Colombia ❖

Colombia is located at the northern end of South America bordering the Caribbean Sea, between Panama and Venezuela, and the North Pacific Ocean, between Ecuador and Panama.

A several thousand strong anti-insurgent army of paramilitary has grown up in recent years, challenging the insurgents for control of territory and the drug trade, and also the government's ability to exert its dominion over rural areas. While Bogota steps up efforts to reassert government control throughout the country, neighbouring countries worry about the violence spilling over their borders.

Economy*

Colombia's sound economic policies and promotion of free trade agreements have strengthened its ability to face external shocks. Real GDP has grown more than 4 percent per year for the past three years, continuing almost a decade of strong economic performance. All three major ratings agencies have upgraded Colombia's government debt to investment grade.Nevertheless, Colombia relies heavily on oil exports, making it vulnerable to fall in oil prices. Financial growth is stymied by insufficient infrastructure, damaged further by latest flooding. Moreover, the unemployment rate of 10.8 percent in 2012 is one of the highest in Latin America. The Santos Administration's foreign policy has focused on bolstering Colombia's commercial ties and boosting investment at home.

Colombia is a WTO member since April 30, 1995 and of Latin America Association of Integration (ALADI) as well. It participates in the Andean Community, has Free Trade Agreement between the Group of Three (G3) and has negotiated a FTA with the United States. The Agreement between with the US (NAFTA) was ratified by the US Congress in October 2011 and is awaiting execution in 2012. Colombia has signed or is negotiating free trade agreements with several countries, including Canada, Chile, Mexico, Switzerland, the European Union,

PROFILE	
Population:	45.2 million***
GDP (Current US$):	328.422 billion**
Per Capita Income: (Current US$)	7,131 (Atlas Method)*** 10,248 (at PPP.)**
Surface Area:	1.14 million sq. km
Life Expectancy:	74.79 years***
Literacy (%):	93 (of ages 15 and above)**
HDI Rank:	87***

Sources:
- World Development Indicators Database, World Bank, 2011
- Human Development Report Statistics, UNDP, 2011
- CIA World Fact Book, 2012

(**) For the year 2011

(***) For the year 2012

Venezuela, South Korea, Turkey, Japan and Israel. Foreign direct investment - particularly in the oil sector - reached a record US$10bn in 2008 but fell to US$7.2bn in 2009 before starting to recover in 2010, and appears to have reached a record US$13bn in 2011. Colombia is Latin America's third-largest oil exporter to the US.

Inequality, underemployment, and narco-trafficking remain important problems and Colombia's infrastructure needs significant improvements to sustain financial growth. In late 2010, Colombia suffered its most severe flooding in decades with damages estimated to exceed US$6bn. The rains resumed in 2011 causing more damage to crops and infrastructure as well as killing hundreds of Colombians besides displacing millions.

Competition Evolution and Environment

Colombian laws of competition and regulations have been promulgated and published in accordance with Article 333 of the Constitution. According to that article, the

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* CIA

government is obliged to intervene in the Colombian economy in order to prevent unfair competition and anti-competitive behaviour, and ensure free and fair competition in all markets. The legal framework governing antitrust matters in Colombia has two main sets of rules, i.e.

- Law 155/59 which establishes the basic principles governing the Colombian regime antitrust and competition, and
- Decree 2153/92 that determines the basic structure, the scope of the authority and powers of the competition authority and establishes specific rules governing anti-competitive behaviour.

Colombia's competition law is one of the oldest in Latin America. The law was approved by the national Congress in 1959, on the basis of the 1886 Constitution. This first law which is still largely in intact, was first customised in 1963, then developed by Decree 1302 of 1964, and experienced a significant addition with the issuance of Decree 2153, 1992, and has now been improved by Law 1340, 2009.[1]

Competition Law and Institutions

Colombian law on restrictive business practices, the Law 155/59, is 50 years old. It was accepted in 1959 (hereafter it is known as the 1959 law), on the aspects of article 32 of the 1886 Structure, which assigns to the State the general direction of the economy and empowered to intervene in specific circumstances.

Article 1 of the law articulates the basic legal standard applicable to cases of conduct, which prohibits "agreements or understandings aimed at limiting production, supply, distribution or consumption of primary resources, products, goods or services, or national foreign origin, and in general all kinds of practices, procedures or systems designed to limit competition and maintain or determine unfair prices."

Law 155/59 also establishes a system of prior control of mergers and acquisitions (which in Colombia are called "economic integration"), requiring companies engaged in the same business "to inform the national government transactions that intend to pursue the purposes of merger, consolidation or integration thereof, irrespective of the legal form of such consolidation or merger integration, and states that companies" may proceed "with the transaction if the Government has not objected within 30 days of the filing of the complete notification documentation."

Article 10 of Law 1340/09 tailored the method of dividing the notification process in three stages. The first is a request for appraisal and completed three days after submission of a brief accompanying report. The second comprises all procedures derived from the previous step and completed within 30 days of the filing of the notice of interested parties, and the third stage involves the procedures that must be completed within three months after the parties concerned have provided all the information. Notwithstanding the above, the transaction shall be authorised if the Government has not objected within three months of receipt of complete information.

The 1959 Act was amended by Decree 3307 of 1963, and implementing regulations were issued in 1964 by Decree 1302. These regulations, however, were not enough to implement the law effectively and rarely applied in order to preserve competition. Instead, it has mainly been used as the legal basis for the application of price controls.

This situation began to improve in the 1990s, coinciding with the economic liberalisation policy. The new constitution, adopted in 1991 established competition as a constitutional right, provided that: (a) "economic competition" is a collective right or interest, (b) that "economic activity and private initiative are free" and (c) that "the State, by rule of law, prevent the obstruction or restriction of economic freedom and prevent or control any abuse that people or businesses make its dominant position in the market." This new Structure was followed in 1992 by the promulgation of Decree 2153 (hereafter the 1992 decree), which had an essential aspect in developing a new competitors technique in the nation.

The Decree No. 2.153 of 1992 contains provisions concerning free competition and restrictive trade practices. It was designed to stimulate competition in the market and to improve the efficiency of the economy and the well being of entrepreneurs and consumers.

Article 46 of Decree No. 2.153 of 1992 stipulates that under the terms of Act No. 155 of 1959 all practices, which affect freedom of competition in markets and are considered illegal under the Civil Code, are prohibited.

The Law and the Decree are applicable to all public and private companies carrying on entrepreneurial activities – firstly, because the Law makes no distinction between two types of firms; and secondly, because the Decree specifically stipulates that the Superintendent's terms of reference provide for supervision of all entities carrying on economic activities, irrespective of the type of activity or the legal character of the entity carrying on that activity.

General supervision is exercised to guarantee free competition in national markets, without supplanting the powers assigned in current legislation to other authorities, such as Household Public Services, which, under Law No. 140 of 1993, is the tutelary body of the Public Services Supervisory Board. In the financial sector, under Decree-Law No. 663 of 1992 and Decree No. 2159 of 1995, responsibility for supervision and control lies with the Banking Supervisory Board.

The Decree, while prohibiting all practices contrary to freedom of competition, specifically accepts agreements

to further research and development activities, agreements on compliance with rules, standards and measures and agreements relating to the use of procedures, methods and systems.

Coincidentally, however, the liberalisation in the early 90s also presented important changes in public services that affected competition policy. Three regulatory commissions (in telecommunications, water and sanitation, electricity and gas) with a general mandate to strengthen competition and prevent monopolistic practices, in addition to the normal regulatory powers (speed adjustment, the tender conditions technical and commercial regulations) were created. From 2004 the disadvantages of this model were becoming obvious, and a second circular of reforms was started. While the first change of competition law was aspect of a growth technique that was centered on starting the Colombian economic system to worldwide competition, this second circular was aspect of a strategy of increasing market competition nationally, as described in the Nationwide Development Plan 2006-2010.

Under the Nationwide Development Plan, the focus was on upgrading the competition protection system in order to improve the investment and business environment in the country, and to drive the development of world-class competitors. The result was the enactment of important amendments to the competition law, recently accepted by Congress and signed by the President on July 24, 2009 (Law 1340/09). The stated purpose of the regulation is "to upgrade the guidelines regulating the security of competition to indicate current market circumstances, to help users track and to optimise the tools available to the national regulators for implementing the constitutional responsibility to secure free economic competition within the national area."[2]

Colombian Competition Authority

The Superintendent of Industry and Commerce (SIC) is a high administrative authority in charge of the protection of economic public order and the preservation of competition. It enjoys administrative, financial and budgetary autonomy. SIC has also judicial authority to investigate and decide on unfair trade practices.

Accordingly, SIC aims its activities towards the investigation and sanction of anticompetitive and unfair trade practices. SIC applies the general competition principles to all economic sectors without special free competition rules. The enactment of the 1340/09 law resulted in the SIC be designated the National Competition Authority, the elimination of most antitrust enforcement powers of other agencies. Only the Civil Aviation Authority and the Financial Supervisory retain limited powers merger approval, and the two should consult SIC to use those powers. Special competition regimes and additional authorities have been created for sectors of the economy, such as public residential services, telecommunications, television, financial and insurance systems, health, maritime transport and aeronautical sectors.

Decision No. 285 of the *Commission of the Cartagena Agreement*, signed in Lima (Peru) on March 21, 1991, contains regulations to prevent or correct distortions to competition caused by practices restrictive of competition within the Andean Group. This group consists of Bolivia, Colombia, Ecuador, Peru and Venezuela. The free trade agreement between the Group of Three, G3 (Colombia, Mexico and Venezuela), in paragraph (a) of article 16-03, provides for the creation of a Competition Committee with a specific mandate relating to subjects with a bearing on competition policies and trade in the free trade zone. The Committee is composed of representatives of the three countries.

The SIC has two major application toolkits. The first one is its capability to impose charges on organisations and people in the case of any violation of guidelines regarding merger control or anti-competitive conduct. In the situation of organisations, the SIC may impose charges of up to 100,000 times the minimum wage (MMW), roughly comparative to US$27mn or 150 percent of the benefit resulting from the appropriate anti-competitive action, which is a larger amount. In the situation of individuals, charges may go up to 2,000 MMW, approximately comparative to US$540,000.

The second one is its capability to use its newly obtained leniency powers to arrive at contracts with natural or legal persons who have participated in anti-competitive agreements or conduct in order to ensure their cooperation in exchange for reduced penalties or foregone.

The SIC's leniency abilities are subject to the following common rules:

- The SIC may partly or absolutely abandon any charges that would otherwise be enforced on organisations or individuals that choose to cooperate, but only the first organisation or person that starts participating with the SIC will be eligible to a have any potential charges absolutely forgone by the SIC.
- The 'mastermind' behind the anti-competitive conduct may not receive any advantages from the SIC.

The SIC will figure out the level of the advantages provided to a given organisation or individual on the basis of an assessment of the following factors:

- The real impact of the cooperation in the procedure of proving the existence of a breach and penalising those involved in it. The SIC will look at whether the details were useful in identifying the opportunity of the conduct, the identification of those enjoying it and the real benefit made by them due to their contribution.

Box 1: SIC v Fendipetroleo

Sanction was imposed on the National Gas Stations Trade Association - FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division), FENDIPETRÓLEO (Casanare Division), and six Gas Stations in Duitama. The Superintendence of Industry and Commerce in Resolution 71794 de 20115 stated that FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division) and FENDIPETRÓLEO (Casanare Division) transgressed the provisions of Article 1 of Law 155 of 1959 and paragraph 2 of Article 48 of Decree 2153 of 1992, by influencing six (6) gas stations to raise their prices for regular gasoline and diesel. Furthermore, the gas stations were also influenced to desist from their intention of decreasing the prices of the mentioned products. Moreover, the Superintendence found that the retail prices of the investigated gas stations identically matched the prices suggested by monthly circulars from FENDIPETROLEO's Boyacá and Casanare Divisions. The Association acted as a hub for pricing information exchange and for discussions regarding prices and pricing strategies for unleaded fuel and diesel fuel. SIC found that consumers paid an excess of COP $2,500 million during 2009 for oil prices.

Source: http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)10&docLanguage=En

Box 2: SIC v Consorcio Vial Colombiano and Consorcio Oriente

The Superintendence of Industry and Commerce found that two joint ventures agreed to determine which of them would be the winner of a public tender for the construction of a number of national roads. FONADE - the National Agency for Planning Procurement Contracts - found evidence suggesting that two of the agents participating in the tender colluded in order to exclude a third participant: CONCONCRETO. The SIC, while investigating, also found that two of the submitted proposals evidenced coincidences which suggested the existence of bid rigging. While conducting the investigation, it was found out that the parties had an agreement with the purpose and the effect of winning the tender, regardless of other members' participation. This was possible through cover pricing and joint assessment of different variables such as costs of other participants and the knowledge of the tender's terms of reference. Firstly, the Superintendence, through circumstantial evidence, encountered multiple coincidences between the parties' proposals. These were only possible under a collusive scenario: similar spelling mistakes and payments for insurance made at a same date and time. Secondly, mathematical methods were applied to demonstrate the cartel's existence.

Source: http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)10&docLanguage=En

- Synchronisation information, i.e., whether the details were obtained when it was still useful.[3]

Anticompetitive Business Practices

Pursuant to Decree 2153/92, any behaviour that impacts or reduces free competition is prohibited. There are two different categories of behaviour that are regarded restrictive to competition:

(i) Dealings with competitors-anti-competitive agreements; and
(ii) anti-competitive conduct and misuse of dominant position.

In case the SIC believes that any market participant has performed any of the acts mentioned, the SIC can order the relevant competitors to cease any anti-competitive behaviour. In addition, the SIC can use its coercive powers to impose fines. The breaching competitor can offer sufficient guarantees as to the end of the relevant anti-competitive activities, which will end an investigation conducted by the SIC. However, requests for cease and desist agreements may be accepted by the SIC before the end of the investigative stage of the process. Moreover, any breach of the terms of an agreement to cease and desist will be considered an independent anti-competitive practice and subject to the same penalties.

Regulatory Framework

The regulatory framework is defined well in Colombia only in the Constitution of 1992. Later, in the complementary Law No. 142 of 1994, the sectors were defined and further perfected with complementary Laws No. 286 of 1996 and 632 of 2000. Only then was the creation of the regulatory institutions identified as essential.

In Colombia, the regulatory framework has been divided in four economic sectors with regulatory institutions: Telecommunication Regulatory Commission (CRT) and National Television Commission (CNTV) under the Communication Department, Drinking Water and Sanitation Basic Regulatory Commission (CRA) under the Environment Department and Energy and Gas Regulatory Commission (CREG) under the Mines Department.

There are still any sectors without particular institutions, like the financial sector, transport and environment. The objective of Law No. 142 is to assure competition in sectors under public and/or private administration, while retaining the possibility of intervention by the government to promote overall welfare.

Telecommunications Sector[4]

The telecommunications sector in Colombia has characteristics that differ substantially from most of the countries of the world. Today, the sector is open to competition in all services.

Revenue from the telecommunications sector contributes almost three percent of the Gross Net Product. The Ministry of Telecommunications is in charge of planning and regulation of mobile, cellular telephony, data transmission services, Internet service providers (ISP), radio-electric spectrum, the technical plans of numbering and signaling and broadcasting services.

There are also two regulatory commissions: one in charge of television – National Television Commission, and the other in charge of regulating telecommunications.

In 1994, the Telecommunications Regulatory Commission (CRT), was created by the Public Utility Services Law. The local telephony service was open to competition. This Law also established the parameters by which the CRT could define the structure for long distance service. The CRT has become an active, independent entity that was able to break 50 years of long distance monopoly.

Colombia Law No. 142 of 1994 was amended by Decree No. 2870/2007 which sets out the general legal framework for telecommunications in Colombia. It includes licensing, competition policy, scarce resources management, and penalties and sanctions. This Decree is to establish a regulatory framework that allows the convergence of public telecommunications services and telecommunications networks of the State, to ensure access to and use of networks and services to everyone in the territory and promote competition between different operators.[5] Decree No. 2870/2007 has been amended by Decree 945 & 147of 2008.

Energy Sector[6]

Energy sector is of enormous importance as it yields important economic benefits. The law for the electricity sector was first passed in 1990 through a decree. The current structure of the electricity sector in Colombia is a direct result of the stipulations formulated in the Electricity Law and the Public Utilities Services Law.

CREG has been operating satisfactorily since 1993 when it was established by decree, and affirmed by law in 1994, as the new institution in charge of regulating the electricity and gas sectors. Its independence has been questioned, as three ministers sit in its eight-member board of directors, and most of its budget comes from the Ministry of Mines and Energy.

The 1994 Law also created the Superintendent of Public Services (SSP) to oversee the compliance of public service enterprises with legal and regulatory criteria.

CREG mostly maintains a strict division between generation, transmission, and distribution activities, though it does allow some heritage organisations to sustain vertically-integrated functions. In the generation sector, there are about three dozen effective companies, and the significant players are EMGESA, EEPM, ISAGEN, and EPSA. EMGESA is the largest, managing about one-fifth of Colombia's generating capacity. As part of liberalisation programmes, the Colombian government has continued to decrease its stake in generating companies. The largest electricity distributing company in Colombia is CODENSA, which serves over one million customers in Bogota and surrounding areas.[7]

Consumer Protection

The Constitution has many Articles about consumer protection – specifically No. 78 to control quality and consumer organisations' freedom, and No. 88, 'the law will regulate the people's action for the protection of the rights and collective interest, its relation with free competition'.

On September 13, the Senate of Colombia adopted a new consumer protection law, promoted by President of the House of Representatives, which now goes to President for his promulgation.[8]

About free competition, Article 333 says: "Free competition is the right of all who assume its responsibilities… The State, under mandate of the Law, will prevent the obstruction or restriction of economic liberty and will prevent or control any form of abuse that persons or businesses make of their dominant market position. The law will restrict the scope of economic freedom when the Nation's social interest, state of affairs, and cultural patrimony demands it".

Article 334 gives to State the right to intervene to guarantee the development and to promote productivity and competitiveness.

Concluding Observations and Future Scenario

Colombia competition regime deserves praise for its vitality and flexibility. It seems to have made steady progress during the past several years, despite laws that were deficient in many respects and has resources. The Colombian system of competition has strengths and weaknesses. Law 1340/09, 2009, has corrected some deficiencies, but several other remain. Many of these require more laws, although some may be rectified by regulation and changes in practice by the SIC.

One of the strengths of the defense system of Colombia competition is their constitutional status. In its judgments, the Constitutional Court Tribunal has reached a balance between protection and the promotion of free competition and other fundamental rights enshrined in the

Constitution, and this makes it easier for law enforcement authorities. There is also a system flexible enough to modify and update the legislation in line with the strategic plans of the government, which now focus in improving the overall competitiveness of the economy.[9]

Endnotes

1 http://centrocedec.files.wordpress.com/2010/06/eur5664-anti-esguerra1.pdf
2 http://www.oecd.org/countries/colombia/44110853.pdf
3 http://www.bu.com.co/bup/ArticulosBUIngles/2011%20Antitrust%20Review%20of%20the%20Americas.pdf
4 http://www.connect-world.com/Articles/5Colombia.html
5 http://ppp.worldbank.org/public-private-partnership/sector/telecom/laws-regulations#columbia
6 www.iadb.org/sds/doc/1823eng.pdf
7 http://www.eoearth.org/article/Energy_profile_of_Colombia
8 Latin News.com
9 OECD Columbia – Peer Review of Competition Policy & Law