent section, and, the attempt to assimilate the prohibition of abuse of dominance of Peruvian competition law to the prohibition of monopolisation under the US antitrust law). Needless to say that, those attempts performed in the late 1990s, were condemned to failure due to their inconsistency with the legal provisions of Legislative Decree 701.

The decision of the Chamber suppressed any discussion regarding the scope of the prohibition of abuse of dominance, sending a simple and clear message to dominant undertakings: that all abusive conducts – no matter if exploitative or exclusionary – from dominant companies were anticompetitive and, therefore, illegal.

### **Due Process**

In *Free Competition Commission v. Clorox Perú S.A.*, (also known as the *Clorox* case), the Competition Chamber set a precedent of mandatory compliance related to due process in investigations and legal proceedings regarding the enforcement of Legislative Decree 701 provisions. This decision was issued in 2005.

The Chamber held that, under the Constitution and Law 27444, due process shall be respected in all investigations and legal proceedings directed to the enforcement of the substantive prohibitions of Legislative Decree 701. Particularly, the Chamber ruled that, whenever the authority required pieces of information from the defendants, it must be done under reasonable grounds that have to be duly notified to them. The establishment of this due process rule is consistent not only with constitutional provisions but with the European Court of Justice doctrine.

Currently, there is no general merger control legislation in Peru but an isolated particular merger control mechanism in the electricity industry. In order to improve and complete Peruvian competition law, INDECOPI is proposing a bill to establish an integral and general merger control system in Peru.

### **Regulatory Framework**

In order to support the process of privatisation, which started in the 1990s, 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). Through this process several institutions were wound up and replaced by new bodies such as:

- OSIPTEL, the supervising agency of private investments in telecommunications;
- OSINERG, the supervising agency of investment in energy;
- OSITRAN, the supervising agency of investment in infrastructure of public service transport; and
- SUNASS, the national superintendence of sanitation services.

These agencies are meant to simulate competition in markets where there are natural monopolies. However, their activities have also reached some competitive markets. For instance, OSIPTEL regulates the monopolised telephone market, but also the competitive mobile one.

### **Telecommunications Sector**

Based on the Legislative Decrees 701 and 702, OSIPTEL regulates the telecommunications sector. Though, Decree 701 entitles INDECOPI to ensure that competition regulations are duly respected in all the economic sectors, Decree 702 provides OSIPTEL with exceptional entitlement to regulate competition in the telecom sector.

As per the Supreme Decree No. 020-98-MTC, August 1998, OSIPTEL established general guidelines and criteria on free and fair competition as a means to guide economic agents in the telecom sector.

### **Energy Sector**

The power sector underwent vertical and, to a lesser degree, horizontal restructuring initiated in 1994, following enactment of a new Electricity Concessions Law 25844 in 1992. After the enactment of electricity concessions law, the Peruvian Government has reduced its participation in the power sector by privatising some of its commercial assets and allowing the participation of private investors.

Existing regulatory institutions were modified and given greater authority and definition under the 1992 Concessions Law. Jurisdiction is mainly shared between the rate-setting Tariff Commission and the National Direction of Electricity.

### **Consumer Protection**

The Peruvian law on consumer protection (Legislative Decree 716, 1991) is comprehensive in its coverage of these issues. Though it has undergone various changes, it still has certain deficiencies:

- legal vacuum with regard to impossibility of abdicating one's consumer rights; and
- lack of legal framework for consumer associations, resulting in absence of clear rules on the access to justice on behalf of consumers.

The National Institute for the Defense of Competition and Consumer Protection (INDECOPI – *Instituto de Defensa de la Competencia y de Protección al Consumidor*), a government entity, was created in 1992 by Law Decree 25868 to resolve disputes and enforce rules regarding adequate market performance and consumer protection.

### **Concluding Observations and Future Scenario**

Peruvian competition policy has been subject to major improvements since 2001. In fact, there are strong differences between cases ruled on before and after 2001, that are particularly evident in a progressive improvement in respect of due process and in compliance with the constitutional and legal provisions. This is due to the fact that the current members of the Competition Chamber of INDECOPI's Tribunal – all Professors of Law or

Economics in the most prestigious universities of Lima – seem to be resolving conflicts according to legal and theoretical criteria. This represents a major change with the ideological criteria that seemed to inspire the Chamber’s decisions before 2001.

It is evident that, although there are aspects that could be strengthened, in particular the legal framework – particularly via the inclusion of merger control – the reinforcement of capacities, and the dissemination and awareness of the benefits of a competition culture, there is a general sensation of progress towards a competition law

that fits the standards used by the most traditional competition agencies of the world, particularly the European Commission.

It has been observed that in spite of 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. Further, the relationship between INDECOPI and the other regulatory authorities needs to be improved.

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