A Report on Barriers to Competition in Food-Related Markets in El Salvador, Guatemala, and Honduras

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Executive Summary

Prepared at the request of the Latin America and Caribbean Bureau of the United States Agency for International Development (USAID), this report identifies barriers to competition that affect food security in El Salvador, Guatemala, and Honduras. This report also: describes the common ways consumers access food and how producers get food to markets; discusses the impact of barriers to competition on food security, consumer welfare, and economic growth; and identifies measures that may be taken to improve consumer welfare and food security. The report is part of a capacity-building program to improve food security and economic prospects by developing the capacity of the relevant authorities in El Salvador, Guatemala, and Honduras to address barriers to competition.

Healthy competition in food-related markets enhances the availability, accessibility, utilization, and stability of food supplies, and contributes to increased food security. Barriers to competition identified in this report include anticompetitive business conduct like price fixing and bid rigging, regulatory and regional trade barriers, and barriers to accessing inputs and markets. Such barriers often result in higher consumer prices, lower output, fewer product choices, reduced incentives to innovate, and decreased customer service. Applying competition law and policy to promote competitive markets and prevent anticompetitive business conduct, in conjunction with other policies, can significantly improve food security in the Central American region. In addition, applying competition law and policy to prevent anticompetitive conduct can support increased productivity and national competitiveness.

Government policies and regulations can also serve as barriers to competition. Like anticompetitive business conduct, regulations can distort markets, add costs, and reduce choice. In some cases, regulations protect domestic oligopolies and firms, insulating local firms from competition. These regulations may allow protected firms to maintain higher prices and survive without innovating. While such laws and regulations often are motivated by legitimate public interest concerns, regulations and practices that undermine the benefits of competition may in some cases reflect a lack of understanding of the importance of balancing and harmonizing regulations with competition and legitimate policy goals.[1] For example, regulations may be put in place at the behest of well-connected individuals or firms that seek governmental protection from competition. This report identifies several examples of regulatory systems that serve as barriers to competition.

El Salvador and Honduras have adopted competition laws that proscribe anticompetitive conduct and have created competition agencies that apply those laws.[2] Guatemala has committed to adopting a competition law.[3] The competition agencies in El Salvador, the Superintendencia de

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[1] *See, e.g.,* Organisation for Economic Cooperation and Development (OECD), "Mainstreaming Competition Policy into the Overall Economic Policy and Government Actions in Latin America and the Caribbean – Contribution by the United States," September 2014, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2014)17&docLanguage=En.

[2] El Salvador, "Ley de Competencia," Decreto Legislativo No. 528, published December 23, 2004, Diario Oficial No. 240 [as amended]; Honduras, "Ley para la Defensa y Promoción de la Competencia," Decreto Legislativo No. 357-2005, Art. 60, published February 4, 2006, Diario Oficial [as amended].

[3] *See* EU-Central America Association Agreement, Part IV, Article 279, CENTR-AM/EU/en 110, June 2012, *available at* http://trade.ec.europa.eu/doclib/html/147664.htm.

Competencia (SC), and in Honduras, the Comisión para la Defensa y Promoción de Competencia (CDPC), have the authority to conduct investigations and prevent anticompetitive business conduct, and they each work to identify government policies and regulations that conflict with principles of competition. The competition agencies are actively working to promote and enhance competition in food, agricultural, and related markets, but are constrained by lack of resources, authority, and enforcement capacity.

Inputs and assistance activities would support reducing barriers to competition and could make a difference in improving food security in El Salvador, Guatemala, and Honduras. Effective competition policy, which includes competition laws, competition law enforcement, and competition advocacy, can reduce prices, increase consumer choice, open markets, and contribute to food security and consumer welfare. To do so, they must be properly applied by competition agency staff trained to apply the necessary investigative, analytical, and economic tools. Assistance would focus on developing and implementing more effective competition law and policy in the region and working with existing agencies to advocate within governments for pro-competitive policies and regulations. Competition agencies, governments, multinational organizations, and other stakeholders can all play a role.

To take effective action against anticompetitive conduct, including cartels, unilateral conduct like monopolization,[4] or anticompetitive mergers, a jurisdiction must have both well-drafted competition legislation and a properly resourced and empowered agency to enforce that law. All three countries, but especially Guatemala, can benefit from understanding other countries' experiences with developing strong and effective competition law and policy. In Guatemala, the greatest need is to support national efforts to build domestic political support for a robust competition law. In El Salvador and Honduras, the greatest need is to strengthen the existing competition authorities' capacity to detect, investigate, and remedy anticompetitive conduct to improve how markets function.

Competition authority leaders, managers, and staff need to continue learning how to better detect and understand the likely effects of business practices on competition. Leaders, managers, and staff require knowledge and expertise in how to conduct effective investigations, identify competitive issues caused by certain business conduct, and develop remedies that solve the competitive issues. In this area, and in others, competition agencies benefit immeasurably by sharing experiences and building skills by working with sister competition agencies and international organizations such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD).

To reduce regulatory barriers to competition, assistance can be provided to identify and understand the competitive impact of policies and regulations. While competition agency officials have long recognized the relationship between regulation and competition, finding ways to effectively address barriers to competition created by regulations and to build bridges to regulators so competition may be considered in the regulatory process has proved more of a challenge. Effective competition law and policy require support from other institutions, including regulators in other government agencies and members of the judiciary. In cooperation with other government agencies and the judiciary,

[4] Unilateral conduct by a dominant firm is characterized as monopolization in the United States and as abuse of dominance under Central American laws. There are some differences between the two – principally that abuse of dominance can impose special responsibilities on dominant firms while monopolization does not – but for the purpose of this report, they are analytically similar.

separate trainings for agency staff and judges would support effective competition law and policy in El Salvador, Guatemala, and Honduras.

A combination of these inputs and other assistance activities can support increased food security in El Salvador, Guatemala, and Honduras.

Preface

This study was conducted at the request of the Latin America and Caribbean Bureau of the United States Agency for International Development through an interagency agreement with the U.S. Federal Trade Commission (FTC), and with the support of the Antitrust Division of the U.S. Department of Justice (DOJ). The project leaders were Molly Askin and Russell Damtoft of the FTC and Melanie Krebs-Pilotti of the DOJ. Significant assistance was provided by Prof. Dale Furnish of the Arizona State University Law School, Taylor Thomas of the DOJ, and Sara Salvador and Michael Ferrari of the FTC. The views expressed herein do not necessarily reflect the views of the Federal Trade Commission, the Department of Justice, the U.S. Agency for International Development (USAID), or the United States of America.

Indispensable contributions and insights were provided by the Superintendencia de Competencia in El Salvador, the Comisión para la Defensa y Promoción de Competencia in Honduras, the Competition Policy team at the Investment Climate Department of the World Bank Group, and the USAID Latin America and Caribbean Bureau.

A Report on Barriers to Competition in Food-Related Markets in El Salvador, Guatemala, and Honduras

This report focuses on the competitive barriers affecting food, agricultural, and related markets in El Salvador, Guatemala, and Honduras. In particular, it focuses on markets that affect products in *la canasta básica*, including rice, beans, milk, sugar, poultry and corn – staple foods vital to most consumers in the region. It identifies a number of potential barriers to competition that may adversely affect consumer welfare in food, agricultural, and related markets, and focuses primarily on the barriers that can be addressed through effective competition policy, either through competition law enforcement or competition advocacy.

The competition agencies in El Salvador, the Superintendence of Competition (SC), and in Honduras, the Commission for the Defense and Promotion of Competition (CDPC), have studied food-related markets and analyzed competitive conditions in markets for many food products in *la canasta básica*. This report draws on their findings, as well as other published works and observations from knowledgeable members of the public and private sector, non-government organizations, and representatives of other government agencies and other governments.[1] Some of the barriers identified in this report, such as poor infrastructure and security concerns, go beyond the scope of competition policy, but are identified for the benefit of other agencies and organizations that may wish to consider the impact on competition as they seek to address them. These barriers are discussed in the report for completeness, but they are not discussed in detail.

After introducing how food is distributed in the El Salvador, Guatemala, and Honduras, often referred to as the "Northern Triangle," this report discusses the negative impacts that barriers to competition have on consumers and small producers and the connection between competition, food security, and economic development. The report next identifies specific barriers to competition, dividing them into several categories: (1) anticompetitive business conduct; (2) government policies and regulations; (3) trade barriers that favor domestic incumbents; (4) input access barriers; (5) market access barriers; and (6) competition policy implementation barriers. The final section of the report identifies inputs to help reduce barriers to competition by strengthening the domestic institutions charged with addressing anticompetitive conduct and addressing anticompetitive legislation and regulation in ways that will help El Salvador, Guatemala, and Honduras develop, promote, and enforce effective competition policies to support increased food security.

I. The path from farm to kitchen

Markets for food products and the ways in which end consumers purchase food in El Salvador, Guatemala, and Honduras have undergone significant changes in the past decade, most notably due to the rapid expansion of supermarkets, the availability of imported goods due to reduced trade restrictions, a steep increase in foreign and regional trade, and an increasing number of agricultural

[1] We cite only to publicly-available materials. Much of the information in this report was discussed during oral interviews with knowledgeable individuals in each of the three countries.

cooperatives. End consumers typically purchase both domestic and imported food products in either municipal markets, supermarkets, or corner markets.[2] Some consumers, especially in remote rural areas, are primarily subsistence farmers who grow their own food and, if conditions permit, sell some for cash.

Traditionally, most non-farming consumers in the Northern Triangle purchased food at central or municipal markets. Each country still has a system of these markets, which function as a hub and spoke network. Farmers, often working with intermediaries, transport agricultural products to small municipal markets in each region, which direct products to a larger central market. Some food sold at these markets is grown domestically and some is imported, mostly from neighboring countries. For example, in El Salvador, domestically grown and imported produce is trucked into La Tiendona market in San Salvador. From La Tiendona, trucks distribute food to stores and stands within the capital and to municipal markets in towns across the country.[3] A large percentage of consumers regularly purchase food for personal consumption at these markets or at the corner markets and stands that purchase food from municipal markets. Similar systems play an important part in food distribution in each of the three countries.[4]

Smaller producers throughout the region, particularly those without easy access to transportation, frequently rely on intermediaries or middlemen, often referred to as "coyotes," to aggregate goods and transfer them to municipal markets.[5] Smaller intermediaries are located near production areas and purchase directly from farmers. They often have long-term relationships with communities and aggregate production from many small farms. Smaller producers whose products are sold in municipal markets rely on intermediaries to provide transportation. Intermediaries may also provide credit and facilitate the purchase of inputs, like seeds and fertilizer. In some instances, intermediaries pay growers upfront to produce specific crops, and producers must give all of their production to the intermediary for the previously agreed upon price. In other arrangements, the

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[2] *See* Iglesias, Ana, "El Salvador: Retail Foods Annual Update of Retail Food Report – 2013/14," January 2014, *available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Foods_San%20Salvador_El%20Salvador_1-2-2014.pdf; Vasquez, Edith, and McLeod, Lashonda, "Guatemala: Retail Foods Update for 2013 and 2014," January 2014, *available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Foods_Guatemala%20City_Guatemala_1-2-2014.pdf; Sanchez, Erika "Honduras: Retail Food Sector Report," 2010: *available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Food%20Sector%20Report_Tegucigalpa_Honduras_1-14-2010.pdf.

[3] USAID, "Potato Action Plan, USAID Regional Trade and Market Alliances Project," March 2014, at 12. *See* p. 15 of the plan for a description of intermediaries who deal in potatoes.

[4] *See* Brenes, Esteban; Ciravegna, Luciano; and Montoya, Daniel, "Super Selectos: Winning the war against multinational retail chains," *Journal of Business Research*, Vol. 68 No. 2, February 2015, at 216 *available at* http://dx.doi.org/10.1016/j.jbusres.2014.09.030 (stating "[i]nformal neighborhood stores and municipal farmers markets represented between 40 and 50% of the total market" and "Honduras had 16 markets in Tegucigalpa and 17 in San Pedro Sula. San Salvador had seven markets and at least one in each town.").

[5] USAID, "Potato Action Plan, USAID Regional Trade and Market Alliances Project," at 19 (in the case of potatoes, intermediated sales from farmers to higher-level or small traders account for the largest volume of potato sales).

intermediary will negotiate a price for crops after harvest. Larger intermediaries monitor prices and availability in various markets, moving crops in response to market conditions.[6] Intermediaries and, increasingly, agricultural cooperatives, may add value to the crops they source, such as washing, cutting and packaging, which tends to increase profit margins. Larger wholesalers, processors, and distribution and logistics companies work with medium and large producers, but are increasingly working with small producers and cooperatives.

In each of the countries, increasing numbers of consumers are shopping in supermarkets instead of municipal markets, and the number of supermarkets is expected to increase. Typically, supermarkets have attracted high and middle income shoppers, but larger supermarket chains have opened stores with less expensive products to draw lower income consumers.[7] In Guatemala, approximately 30 percent of perishable food is purchased from supermarkets,[8] and in El Salvador, supermarkets sell approximately half of all retail food products.[9] In the two largest urban areas in Honduras, 38% of people visit a store owned by one of two major supermarket chains at least once a week.[10]

II. Competitive markets support food security for all consumers

Barriers to competition contribute to food insecurity in El Salvador, Guatemala, and Honduras, where people often do not have access to sufficient quantities of nutritious food. The lack of food security is a serious issue in the region. "Food security [is] a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."[11] Many people in these three countries are food insecure. The Global Food Security Index of 109 countries ranks Honduras 63rd, El Salvador 68th, and Guatemala 71st.[12] High rates of malnourishment and poverty are associated with food insecurity. Malnourishment is pervasive among children in El Salvador and Honduras. Guatemala has the fourth highest rate of chronic malnutrition in the world.[13] Malnutrition is particularly serious in rural

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[6] *Id*. at 15-18.

[7] *See, e.g.*, Brenes, et al., "Super Selectos: Winning the war against multinational retail chains," at 216, *supra* at n.4.

[8] Vasquez and McLeod "Guatemala: Retail Foods Update for 2013 and 2014," *supra* at n.2. *See* Commission for the Defense and Promotion of Competition (CDPC), "Estudio Sobre el Sector de los Supermercados en Honduras: Distrito Central y San Pedro Sula," September 2012, at 18, *available at* http://www.cdpc.hn/?q=node/32.

[9] Iglesias, "El Salvador: Retail Foods Annual Update of Retail Food Report – 2013/14," *supra* at n.2.

[10] CDPC, "Estudio Sobre el Sector de los Supermercados en Honduras: Distrito Central y San Pedro Sula," at 44, *supra* at n.8.

[11] International Fund for Agricultural Development (IFAD), "The Food Security Learning Framework: The M&E Harmonization Group of Food Security Partners," July 2013, *available at* http://www.ifad.org/hfs/tools/hfs/fs_frameworkpub/foodsecurity.pdf.

[12] The Economist Intelligence Unit Limited, "Global food security index 2014," 2014, at 13, *available at* http://foodsecurityindex.eiu.com/Home/DownloadResource?fileName=EIU%20Global%20Food%20Security%20Index%20-%202014%20Findings%20%26%20Methodology.pdf.

areas, where subsistence farmers lack the resources to purchase sufficient food to have a balanced diet.[14] Poverty rates are also high in each country. The most recent figures show the percentage of the population living below the poverty line is: 34.5% in El Salvador,[15] 53.7% in Guatemala,[16] and 64.5% in Honduras.[17] The causes of poverty, malnutrition, and food insecurity are related and complex, and countries around the world struggle to create policies to reduce each.

Effective competition policy, including both law enforcement and advocacy, can improve food security by reducing barriers to competition in food, agricultural, and related markets. Reducing these barriers and increasing competitive pressures can encourage new production, innovation, and entrepreneurship,[18] and can result in greater quantities of food and lower prices for consumers. Without competition, prices are artificially maintained and incentives to increase production and performance may be limited.[19] With a lack of competition to buy farmers' crops, farmers are paid less and have fewer incentives and resources to increase production, resulting in lower quantities and even higher prices for all consumers. Competition in markets for agricultural inputs can also encourage innovation,[20] leading to increased yields, and improved quantity, quality, and availability of food.[21]

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[13] World Health Organisation, "Global Database on Child Growth and Malnutrition," October 2014, *available at* http://www.who.int/nutgrowthdb/about/introduction/en/; *See* IFAD, "Rural Poverty Portal: Rural Poverty in Honduras," October 2014, *available at* http://www.ruralpovertyportal.org/country/home/tags/honduras ("Minifundistas, or subsistence farmers, make up about 70 per cent of farming families.").

[14] FAO, "World Food Insecurity and Malnutrition: Scope, Trends, Causes and Consequences," 2008, at 14, *available at* ftp://ftp.fao.org/docrep/fao/010/ai799e/ai799e02.pdf. Produced as part of: FAO, "Impact of Climate Change and Bioenergy on Nutrition," 2008, *available at* http://www.fao.org/docrep/010/ai799e/ai799e00.HTM. *See* CDPC, "Estudio Sectorial sobre el Mercado de Granos Básicos en Honduras," November 2013, *available at* http://www.cdpc.hn/?q=node/32 (reporting that half of the calories consumed in rural areas are derived from white corn).

[15] World Bank Group, "El Salvador Data," October 2014, *available at* http://data.worldbank.org/country/el-salvador. Figure is from 2012.

[16] World Bank Group, "Guatemala Data," October 2014, *available at* http://data.worldbank.org/country/guatemala. Figure is from 2011.

[17] World Bank Group, "Honduras Data," October 2014, *available at* http://data.worldbank.org/country/honduras. Figure is from 2013.

[18] *See* Diaz-Bonilla, Eugenio; Orden, David; and Kwieciński, Andrzej, "Enabling Environment for Agricultural Growth and Competitiveness: Evaluation, Indicators and Indices," *Organisation for Economic Cooperation and Development (OECD) Food, Agriculture and Fisheries Papers*, No. 67, OECD Publishing, 2014, at 31, *available at* http://dx.doi.org/10.1787/5jz48305h4vd-en; Bassanini, Andrea, and Ernst, Ekkehard, "Labour Market Institutions, Product Market Regulation, and Innovation: Cross-Country Evidence," *OECD Economics Department Working Papers*, No. 316, OECD Publishing, 2002, *available at* http://www.oecd-ilibrary.org/economics/labour-market-institutions-product-market-regulation-and-innovation_002243151077.

[19] *See* OECD, "Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling," 2004, at 180, *available at* http://www.oecd.org/competition/abuse/35910977.pdf.

[20] *See* Vives, Xavier, "Innovation and Competitive Pressure," *The Journal of Industrial Economics*, September 2008, 56: 419–469, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6451.2008.00356.x/full (finding "robust results on the relationship between indicators of competitive pressure and innovation which do not depend on the specification of functional forms, and hold for both Bertrand and Cournot competition"); Noland, Marcus, "Competition Policy and FDI: A Solution in Search of a Problem?," *Institute of International Economics,* Working Paper , 1999, *available at* http://www.iie.com/publications/wp/print.cfm?ResearchId=132&doc=pub;

Competitive markets for transportation, fair and transparent border-crossing procedures, policies that encourage entrepreneurship, and markets free of the anticompetitive behavior that competition law prohibits, support both physical and economic access to food, and create opportunities for small producers to compete.

Each of these changes – greater quantities of food, lower prices, increased productivity and quality, and expanded physical and economic access to food – promotes food security. The Food and Agriculture Organization of the United Nations has also found that competition supports food security policy goals: "Productive investment that makes the agricultural sector competitive on world markets… should be the real goal, because it is the only way to provide long-term benefits for both farmers and consumers."[22] Sound competition policies, created by competition agencies and supported by other government institutions, businesses, and the public, help keep input prices competitive for producers and ultimate prices competitive for consumers, and help support economic mobility by incentivizing entrepreneurship,[23] which can also improve food security.

Increasing the quantity of food produced and reducing the price of food would benefit all consumers, and such changes would impact the poor most dramatically. Development strategists have found that poverty reduction can be possible only when public institutions ensure and protect competition and access to basic goods and services,[24] including food.[25] Around the world, poor people

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Martinez Licetti, Martha, "Combating Cartels in Developing Countries: Implementation Challenges on the Ground," *Competition Policy International*, 2013, at 2, *available at* https://www.competitionpolicyinternational.com/assets/Uploads/CartelSeptember1.pdf, ("Besides increasing the cost of goods and services, cartels are associated with low labor productivity and low incentives to innovate."); Diaz-Bonilla, et al., "Enabling Environment for Agricultural Growth and Competitiveness: Evaluation, Indicators and Indices," *OECD Food, Agriculture and Fisheries Papers*, at 31, *supra* at n.18 (agricultural innovation is supported by factors including competition and competition policy).

[21] *See* Curzi, Daniele; Raimondi, Valentina; and Olper, Alessandro, "Quality upgrading, competition and trade policy: evidence from the agri-food sector," *European Review of Agricultural Economics*, March 2014, *available at* http://erae.oxfordjournals.org/content/early/2014/06/30/erae.jbu021.abstract (finding that increased competition leads to improved quality of agricultural products, noting that "… especially for developing countries, which often have a comparative advantage in the agri-food sector, improving the quality of exported products represents a necessary condition for economic growth and development."). An earlier draft of the paper is *available at* http://ageconsearch.umn.edu//handle/152386. The authors found that firms farther from the world technology frontier were less likely to upgrade quality in response to increased global competition than firms closer to the technology frontier. Assistance and training programs offered by USAID, WFP, and Government Ministries in El Salvador, Guatemala, and Honduras, discussed *infra* at p. 27, are in place to address those likely to be farther from the technology frontier.

[22] FAO, "Lessons from the world food crisis of 2006-08," 2011, at 25-26, *available at* http://www.fao.org/docrep/014/i2330e/i2330e04.pdf.

[23] *See* Fox, Eleanor, "Economic Development, Poverty, and Antitrust: The Other Path," *New York University Law and Economics Working Papers*, Paper 102, 2007, at 110, *available at* http://lsr.nellco.org/nyu_lewp/102.

[24] *See, e.g.,* World Bank Group, "World Development Report," 2005, *available at* https://openknowledge.worldbank.org/handle/10986/5987; Anderson, Robert and Müller, Anna, "Competition Policy and Poverty Reduction: A Holistic Approach," *WTO* 2012, *available at* http://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf; Godfrey, Nick, "Why is Competition Important for Growth and Poverty Reduction?," March 2008, *available at* http://www.oecd.org/investment/globalforum/40315399.pdf; OECD, "Promoting Pro-Poor Growth: Private Sector

spend a larger percentage of their income on food than richer people.[26] For example, in Guatemala, between 2000 and 2012, those in the lowest income quintile spent 53% of their income on food.[27] The average spent per capita across all incomes was 40.1 percent in 2013.[28] The same is true in Mexico, where the competition agency recently launched an investigation in the food and agriculture industry.[29] In 2012, on average, "Mexican households allocate[d] 34% of their monthly spending on buying food." However, "families in rural communities [allocated] as much as 42%" and "the lowest income families [allocated] as much as 52% of their spending" for food.[30]

In addition, poor households are particularly affected by lack of competition. "Anticompetitive practices such as price fixing in the retail sector or in the consumer goods sector clearly impose a large cost on consumers, and in particular the poorest consumers, by artificially increasing the price of basic necessities[.]"[31] Studies have quantified the particular impact of concentrated markets on households. For example, a study found that 42% of Mexico's poorest households' spending accounted for products and services in highly concentrated markets, [32] with 7% of the spending of these households on price premiums charged by firms with market power.[33] The poorest households in Mexico experienced the

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Development," 2006, at 38, *available at* http://www.oecd.org/dac/povertyreduction/36563626.pdf; Khemani, Shyam, "Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries," 2007, *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/11/07/000020953_20071107085243/Rendered/PDF/413340FIAS1Competition1Policy01PUBLIC1.pdf.

[25] *See* Diaz-Bonilla et al., "Enabling Environment for Agricultural Growth and Competitiveness: Evaluation, Indicators and Indices," at 31, *supra* at n.18; UNCTAD, "Voluntary Peer Review of Competition Policy: Costa Rica," 2008, at 35, *available at* http://www.unctad.org/en/Docs/ditcclp20081_en.pdf.

[26] *See, e.g.*, FAO, "The State of Food Insecurity in the World: How does international price volatility affect domestic economies and food security?," 2011, at 14, *available at* http://www.fao.org/docrep/014/i2330e/i2330e.pdf.

[27] FAO, "FAO Statistical Yearbook 2014: Latin American and the Caribbean Food and Agriculture," 2014, Table 12, at 58, *available at* http://www.fao.org/docrep/019/i3592e/i3592e.pdf. Figures were not available for El Salvador or Honduras.

[28] USDA Economic Research Service, "Percent of consumer expenditures spent on food, alcoholic beverages, and tobacco that were consumed at home, by selected countries, 2013," October 2014, *available at* http://www.ers.usda.gov/data-products/food-expenditures.aspx. Figures were not available for El Salvador or Honduras.

[29] Competition Policy International, "Mexico: COFECE efforts turn to agriculture, food costs," November 2014, *available at* http://www.competitionpolicyinternational.com/mexico-cofece-efforts-turn-to-agriculture-food-costs.

[30] *Id*.

[31] OECD, "Competition Policy and Poverty Reduction," 2013, *available at* http://www.oecd.org/daf/competition/competition-and-poverty-reduction2013.pdf (quoting Jenny, Frederic, "Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence," *World Competition*, 2006, at 109, 134); *See* Fox "Economic Development, Poverty, and Antitrust: The Other Path," at 211, 226, *supra* at n.23.

[32] Urzúa, Carlos, "Evaluation of the Distributional and Spatial Effects of Companies with Market Power in Mexico," 2008, *available at* www.oecd.org/dataoecd/43/20/45047597.pdf.

[33] *Id.*

greatest negative impact from highly concentrated markets, including markets for chicken, milk, and corn tortillas. Poor households experienced welfare losses 20 percent higher than the richest households.[34] While high concentration levels are not conclusive evidence of anticompetitive business conduct,[35] they indicate the existence of few market participants and of market conditions that facilitate anticompetitive business conduct and regulatory capture. Reducing barriers to competition can help all consumers increase their food security.

III. Competition in food-related markets benefits consumers and supports economic growth

Consumers benefit from competitive markets without barriers to competition. When markets are competitive, multiple producers of products and services compete for consumers' favor, prices are likely to decrease, and a greater variety of products and services are likely to be made available. Consumers can choose the products and services that best meet their needs and budgets. As competition drives prices down, consumers spend less of their incomes on overpriced goods and services[36] and are able to spend those funds for other purposes, such as on better quality food, other necessities, education, or the creation of small enterprises. Increased competition also benefits small producers, who are likely to benefit from cheaper necessary inputs and may experience price gains when multiple buyers are vying for their products or services. Small producers that can improve the quantity or quality of their products are likely to see greater revenue from selling their products in competitive markets.

As the benefits of competition are maximized, competition stimulates an economy by encouraging innovation, creativity, and entrepreneurship. Competition creates opportunities for businesses and for individuals within an economy, in both the supply of and demand for food products, and of all products and services. Competition drives individuals and businesses to become more efficient, to produce better products, and to provide better services. This may result in the displacement of existing, inefficient incumbents with more efficient entrants, which can lead to lower prices and increased choice for consumers.[37] Competition supports a nation's productivity, competitiveness, and economic growth, which, in turn, supports food security.

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[34] *Id.*

[35] In principle a market could become highly concentrated as a result of competitive forces.

[36] *See* Urzúa, "Evaluation of the Distributional and Spatial Effects of Companies with Market Power in Mexico," *supra* at n.32.

[37] *See, e.g.*, Nicholas, Tom, "Why Schumpeter was Right: Innovation, Market Power, and Creative Destruction in 1920s America," *The Journal of Economic History*, Vol. 63, No. 4, December 2003, *available at* http://www.people.hbs.edu/tnicholas/JEH03.pdf.

A. Barriers to competition in food-related markets negatively affect consumers

Barriers to competition in food-related markets hurt consumers in the Northern Triangle. This report identifies several categories of barriers to competition, including anticompetitive business conduct and government regulations that serve as barriers. Competition agencies and others have studied, and in some cases quantified, the negative impact such barriers have on consumers.

In the last nine years, anticompetitive collusion in food-related markets and in other sectors has been identified by the competition agencies in both El Salvador and Honduras.[38] Anticompetitive collusion among competing firms is a type of anticompetitive business conduct that undermines the benefits of competition and hurts consumers.[39] It includes price-fixing and output restricting cartels, which are prohibited by the competition laws in El Salvador and Honduras.[40] El Salvador's Superintendence of Competition recently took action against a cartel in the milled wheat (flour) sector that resulted in fines of over US$4 million.[41] Bread is a significant part of Salvadoran household consumption, and the collusion "negatively affect[ed] 1,323,160 homes that consume[d] bread" while the cartel was active.[42] While precise values were not calculated, the cost of this anticompetitive conduct to Salvadoran consumers was substantial. In another case, the SC estimated that anticompetitive unilateral conduct by a sugar distributor led "Salvadoran households [to overpay] an estimated US$ 12,483.372.32"[43] for sugar.

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[38] While not illegal in Guatemala, media reports suggest that collusive activity occurs in that country as well. *See* Orozco, Andrea, "Descuentos en medicina no son reales," May 2013, *available at* http://www.prensalibre.com/noticias/politica/Descuentos-medicina-reales_0_1137486254.html.

[39] Levenstein, Margaret, and Suslow, Valerie, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," *Antitrust Law Journal*, Vol. 71 No. 3, June 2004, at 819, *available at* http://www-personal.umich.edu/~maggiel/ALJ.pdf ("For developing country consumers, or consumers in any country for that matter, the direct cost of a cartel is plain: price will increase if the cartel is successful. Using trade flow data instead of direct price and quantity data, the previous section showed that these costs are likely to be substantial. There may be other costs as well, such as decreased product choice (if the cartelized product is differentiated and geographic markets are allocated among producers) or a slower rate of product innovation and technological change."); Licetti, "Combating Cartels in Developing Countries: Implementation Challenges on the Ground," at 2, *supra* at n.20 ("Besides increasing the cost of goods and services, cartels are associated with low labor productivity and low incentives to innovate.").

[40] *See* El Salvador, "Ley de Competencia," Decreto Legislativo No. 528, published December 23, 2004, Diario Oficial No. 240 [as amended]; Honduras, "Ley para la Defensa y Promoción de la Competencia," Decreto Legislativo No. 357-2005, Art. 60, published February 4, 2006, Diario Oficial [as amended].

[41] *See* Superintendencia de Competencia (SC), "Constitucional Tribunal rules in favor of [SC] in MOLSA case, El Salvador," November 2014, *available at* http://www.sc.gob.sv/pages.php?Id=1560. Discussed *infra* at p. 15.

[42] *Id.*

[43] *See* Contribution from El Salvador to the OECD Competition Committee Global Forum on Competition, "Competition and Poverty Reduction," February 2013, DAF/COMP/GF/WD(2013)67, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2013)67&docLanguage=En; "Investigación de oficio sobre prácticas anticompetitivas relacionadas con el sector azucarero," April 12, 2012, *available at* http://www.sc.gob.sv/pages.php?Id=867. Discussed *infra* at p. 15.

Studies in other countries have quantified the cost of other types of barriers to competition in food markets, including government regulations that serve as barriers to competition. The costs created by such barriers have been significant. For example, in Kenya, a study of maize market reforms found that reducing barriers to competition related to price and number of market participants saved Kenyan consumers US$10.1 million.[44]

Across all countries and all income levels, barriers to competition in food, agricultural, and related markets, including anticompetitive collusion, other anticompetitive conduct, and overly restrictive regulations, harm consumers by increasing the cost of food products and other goods and services that constrain food security. For example, barriers to competition increase the cost of intermediate services, such as transportation. The cost of intermediate services is often passed onto consumers and increases the price of finished goods and services. A recent World Bank study found that, in Central America, "whereas improved cost efficiencies could reduce [road freight transport] prices by 3 cents per ton-kilometer, increased competition on national routes—those entirely within a nation's borders—would reduce prices by significantly more,"[45] and that "a lack of competition is likely to explain the persistence of an inefficient market structure, as well as a lack of innovation to reduce costs and enhance the quality of service." [46] In the United States, deregulation of road freight transportation ("trucking") in the 1980s is estimated to have benefitted consumers with a 35 to 75 percent reduction in trucking rates.[47] Trucking deregulation in the EU, Mexico, and Zambia has also been shown to benefit consumers by reducing costs and increasing efficiency, the quality of service, and innovation.[48] Increasing competition in transport markets in the Latin American and Caribbean region is essential to increasing productivity and competitiveness within the region.[49]

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[44] Jayne, Thomas, and Argwings-Kodhek, Gem, "Consumer Response to Maize Market Liberalization in Urban Kenya," *Food Policy* Vol. 22 No. 5, October 1997, *available at* http://www.sciencedirect.com/science/article/pii/S0306919297000341.

[45] Osborne,Theresa; Pachon, Maria Claudia; and Araya, Gonzalo Enrique, "What drives the high price of road freight transport in Central America?," *World Bank Group:* Policy Research working paper no. WPS 6844, 2014, at 1, *available at* http://documents.worldbank.org/curated/en/2014/04/19432378/drives-high-price-road-freight-transport-central-america.

[46] *Id.*

[47] Crandall, Robert W., "Extending Deregulation: Make the U.S. Economy More Efficient," *The Brookings Institution*, 2007, at 3, *available at* http://www.brookings.edu/~/media/research/files/papers/2007/2/28useconomics%20crandall%20opp08/pb_deregulation_crandall. *See also* Submission by the United States to the Ibero-American Competition Forum, "Trucking Deregulation in the United States, September 2007, *available at* https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/ibero-trucking.pdf; Daniel, Timothy P. and Kleit, Andrew N., "Disentangling Regulatory Policy: the effects of state regulations on trucking rates," FTC, Bureau of Economics, 1995, *available at* http://www.ftc.gov/reports/trucking.pdf.

[48] *See* Osborne, et al., "What drives the high price of road freight transport in Central America?," at 5, Box 1, *supra* at n.45.

[49] World Bank Group, "Latin America and the Caribbean's long term growth: Made in China?," 2011, *available at* http://siteresources.worldbank.org/LACEXT/Resources/Annual_Meetings_Report_LCRCE_English_Sep17F2.pdf.

Regulations can also create barriers to competition in food-related markets. In the region, discretionary and unpredictable enforcement of certain regulations may increase costs for consumers. For example, Sanitary and Phytosanitary measures (SPS) applied at ports of entry are justified by the need to protect the environment and health, but some SPS regulations could achieve the same policy goals with a lesser impact on competition. In addition, existing SPS measures can be applied inconsistently and can provide an opportunity for corruption or discretionary application, which may compromise legitimate environmental and health concerns while serving as barriers to competition.[50] Recent work by economists at the World Bank demonstrated that SPS measures increase food prices in El Salvador and Guatemala, and that SPS measures are applied inefficiently within the region.[51] In Guatemala, technical measures that include SPS barriers increase "the average import prices of [beef, bread and pastry, chicken meat, and dairy products] … by an amount equivalent to an ad-valorem tariff of 68.4%, 51.4%, 22.0%, and 5.0%, respectively."[52] The World Bank estimates that reductions in SPS barriers "would have the effect of making the basic consumption basket more affordable, thereby benefitting the poorest segment of the population" and reducing poverty rates,[53] which can support increased food security.

B. Competitive markets support competitiveness, productivity, and economic growth

There is a positive relationship between vigorous competition within a country and the ability of that country's firms to compete internationally.[54] Professor Michael Porter has studied the relationship between competitiveness and how economies develop. After looking at how certain companies became successful on a global scale, he concluded that, "[n]ational prosperity is created, not inherited. It does not grow out of a country's natural endowments, its labor pool, its interest rates, or its currency's value, as classical economics insists. A nation's competitiveness depends on the capacity of its industry to innovate and upgrade."[55] The drive to innovate, upgrade, and increase efficiency comes from competitive pressures that ultimately benefit consumers and support food security.

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[50] *See* OECD, "Fighting Corruption and Promoting Competition," DAF/COMP/GF, 2014, at 23, *available at* http://www.oecd.org/competition/fighting-corruption-and-promoting-competition.htm.

[51] Kelleher, Sinead, and Reyes, Jose-Daniel, "Technical measures to trade in Central America: incidence, price effects, and consumer welfare," *World Bank Group*: Policy Research working paper no. WPS 6857, 2014, at 22, *available at* http://documents.worldbank.org/curated/en/2014/05/19457741/technical-measures-trade-central-america-incidence-price-effects-consumer-welfare.

[52] *Id*. at 3.

[53] *Id*.

[54] *See* Lewis, William, "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability," *U. of Chicago Press*, 2004. *See also* UNCTAD, "The Relationship between Competition, Competitiveness, and Development," 2002, *available at* http://unctad.org/en/Docs/c2clp30.en.pdf.

[55] Porter, Michael E., "The Competitive Advantage of Nations," *New York: Free Press*, 1990 (republished with a new introduction in 1998), at 73 (also finding that "Companies gain advantage against the world's best competitors

The relationship between competition and competitiveness is often misunderstood. Some countries in the past have endorsed policies formed around the idea that if domestic firms were shielded from foreign competition, they would be able to grow stronger and better compete in global markets. These policies have been debunked in advanced and developing economies.[56] Protecting firms from competition encourages inefficiency, higher prices, and diminished consumer welfare.[57] Lacking the discipline to compete effectively, beneficiaries of the policies that limit competition are at a disadvantage when they try to compete with firms in international markets.

Competition not only benefits consumers and supports competitiveness, but also can encourage productivity and economic development. Beginning in 1991, the McKinsey Global Institute undertook a twelve year study to determine why some nations remained wealthy, while others remained less developed. The study found that "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition … more efficient companies can't replace less efficient ones."[58] This lack of productive efficiency was found to slow economic growth. A more recent study of developing economies in Eastern Europe and Central Asia found that competition was positively correlated to productivity at the firm-level, and that firms with a higher markup on products had lower total factor productivity and lower labor productivity.[59]

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because of pressure and challenge. They benefit from having strong domestic rivals, aggressive home-based suppliers, and demanding local customers.").

[56] *See e.g.*, Aghion, Philippe, and Griffith, Rachel, "Competition and growth: reconciling theory and evidence, Introduction," 2008, at 2, *available at* http://discovery.ucl.ac.uk/16507/1/16507.pdf; Kitzmuller, Markus, and Martinez Licetti, Martha, "Encouraging Thriving Markets for Development," *The World Bank Group*, Viewpoint, Note Number 331, September 2012, *available at* http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf (finding that "discriminatory or selective subsidization policies are mostly detrimental to productivity growth, especially in developing countries." (citing Harrison, Ann and Rodriguez-Clare, Andres, "Trade, Foreign Investment, and Industrial Policy," *Handbook of Development Economics*, eds. Dani Rodrik and Mark Rosenzweig, vol. 5, at 4039–214. Amsterdam: North-Holland)).

[57] *See, e.g.,* Porter, "The Competitive Advantage of Nations," at 66, *supra* at n.55; Lewis, "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability," at 103, *supra* at n.54; Summers, Lawrence, "Competition Policy in the New Economy," *Antitrust Law Journal,* Vol. 63, 2001, at 353, 357, *available at* http://www.jstor.org/stable/40843520; Platt Majoras, Deborah, "National Champions: I Don't Even Think it Sounds Good," *Remarks at 13th International Conference on Competition*, March 2007, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf; Kroes, Neelie, "Address at the Institute of Electrical Engineers, Challenges to the Integration of the European market: Protectionism and Effective Competition Policy," June 2006, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/369&format=HTML&aged=0&language=EN&guiLanguage=en/; Romer, Christina, "Why Did Prices Rise During the 1930s?," *Journal of Economic History*, Vol. 59 No. 1, 167-199, March 1999, at 197, *available at* http://www.jstor.org/stable/2566501; Taylor, Jason, "The Output Effects of Government Sponsored Cartels During the New Deal," *Journal of Industrial Economics*, Vol. 50, 2002, at 1-10, *available at* http://www.jstor.org/stable/3569770.

[58] Lewis, "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability," at 103, *supra* at n.54.

[59] Ospina, Sandra, and Schiffbauer, Marc, "Competition and Firm Productivity: Evidence from Firm-Level Data," *IMF* Working Paper No. 10/67, 2010, *available at* https://www.imf.org/external/pubs/ft/wp/2010/wp1067.pdf ("Firms

Economic theories and empirical research over the past twenty years also support the relationship between increased productivity and competition. Economic models developed in the 1980s and 1990s identified available technology and production factors, including the education and skill level of workers and the availability of capital goods, as the primary drivers of GDP growth.[60] The application of this theory showed that it was incomplete, and that more was needed to explain differences in productivity, GDP, and per capita income growth. What emerged in the last two decades is the understanding that economic growth occurs most robustly in economies with a developed enabling environment.[61] An enabling environment includes competition, which "is an important determinant of the conditions under which productivity growth occurs and under which high productivity levels may emerge."[62] Both at the firm level and on a national level, competition supports increased productivity.[63]

Pro-competitive policies and regulations have been directly linked to productivity and economic growth. The Organisation for Economic Cooperation and Development (OECD) has developed an integrated model to understand the role of regulations that limit competition, called the Product Market Regulation (PMR) indicator. The categories of potentially restrictive regulations that comprise the PMR indicator align with many of the regulatory barriers to competition analyzed in this report.[64] The PMR

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that have 20 percent higher markups, have, on average, 1.2 percent lower TFP levels and 8 percent lower labor productivity" and "The contribution to productivity growth due to competition spurred by these reforms is around 12–15 percent.").

[60] *See* Martin, Ron, and Sunley, Peter, "Slow Convergence? Post-neoclassical Endogenous Growth Theory and Regional Development," *Economic Geography*, Vol. 74, No. 3, July 1998, at 201-227, *available at* ftp://131.252.97.79/Transfer/ES_Pubs/ESVal/econ_geog/martin_1998_EndogGrowthAndRegionalDevelop_econGeog_v74_3_p201.pdf .

[61] Aghion, Philippe and Howitt, Peter, "Appropriate Growth Policy: A Unifying Framework," 2005, *available at* http://www.oecd.org/eco/growth/35912476.pdf. *See* Diaz-Bonilla, Orden, and Kwieciński, "Enabling Environment for Agricultural Growth and Competitiveness: Evaluation, Indicators and Indices", at 31, *supra* at n.18 ("A positive enabling environment for agricultural growth and competitiveness is defined in this report to comprise a multifaceted setting for the agricultural sector and economy wide of non-distorting and stable policies, adequate provision of public goods, good governance through laws and regulations that are conducive to private-sector economic activity while addressing market failures, and strong and effective institutions through which [government measures and actions] are operationalised.").

[62] Pilat, Dick, "Competition, Productivity, and Efficiency," *OECD Economic Studies* No. 27 1996 II, 1996, at 122, *available at* http://www.oecd.org/eco/reform/17985473.pdf. *See* Martin, Ronald L., "A Study on the Factors of Regional Competitiveness – a draft final report for the European Commission Directorate-General for Regional Policy," University of Cambridge, *Cambridge University Press*, 2004, *available at* http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/3cr/competitiveness.pdf.

[63] *See, e.g.*, Aghion and Howitt, "Appropriate Growth Policy: A Unifying Framework," *supra* at n.61; Kitzmuller and Licetti, "Encouraging Thriving Markets for Development," *supra* at n.56 (reviewing literature that studies the effects of competition policy on productivity and economic development).

[64] *See* Wölfl, Anita; Wanner, Isabelle; Röhn, Oliver and Nicoletti, Giuseppe, "Product Market Regulation: Extending the Analysis Beyond OECD Countries," *OECD Economics Department* Working Papers, No. 799, OECD Publishing, 2010, at 8, *available at* http://dx.doi.org/10.1787/5km68g3d1xzn-en.

indicator has been used to analyze the relationship between changes in regulatory barriers to competition and overall economic performance.[65] OECD researchers found that:

> [t]he correlation between pro-competitive policies and growth appears to be mainly driven by measures that lower barriers to entrepreneurship and competition, whose link with growth is found to be robust across specifications and for the whole set of countries[,] though in less advanced countries, the potential growth benefits of enhancing product market competition may be impaired by other structural weaknesses.[66]

An effective, independent competition authority has also been linked to increased productivity,[67] and a country's commitment to funding its competition agency has been linked to economic growth.[68] Competition policy and law enforcement yield greater benefits, and barriers to competition can be more successfully reduced, when competition is supported by and integrated into more comprehensive reforms and changes consistent with the goals of development and competition.

IV. Barriers to competition in food-related markets include anticompetitive conduct and regulatory, trade, and access barriers

Reflecting the region's historic domination by monopolistic structures, food, agricultural, and related markets in El Salvador, Guatemala, and Honduras are characterized by a variety of barriers to competition that support prices at higher than optimal levels and reduce opportunities for producers to effectively market their products. Barriers include anticompetitive conduct by market participants,[69] a variety of anticompetitive regulatory systems, and attitudes that undermine effective competition policy development and implementation. While much progress has been recorded in the past decade as a result of the work of competition agencies in El Salvador and Honduras, and through regulatory reform, maturation of markets, and improved technology in each of the three countries, barriers that limit competition in food and agricultural-related markets persist.

Figure 1 identifies the categories of barriers to competition discussed in this report and illustrates the central role that competition policy, including competition law enforcement and competition advocacy, plays in reducing barriers to competition.

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[65] *Id*.

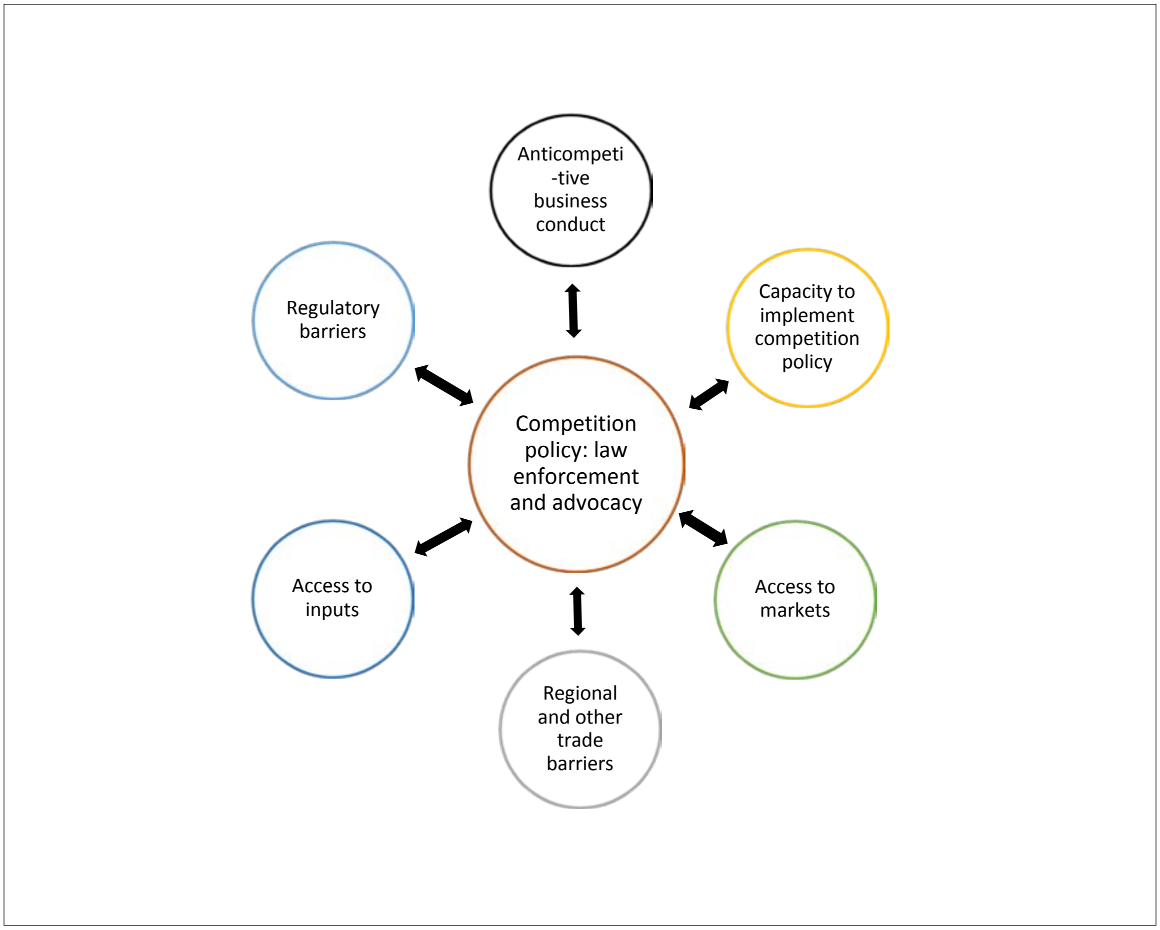
[66] *Id*. at 6. Structural weaknesses can include: unequal access to credit and banking, high national debt, high unemployment, poor infrastructure, high numbers of low-skill workers, and increasing regional and income disparity.

[67] Voigt, Stefan, "The Effects of Competition Policy on Development: Cross-Country Evidence Using Four New Indicators," 2009, *available at* http://www.isnie.org/ISNIE06/Papers06/09.3/voigt.pdf (tying the independence of a competition authority to a 17% decrease in a developing country's productivity gap with the United States).

[68] Clougherty, Joseph, "Competition Policy Trends and Economic Growth: Cross-National Empirical Evidence," 2009, at 18, *available at* http://hdl.handle.net/10419/51215 (finding that "competition policy (or at least a nation's budgetary commitment to competition policy) plays a positive role in economic growth").

[69] This was especially pronounced in Guatemala, which lacks a competition law or enforcement agency.

Figure 1. Summary of barriers to competition by category



A. Anticompetitive business conduct

Generally, competition laws and agencies focus on preventing or prohibiting three types of conduct or practices that serve as barriers to competition: (1) cartels and other anticompetitive agreements, including price-fixing, bid-rigging, and allocation of customers or territories; (2) abuse of dominance through which firms willfully acquire or maintain the power to set prices through illicit means without regard to competitive discipline, thus permitting entrenched firms to prevent or slow new competitors and (3) anticompetitive mergers. In some countries, competition legislation also addresses state aid to enterprises.

Business conduct that injures competition and consumer welfare occurs in El Salvador, Guatemala, and Honduras. This is documented by the cases brought under the competition laws in El Salvador and Honduras. The competition agencies in El Salvador and Honduras have identified and brought cases against firms that colluded, entered into anticompetitive agreements, and engaged in anticompetitive unilateral conduct.[70] Some of these cases have been in food-related markets. Interviews conducted in support of this report indicate that practices similar to those uncovered in El Salvador and Honduras are even more prevalent in Guatemala.

In El Salvador, the Superintendencia de Competencia (SC) brought several cases in the food sector. The SC's first cartel case was in the food sector. In 2007, the SC found that agricultural product brokers violated the competition law. Six brokers operating on the country's agricultural products exchange published a joint notice in local newspapers committing to charge minimum commission fees for brokerage services. The publication was clear evidence of the agreement, but the SC obtained other evidence including emails and minutes of meetings that confirmed the existence of the agreement. The brokers claimed that the agreement had never been put into effect and that the rate was economically motivated, as their commissions were very low. The SC's Board of Directors rejected these defenses and fined each of the brokers approximately US$5,000.[71] The SC's decision was upheld by the Salvadoran Supreme Court in 2011.

In 2008, the SC found that wheat millers Molinos de El Salvador, SA (MOL SA) and HARISA SA violated the competition law by allocating the market for milled wheat. Direct evidence of a conspiracy was found, and MOLSA and HARISA were fined US$1,971,015.15 and US$2,061,406.20, respectively. The SC ordered the companies to terminate the anticompetitive agreements, prohibited the companies from exchanging certain competitively sensitive information, and imposed reporting requirements for a period of two years. Each company appealed the SC's decision to the SC's Board of Directors and then to the Supreme Court. The SC's procedures and findings against MOLSA were upheld in by the Supreme Court in October 2014, and its decision with regard to HARISA was still pending as of March 2015.[72] The SC estimated over one million households in El Salvador were adversely affected by the cartel.[73]

In another food sector case, the SC fined a sugar industry participant for abuse of dominance. The company, Sugar and Derivatives Distribution, SA de CV (Dizucar), had 75% market share in the wholesale distribution of bulk white sugar and violated the competition law by using differentiated pricing and creating discriminatory packaging restrictions that limited sales of the product. The company's anticompetitive conduct created barriers to entry and expansion and shielded the company

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[70] Unilateral conduct by a dominant firm is characterized as monopolization in the United States and as abuse of dominance under Central American laws. There are some differences between the two – principally that abuse of dominance can impose special responsibilities on dominant firms while monopolization does not – but for the purpose of this report, they are analytically similar.

[71] Londono, Alfonso Miranda, "Competition law in Latin America: Main Features and Trends," *Review Competition Law*, Bogota, Vol. 9 No. 9, January-December 2013, at 20 *available at* http://centrocedec.files.wordpress.com/2010/06/6-competition-law.pdf; *see also* OECD and InterAmerican Development Bank (IDB), "Competition Law and Policy in El Salvador: A Peer Review," 2008, at 13, *available at* http://www.oecd.org/countries/elsalvador/41597078.pdf.

[72] SC, "Constitucional Tribunal rules in favor of [SC] in MOLSA case, El Salvador," *supra* at n.41. The final resolution is available at http://www.sc.gob.sv/uploads/SC-005-O-PA-NR-2008_040908_1200.pdf; *see* Contribution from El Salvador to the OECD Competition Committee Global Forum on Competition, "Competition and Poverty Reduction," at 7, *supra* at n. 43.

[73] *Id.,* discussed *supra* at p. 8.

from competition. The SC applied the maximum fine, US $1, 096,750.00, and ordered the company to cease the anticompetitive conduct.[74]

In Honduras, the Comisión para la Defensa y Promoción de Competencia brought a cartel case against sugar producers. The CDPC considered indirect evidence including uniform pricing, differing input costs, and simultaneous price modifications by competitors. The investigated companies stated that the Secretary of Industry and Trade had invited them to regulate and coordinate the wholesale prices. This collusion violated the competition law, and the CDPC imposed fines ranging from 20,204,899 Lempiras (US$1,095,000) to 6,514,306 Lempiras (US$324,000), and prohibited the firms from participating in meetings at the Ministry of Industry and Trade (now the Ministry of Economic Development) to set market prices.[75] The CDPC acknowledges that other industries may still receive support from government agencies to regulate output and pricing.

Concerns have been voiced about ongoing anticompetitive conduct in all three countries. For example, the World Bank has identified evidence of anti-competitive pricing in the trucking industry, particularly on national routes that are protected from foreign competition. The report found that "[r]outes served by fewer firms show higher prices, when accounting for differences in costs and demand. Moreover, the number of firms on a route is dramatically lower relative to demand on national routes, where average markups over cost are significantly higher than on international routes."[76] The same study also found that:

> In some of the countries of the region[,] formal requirements for entry, although seemingly reasonable and surmountable, effectively become barriers to entry in implementation. In some cases, the market is informally partitioned, with permission to operate depending on implicit agreement not to infringe a dominant firm's territory. Although it is not possible to identify the precise mechanisms which limit competition, prohibitions on foreign competition are likely to play a role.[77]

Further, in economies where oligopolies are common, it may be more likely that firms will be mutually interdependent and engage in facilitating practices.[78] This could include coordinated behavior or self-governing procedures through trade associations to collude on price or engage in other anticompetitive behavior.

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[74] Contribution from El Salvador to the OECD Competition Committee Global Forum on Competition, "Competition and Poverty Reduction," *supra* at n. 43; *see* "Investigación de oficio sobre prácticas anticompetitivas relacionadas con el sector azucarero," *supra* at n.43.

[75] OECD, "Derecho y Politica de la Competencia en Honduras, Examen inter-pares," 2011, at 35, *available at* http://www.oecd.org/daf/competition/49733321.pdf.

[76] Osborne, et al., "What drives the high price of road freight transport in Central America?," at 6, *supra* at n.45.

[77] *Id*.

[78] For a discussion of facilitating practices, see http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usfp.pdf.

Competition laws in El Salvador and Honduras are in place, and the competition agencies will continue robust efforts to identify and prohibit anticompetitive conduct. The agencies can more effectively enforce competition laws with the support of their governments and judiciaries. Guatemala does not yet have a comprehensive competition law or policy in place, and it does not have a competition agency to identify and reduce the barriers to competition created by anticompetitive business conduct.

B. Government regulatory systems as barriers

Regulations have the potential to distort markets and reduce competition. While most regulations are intended to further legitimate public policy goals, *e.g.,* protecting health or safety, regulators do not always have a clear understanding of how regulations impact competition. In other cases, regulatory intent is less benign, and regulations may be created to protect a certain industry or interest group. Many regulations may lead to increased prices or reduced choice or output. There may be less restrictive alternatives that would promote the same public policy goals, allow for more competition, and maximize the benefits to consumers. Understanding a regulation's full competitive impact and cost to consumers requires careful economic analysis and a dialogue between experts and regulators so that market forces, public policy goals, and regulation are properly balanced.[79]

Governments in the Northern Triangle recognize the potential for regulation to stifle competition and have sought to address it. Since the 1990s, El Salvador, Guatemala, and Honduras have made some attempts to implement structural reforms to liberalize their economies, deregulate markets, privatize some state-owned enterprises, and open their economies to foreign trade. These reforms have improved the enabling environment by deregulating exchange and interest rates, eliminating tariffs and other nontariff measures, and reducing the number of goods subject to price controls.[80] Some of these changes have been facilitated by trade agreements. Multinational organizations, such as the Secretariat for Central American Economic Integration (SIECA) and the System of Central American Integration (SICA), are focusing on making further progress toward regional harmonization.

Nevertheless, despite significant reforms, governments continue to intervene in the economy in ways that create barriers to competition. Government intervention occurs most frequently through regulation. Overly restrictive regulations may delay entry or make it more costly, time-consuming, and difficult.

[79] *See, e.g.*, OECD, "Latin American Competition Forum, Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean-- Contribution from United States," 2014, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2014)17&docLanguage=En.

[80] *See, e.g.*, OECD and IDB, "Competition law and policy in Honduras: A peer review," 2011, at 45, *available at* http://www.oecd.org/daf/competition/49733270.pdf; OECD and IDB, "Competition Law and Policy in El Salvador: A Peer Review," at 32-34, *supra* at n.71.

1. Regulatory preference for incumbents

A recurring challenge faced by new firms are regulatory structures that tend to advantage existing businesses while making it more difficult for new competitors to successfully enter and compete. These include the cumbersome and time-consuming registration processes for food and agricultural products. Extensive regulatory procedures and mandatory licenses and certifications also increase the opportunity to demand bribes.

a. Barriers to licensing businesses and registering products

The ability to form a new business is a requisite to competing in formal markets. With formal registration comes access to the banking system and capital markets. Without it, entrepreneurs are typically limited to cash operations and rarely have the resources to expand their businesses to meet opportunities. Unjustified costs may place formal registration beyond the reach of small agricultural enterprises, and delays may make it difficult to enter markets quickly enough to capitalize on opportunities. In general, licensing requirements and product registrations serve as barriers that drive entrepreneurs into informal markets,[81] with little opportunity for expansion. Informal markets also deny tax revenues to the government.

In recent years, all three countries have made progress in reducing the procedures and regulatory requirements to start new businesses. Current procedures, however, are still time-consuming and costly relative to regional averages.[82] For example, Guatemala has made reforms that shorten the time it takes to start a new business. In 2014, the government "creat[ed] an online platform that allows simultaneous registration of a new company with different government agencies,"[83] and, in 2008, the government fully implemented "the one stop shop, [and] procedures and time for new company registration were reduced."[84] While the process required to start a new limited liability company is one of the shortest in Latin America—on average requiring 12 procedures and 30 days for a foreign-owned limited liability company,[85] starting a new business remains time-consuming and costly. Guatemala requires six procedures which take an average of 19.5 days to complete and cost 46.4% of per capita income.[86] The process in Honduras is comparable. It takes, on average, 14 days, costs 45.3% of per

[81] While the revenues and participation in the informal market is difficult to measure, it has been analyzed in particular markets. *See e.g.*, Fries, Gwyneth, and Fernandez, Raquel, "Agro-logistics in Central America: a supply chain approach - background paper," World Bank Group, June 2012, at 26, *available at* http://documents.worldbank.org/curated/en/2012/06/17211134/agro-logistics-central-america-supply-chain-approach-background-paper ("Government officials, producers, and exporters alike estimate the illegal trade of dairy products, and particularly artisanal cheese, to El Salvador to be as great as or greater than the official flow.").

[82] *See* World Bank Group, "Doing Business: Measuring Business Regulations," *available at* http://www.doingbusiness.org/rankings (regional ranking for Starting a Business is available by selecting 'Rankings by region' and 'Latin America & Caribbean').

[83] World Bank Group, "Business Reforms in Guatemala," *available at* http://www.doingbusiness.org/reforms/overview/economy/guatemala.

[84] *Id*.

[85] World Bank Group, "Investing Across Borders," *available at* http://iab.worldbank.org/data/exploreeconomies/guatemala#starting-a-foreign-business.

capita income, and requires 13 procedures.[87] Starting a new business in El Salvador requires eight procedures which typically take over two weeks to complete and costs 45.5% of per capita income.[88] In each country, starting a new business costs almost half of the average annual yearly income per person, and many citizens cannot afford to start a registered and licensed business. Simplifying these procedures and reducing the financial cost to starting a new business could contribute to expanded entrepreneurship across the region and encourage business people and entrepreneurs to move from the informal to formal economy.

Each country requires registration of processed food products before they can be transported and marketed, which can be a slow and inefficient process. There is no regional or harmonized registration process, so products need to be separately registered in El Salvador, Guatemala, and Honduras. Separate businesses cannot combine registration efforts for identical products, and each business must separately register identical processed food products. Processed food products have to be re-registered approximately every five years. The registration processes are designed to be shorter for "low risk" products, but many products have complicated registration procedures which result in months of delay. Retailers also identified staffing shortages within the Ministries of Health that oversee the registration processes in each country that likely contribute to delays in processing product registrations. In El Salvador, businesses have complained of long delays in processing registrations, though changes that may speed up the process are planned.[89] The World Bank and SIECA are working to develop a "single window" for registering products in the region,[90] but some view change as unlikely because registrations are a significant source of income for government ministries.

Throughout the region, the registration process for new pesticide and fertilizer products, including generic versions, is regarded as particularly cumbersome and time-consuming, and has resulted in significant delays in new products coming to market. There is no regional set of harmonized standards for approvals of fertilizer products.[91] In Honduras, the National Agriculture Health Service (Servicio Nacional de Sanidad Agropecuaria, SENASA) registration procedures frequently delay the sale of new products by 220 days or more. For example, it took one firm in Honduras, FENORSA, five years to complete the registration process to market and sell a generic version of a branded pesticide.[92] Official

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[86] World Bank Group, "Ease of Doing Business in Guatemala, Starting a Business," *available at* http://www.doingbusiness.org/data/exploreeconomies/guatemala#starting-a-business.

[87] World Bank Group, "Ease of Doing Business in Honduras, Starting a Business," *available at* http://www.doingbusiness.org/data/exploreeconomies/honduras#starting-a-business.

[88] World Bank Group, "Ease of Doing Business in El Salvador, Starting a Business," *available at* http://www.doingbusiness.org/data/exploreeconomies/el-salvador#starting-a-business.

[89] *See, e.g.,* "El Salvador: Registration of Food Companies," January 30, 2015, *available at* http://www.centralamericadata.com/en/article/home/El_Salvador_Registration_of_Food_Companies.

[90] Alfaro de Morán, Mayra, "Central America Regional Agribusiness Trade Logistics Project," Project Presentation, Manila Philippines, October 2014, *available at* https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/trade-logistics/upload/Central-America-Regional-Agribusiness-Trade-Logistics-Project.pdf.

[91] Supeintendencia de Competencia (SC), "Sector Agroindustria Fertilizantes," March 2009, at 89, *available at* http://www.sc.gob.sv/uploads/sector_agroindustria.pdf.

[92] *See, e.g.*, CDPC, "Estudio Sectorial Sobre el Mercado de Fertilizantes y Agroquímicos en Honduras," April 2008, at 96 *available at* http://www.cdpc.hn/?q=node/32.

discretion within Ministries of Health also allow officials to treat select firms more favorably, allowing these firms to complete the registration processes faster than others. The World Bank has achieved some successes in making recommendations to the government to implement more efficient registration procedures.[93]

b. Industry associations that limit entry, access, prices, or quantity

Some of the most pervasive barriers to competition are created by industry or trade associations that impose regulations favoring incumbents and excluding new entrants.[94] In countries around the world, industry associations lobby governments to encourage laws and policies that benefit their members' interests.[95] Sometimes, governments cede regulatory authority over a sector to industry associations. Anticompetitive barriers can be created by market participants who have an incentive to exclude new competitors.[96] Such is the case with some associations in El Salvador, Guatemala, and Honduras, which determine output levels, prices, and access to imported quotas of needed inputs. For example, the Salvadoran rice millers association decides on prospective new members' access to quotas of rice imported under The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and has imposed criteria on new members that are not required of existing members. New members are required to undergo financial audits and submit to inspections, and also document that all equipment used in rice processing is less than ten years old and directly owned.[97] The SC in El Salvador recognizes the problems of allowing industry association members to determine access to needed inputs and has recommended that the Ministry of Economy have a vote and voice in the association's decision-making.[98]

Another advantage held by incumbent firms active in industries such as sugar, rice, white corn, beans, and coffee, are standing agreements brokered by government agencies that maintain processors' and distributors' historical market shares.[99] In El Salvador, to encourage national production of rice, an agreement requires rice processors to buy designated quantities of higher-priced domestic rice before

[93] World Bank Group, "Benefitting Honduran Farmers through Competition Reforms," *available at* https://www.wbginvestmentclimate.org/advisory-services/cross-cutting-issues/competition-policy/loader.cfm?csModule=security/getfile&pageid=43467.

[94] *See, e.g.*, International Competition Network (ICN), "Advocacy and Competition Policy Report," 2002, at 28, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf.

[95] *See, e.g.,* Ramirez, Edith "The Relationship Between Competition, Productivity, and Economic Growth: The Case of the United States," *Remarks at Peru Competition Day*, at 2-3, *available at* http://www.ftc.gov/system/files/documents/public_statements/579931/140902lacfperuspeech.pdf.

[96] *See* ICN, "Advocacy and Competition Policy Report." The FTC and DOJ both have pursued cases against trade associations that create anticompetitive barriers to entry or control aspects of the market. *See, e.g.*, *North Carolina Board of Dental Examiners v. FTC*, Civ. 12-1172, *available at* http://www.ftc.gov/enforcement/cases-proceedings/north-carolina-state-board-dental-examiners.

[97] SC, "Sector Agroindustria e Insumos 'Arroz'," El Salvador, June 2009, at 136, 139, *available at* http://www.sc.gob.sv/uploads/est_11_inf.pdf. A 2012 update to the report is available at http://www.slideshare.net/scompetencia/actualizacin-de-estudio-de-la-agroindustria-arrocera.

[98] *Id.* at 142.

[99] CDPC, "Estudio Sectorial Sobre el Mercado de 'Granos Básicos'," at 173-178, 185-190.

they can purchase lower-cost imported rice. The imported rough rice goes to mills according to historic market share as of 1994, with marginal opportunities for new access.[100] Similarly, in Honduras, a government-brokered agreement requires animal feed importers to buy nationally-produced corn, and the same importing firms have exclusive access to low tariff imports of yellow corn.[101]

2. Price controls

Governments in the Northern Triangle occasionally implement price controls on basic foodstuffs, which can act as another barrier to competition. Price controls can take a variety of forms. The most basic controls come in the form of government mandates that require vital foodstuffs, such as rice or beef, be sold at a particular price. These price controls can be set with little recognition of production costs or variations in grade and quality for a given product. This may cause supply to decrease because retailers may remove more expensive and higher grade foods from store shelves until price controls are removed. Food producers and processors will typically absorb loss of margins caused by the controls, risking the planned recoupment of their investments and discouraging new investment.

While governments in the region do not frequently implement price controls, they may do so occasionally in response to political pressures and concerns over rising food prices. In Honduras, price controls are used relatively infrequently as compared to prior years. The Honduran Ministry of Economic Development (formerly the Ministry of Industry and Trade, Secretaría de Industria y Comercio) monitors agricultural product prices, and, in the event of sharp increases in price, the Ministry can instruct producers and retailers to adjust prices. In 2014, to encourage bean production during a bean shortage, the Honduran Institute of Agricultural Marketing announced a policy to set minimum price guarantees for domestic bean production, a practice that had not been permitted under the 1992 Act of Modernization and Development of the Agricultural Sector (LDMSA). In El Salvador, price controls have not been imposed on agricultural products recently, but a 2012 law allowed for price controls on pharmaceuticals,[102] and, in 2014, the Ministry of Agriculture was considering creating commodity price ceilings and floors, which would have allowed Congress to set prices for food products in certain situations.

Price controls can also take the form of government support for industry associations whose members agree to set price or output levels. In Honduras, the Ministry of Economic Development seeks to promote price stability by taking an active role in industry associations and encouraging them to consult on price and output levels. As discussed above, in 2008 the CDPC opened an investigation into concerted pricing practices by leading sugar processing firms. As a defense against the CDPC's allegations, the sugar firms claimed that the Ministry of Trade and Investment had encouraged them to agree upon and set sales prices to wholesalers.[103] The CDPC encouraged the Ministry to change these practices.[104] Today, national associations continue to broker agreements on output and price, but are

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[100] *Id*. at 185.

[101] CDPC, "Estudio Sectorial Sobre el Mercado de 'Alimentos Concentrados Para el Consumo Animal'," June 2009, at 175, 178, *available at* http://www.cdpc.hn/?q=node/32.

[102] U.S. Department of State, "2014 Investment Climate Statement, El Salvador," June 2014, *available at* http://www.state.gov/e/eb/rls/othr/ics/2014/226955.htm.

[103] OECD and IDB, "Competition Law and Policy in Honduras: A Peer Review," at 31, *supra* at n.80.

[104] *Id*.

more likely to seek consultations with the CDPC before doing so.[105] In Guatemala, industry associations, backed by long-standing government-brokered agreements, establish rules for the sale and distribution of agricultural products. For example, members of the national sugar association, ASAZGUA, attend regular meetings to set prices. The association requires that all sugar mills deliver production to an exclusive marketing arm, COMETCO, which offers sugar at an elevated, monopoly price.

Governments also support price distortions by industry associations authorized to act as the exclusive importers of particular commodities. In El Salvador, industry associations are often the sole importers of products subject to low tariffs, such as rice and poultry, and can sell these products into the internal market at elevated prices. Imports of these products, such as poultry, can be subject to a complicated bid system administered by a product import board. By displacing normal supply and demand mechanisms, these policies result in higher prices for consumers and, by restricting entry and limiting market participation, prevent the market from self-correcting mechanisms in which higher-than-market prices would encourage entry.

Table 1 identifies a number of regulations in El Salvador, Guatemala, and Honduras that restrain entry by new competitors or protect national industries from outside competition. There is limited information available for Guatemala, which has no competition authority.

Table 1. Examples of regulations that limit entry

Country	**Product**	**Restrictive Regulation**
El Salvador and Honduras	Rice	Access to rice imports is determined by historical usage, with new firms receiving very small shares of imported rice quotas. A new importer must establish a four-year record of imports for greater rights to CAFTA-DR rice quotas.
El Salvador	Milk	Art. 22 of the *Act to Promote Production of Milk and Milk Products* has not yet been applied, but would permit restrictions on imported milk once the Salvadoran market achieves self-sufficiency in milk production. Art. 21 of the same law prohibits the sale of liquid milk reconstituted from powder milk, limiting its availability as an alternative to fresh milk.
Honduras	Milk	Limitations on imports of pasteurized milk from Nicaragua protect the local milk industry, through licensing and SPS controls.
Honduras	Meats	Restrictions on meat imports from Nicaragua protect local meat producers.[106]

[105] *Id.* However despite the CDPC's success in some areas, in 2011, the Ministry of Trade and Investment, now the Ministry of Economic Development, encouraged members of the coffee exporters association to form agreements on the price and quantities of coffee sold in the domestic market.

[106] CDPC, "Estudio Sobre el Sector de los Supermercados en Honduras: Distrito Central y San Pedro Sula," at 10, *supra* at n.8.

El Salvador, Honduras, Guatemala	Processed foods	Lengthy and duplicative product registration processes delay arrival of new processed food products to the market.
Honduras	Fertilizer	Registration processes are time-consuming, particularly for generic products.
Honduras	Animal Feed: yellow corn	Access to low tariff corn imports set by annual agreement. All others pay 40% import tariff.
Honduras	Wheat Flour	The government has promoted price agreements among wheat flour producers in response to changes in international wheat prices.
El Salvador, Honduras, and Guatemala	Starting a new business (food producers or sales outlets)	Complexity of national and local permitting and approval processes, and excessive customs procedures, limits competition in many sectors. In particular, these regulations discourage entry by smaller supermarkets or food sellers.
El Salvador	Imported food products	Multiple permits and licenses required for imports, which may require inspections of foreign-located production facilities.

C. Regional trade barriers limit competition from food imports

El Salvador, Guatemala, and Honduras are parties to numerous trade and free trade agreements, including the Agreement on Central American Tariff and Duties, CAFTA-DR, the EU-Central America Association Agreement, and numerous bilateral trade agreements. All three countries are members of the Central American Customs Union and the Central American Common Market. As mentioned above, the governments of all three countries have been working for several decades, through SIECA and SICA, to harmonize trade policies and develop a common market. While progress has been made, a number of barriers continue to limit regional trade, which negatively impacts food security. FAO has found that, "a food security strategy that relies on a combination of increased productivity and general openness to trade will be more effective in enhancing food security and reducing poverty than would a strategy that relies primarily on the closure of borders."[107]

Given the size of markets for food products in El Salvador, Honduras, and Guatemala, expansion by existing companies or entry by new companies may be feasible only on a supranational or regional scale.[108] Further progress toward regional integration of regulatory systems, or recognition of product licenses and certifications in neighboring countries, may make a significant impact on consumer welfare in food-related markets. As discussed above, overly restrictive customs-related regulations and

[107] FAO, "The State of Food Insecurity in the World: How does international price volatility affect domestic economies and food security?," at 26, *supra* at n.26.

[108] *See, e.g.*, SC, "Sector Agroindustria Fertilizantes," at 107, *supra* at n. 91 (mentioning that a potential entrant would need to enter on a regional scale similar to DISAGRO and FERTICA); CDPC, "Estudio Sobre el Sector de Leche," May 2013, *available at* http://www.cdpc.hn/?q=node/32 (finding that many smaller firms have been purchased or left the market because they are not able to afford new technology or achieve economies of scale).

procedures, as well as potentially anticompetitive conduct affecting the movement of food products and inputs, appear to negatively affect consumer welfare and limit the ability of consumers to access and afford food.

Although international trade agreements continue to decrease tariff barriers, tariffs still remain high on certain agricultural products, which protect local industries. This harms consumers and small producers. Comparatively less progress has been achieved in harmonizing regional health and safety standards and product registration processes, and this lack of harmonization continues to serve as a competitive barrier that makes regional trade more costly. The World Food Program notes that intervention by the Honduran Government to "restrict regional trade in grains[,] … restricts the market for smallholder farmers[,] depresses domestic prices[,]" and "allows larger companies such as millers to import grain."[109] The lack of harmonized SPS requirements also limits regional trade in eggs and other poultry products,[110] and likely contributes to egg-smuggling across borders. Another example, affecting both El Salvador and Honduras, is the lack of regional standards that creates a barrier to importing fertilizer. In all three countries, the lack of a harmonized product registration system for processed and imported food products, which requires that each retailer register each product separately in each country, creates a barrier to movement of those products.

1. Border crossing procedures

Inefficient border crossing procedures at customs entry points in El Salvador, Guatemala, and Honduras often lead to delay and reduce the potential of regional imports to compete with domestic products. Numerous government agencies are present at border crossings, and agencies often have separate staff and procedures for crossing the border with cargo, which contributes to delays. The price of goods, including food products, is increased due to these delays. Wait times are often unpredictable, and delays may "more than double logistics costs for both high and low value goods."[111] Costs of border procedures and waiting times constitute 10% - 12% of the final price of goods moved. An estimated 10% to 15% of transit time is spent on border-crossing procedures, and these delays can constitute up to 50% of travel time in the region.[112] Delays related to border-crossing procedures limit the availability of and

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[109] World Food Programme, "Spotlight on P4P in El Salvador," July 2014, available at https://www.wfp.org/purchase-progress/news/blog/spotlight-p4p-el-salvador.

[110] SC, "Sector agroindustria e insumos: Agroindustria avícola; Agroindustria azucarera; Fertilizantes; Agroindustria arrocera; Agroindustria de la leche y Sector de quesos," El Salvador, 2010, at 23 and 27, *available at* http://sc.gob.sv/uploads/sector_agroindustria.pdf. Progress toward reducing other egg and poultry-related barriers is being made. For example, in 2014, the Salvadoran Ministry of Agriculture and Livestock certified egg and poultry imports from Honduras. *See* "El Salvador authorizes the entry of Honduran Eggs," June 9, 2014, *available at* http://www.centralamericadata.com/en/article/home/El_Salvador_Honduras_Authorizes_Entry_of_Eggs.

[111] Fries and Fernandez, "Agro-logistics in Central America: a supply chain approach - background paper," at 27-28, *supra* at n.81 (noting that milk product importers spend "anywhere from 3 to 5 hours… waiting in line and processing paperwork" at the El Amatillo border crossing between El Salvador and Honduras).

[112] Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (CACIF) presentation, "Situación del Comercio Intraregional Fedepricap/CCIE," August 2014. Information regarding the event at which the presentation was given is available at http://www.cacif.org.gt/index.php?option=com_content&view=article&id=2059&Itemid=464&lang=es.

access to food, because perishable products often spoil at the border. People interviewed for this report mentioned losses of up to a third of perishable produce due to delays at the border.

Documentation and license requirements contribute to border-crossing delays. El Salvador requires seven documents to export goods: the bill of lading, cargo release order, commercial invoice, customs import declaration, packing list, technical standard/health certificate, and terminal handling receipts.[113] These documents take an average of 13 days to procure and cost US$980 per container.[114] The same documents are required for imports, taking an average of 10 days to complete and costing US$970 per container.[115] In Honduras, export procedures take 12 days, cost US$1,345 per container, and require five documents: bill of lading, commercial invoice, customs export declaration, foreign exchange authorization, and packing list. [116] Import procedures take 16 days, cost $1,500 per container, and require seven documents: bill of lading, cargo release order, commercial invoice, customs import declaration, packing list, tax certificate, and terminal handling receipts.[117] In Guatemala, export procedures require eight documents, take 17 days, and cost US$1,435 per container. [118] Import procedures require seven documents, take 17 days, and cost US$1,500 per container.[119]

El Salvador has taken steps to reduce barriers to cross-border trade, including "developing a one-stop shop for exporting … implementing electronic data interchange systems [in 2014]" and "[m]odernization of its customs system and physical inspections, increased traffic control, implementation of a single window, and improvements in the banking sector [in 2009]." Overall, "export and import time decreased" in the past five years, but barriers could be further reduced.[120]

a. SPS measures as barriers

Border-crossing procedures include the application of sanitary and phyto-sanitary (SPS) measures. SPS measures are rules and procedures applied by governments to protect food safety and deter transfers of pests and diseases. Most SPS measures are motivated by legitimate public policy concerns. Nonetheless, they have a significant impact on trade. The World Bank has found that "SPS regulations affect between 13.6% and 17.4% of products and cover not more than 22% of import value in [Central America]."[121] SPS certification procedures also differ from country to country, and the

[113] World Bank Group, "Ease of Doing Business in El Salvador, Trading Across Borders,"2014, *available at* http://www.doingbusiness.org/data/exploreeconomies/el-salvador#trading-across-borders.

[114] *Id*.

[115] *Id*.

[116] World Bank Group, "Ease of Doing Business in Honduras, Trading Across Borders," 2014, *available at* http://www.doingbusiness.org/data/exploreeconomies/honduras#trading-across-borders.

[117] *Id*.

[118] World Bank Group, "Ease of Doing Business in Guatemala, Trading Across Borders," 2014, *available at* http://www.doingbusiness.org/data/exploreeconomies/guatemala#trading-across-borders.

[119] *Id*.

[120] World Bank Group, "Business Reforms in El Salvador," 2014, *available at* http://www.doingbusiness.org/reforms/overview/economy/el-salvador.

[121] Kelleher and Reyes, "Technical measures to trade in Central America: incidence, price effects, and consumer welfare," at 3, *supra* at n.51.

lack of regional integration on these standards and certification procedures has limited the ability of imported products to compete.[122]

SPS measures supported by legitimate public policy concerns, however, can be inadvertently or deliberately applied in ways that protect domestic production, either by preventing goods from entering a country or by increasing the price of imported goods. All three countries may use SPS measures strategically as a way to protect national products. For example, SPS measures were found to have prevented exports of poultry from El Salvador, and the underlying motivations were primarily commercial.[123] Interviews completed in support of this study indicated that El Salvador may have used SPS measures to block imports of red beans during peak harvest time in El Salvador.

2. Prohibitions on backhauling

Another barrier that limits competition is the prohibition of backhauling throughout the region. Regulations prohibit trucks registered in one country from picking up and delivering cargo in other countries. For example, if a truck registered in Guatemala carries produce into El Salvador, the truck is not permitted to pick up goods in El Salvador and transport them to another location within El Salvador. Because of these prohibitions, trucks haul cargo one way, but return empty, creating inefficient and more expensive transport. The World Bank found that, "[e]mpty backhauls are particularly high in Guatemala, where 77 percent of truck trips are returning empty" and "[i]n Costa Rica, El Salvador, Guatemala and Panama, large firms present the highest empty backhaul percentage; while in Nicaragua and Honduras, it is small firms that suffer most from this imbalance of trade."[124]

3. Tariff barriers

The CAFTA-DR free trade agreement calls for the progressive elimination of nearly all customs duties. Under the terms of the agreement, each country negotiated a list of sensitive products for which duty-free treatment is delayed, including separate provisions for agricultural products. Duties on over 50% of U.S. exports of agricultural products were eliminated immediately, with the rest to be phased out over a period of up to 20 years.[125] To-date, CAFTA-DR has been effective in promoting a gradual phase-out of tariffs on imported goods within its first decade, and should meet its target date for duty-free import-export trade between the U.S. and countries in the region.

In El Salvador and Honduras, tariffs on most agricultural products are already quite low and will continue to decrease during the CAFTA-DR duty phase-out period. Tariffs are low for fertilizer products

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[122]*See e.g.*, SC, "Sector agroindustria e insumos: Agroindustria avícola; Agroindustria azucarera; Fertilizantes; Agroindustria arrocera; Agroindustria de la leche y Sector de quesos," at 21, *supra* at n.110.

[123] *Id*. at 12.

[124] Schwartz, Jordan, "Logistics in Central America: the path to Competitiveness - summary document," *World Bank Group*, 2012, at 11, *available at* http://documents.worldbank.org/curated/en/2012/06/17211073/logistics-central-america-path-competitiveness-summary-document.

[125]Congressional Research Center, "CAFTA-DR: Developments in Trade and Investment," April 2010, *available at* http://fas.org/sgp/crs/row/R42468.pdf.

(ranging from 0 to 5%),[126] animal feed inputs such as yellow corn (0%),[127] and poultry products such as broiler chickens and eggs (0-5%). Duties are kept high, however, on select products, which limit competition for local industries. Tariffs are high for chicken thighs and legs imported over the negotiated quota (164%) in El Salvador, which effectively bans imports of these products.[128] Tariffs are also kept high to protect other local industries. For example, in the dairy industry, pasteurized milk tariffs are between 15% to 20% in El Salvador and range from 19% to 35% in Honduras. At least one Salvadoran government has considered an outright ban on crude milk imports.[129]

D. Barriers to accessing inputs

There are a number of other barriers that limit the quantity and quality of domestically grown food in El Salvador, Guatemala, and Honduras. Lack of access to agricultural inputs, including land, technical knowledge, credit, storage, seeds, and fertilizer, limit production and market participation and affect small farmers in particular. While these barriers are mostly beyond the reach of what is normally thought of as competition policy, any comprehensive effort to improve food security and support competitive markets must address them. There are a number of ongoing programs supported by each country's government, local organizations, the World Food Program, and other NGOs to address these barriers.[130]

In each country, many small farmers own land in mountainous areas that are not well-suited for productive agriculture, and small plots are often located far from major roads and transportation networks.[131] Smaller farmers also may lack the capital to invest in seeds, fertilizer, and crop storage that

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[126] SC, "Sector Agroindustria Fertilizantes," at 90, *supra* at n.91; Comisión para la Defensa y Promoción de la Competencia (CDPC), "Estudio Sectorial sobre el mercado de 'Fertilizantes y agroquímicas,'" April 2008, at 26, *available at* http://www.cdpc.hn/?q=node/32.

[127] SC, "Sector agroindustria e insumos: Agroindustria avícola; Agroindustria azucarera; Fertilizantes; Agroindustria arrocera; Agroindustria de la leche y Sector de quesos," at 12, *supra* at n.110.

[128] *Id.* at 11.

[129] *Id*. at 179.

[130] *See, e.g.*, World Food Programme, "Spotlight on P4P in El Salvador," *supra* at n.109 ("P4P in El Salvador focuses on capacity-building and strengthening farmers' organizations requirements, WFP does not constitute a significant market for P4P-supported organizations."); World Food Programme, "Honduras P4P Country Programme Profile," Version 1, October 2010, *available at* http://documents.wfp.org/stellent/groups/procuweb_content/documents/reports/wfp226772.pdf; World Food Programme, "Honduras: WFP Assists Poor Farmers Affected By Coffee Rust," September 2013, *available at* https://www.wfp.org/node/3481/4365/533452 ("Besides the department of Intibucá, WFP organized distributed food rations among coffee producers in the department of Copan."); World Food Programme, "Canada and Guatemala Work Together to Improve Food Security and Nutrition," February 2014, *available at,* http://www.wfp.org/photos/gallery/canada-and-guatemala-work-together-improve-food-security-and-nutrition (A "project known as 'Maíz chapín contra el hambre'… is to support the efforts of Guatemala to increase agricultural productivity and reduce malnutrition, and support the resilience of the communities involved and the empowerment of women with the ultimate goal of ending hunger in the country.").

[131] *See* Corriveau-Bourque, Alexandre, "Beyond Land Redistribution: Lessons Learned from El Salvador's Unfulfilled Agrarian Revolution," *Earthscan: Land and Post-Conflict Peacebuilding*, eds. Unruh, Jon, and Williams, Rhodri,

would help achieve consistent quality products in sufficient quantities to enable participation in formal markets.[132] In addition, small farmers may lack the resources or education to choose the best crops for specific plots of land, plant seeds at the best times of year, and properly apply fertilizers to maximize production and minimize environmental impacts.

Cooperatives and farmer associations help members access necessary inputs, and they are increasingly common in each country. Through cooperatives and associations, smaller producers have been able to access credit, gain and share knowledge about farming and business practices, negotiate for seed and fertilizer, and build storage facilities.[133] Many agricultural cooperatives add value to the crops they source, such as washing, cutting, and packaging, which tends to increase profit margins for members. The World Food Program has offered assistance in developing agricultural cooperatives in El Salvador, Guatemala, and Honduras, through its Purchase for Progress (P4P) program.[134] Ministries of Agriculture have also supported the formation of cooperatives, and provided training to support expanded local production of staple crops, such as maize and beans.[135]

November 2013, *available at* http://www.environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_160.pdf.

[132] IFAD, "Enabling poor rural people to overcome poverty in Honduras,", November 2011, at 2, *available at* http://www.ifad.org/operations/projects/regions/pl/factsheet/honduras_e.pdf; and IFAD "Enabling poor rural people to overcome poverty in Guatemala," May 2012, at 4, *available at,* http://www.ifad.org/operations/projects/regions/pl/factsheet/guatemala_e.pdf.

[133] *See, e.g.*, Stockbridge, Michael; Dorward, Andrew; and Kydd, Jonahtan, "Farmer organizations for market access: A briefing paper," Wye Campus, Kent, England: *Imperial College*, London, 2003, at 3, *available at* http://r4d.dfid.gov.uk/PDF/Outputs/R8275_040516_Bfg_Paper_FO_for_market_access.pdf.

[134] *See, e.g.*, World Food Programme, "Spotlight on P4P in El Salvador," *supra* at n.109; World Food Programme, "Honduras P4P Country Programme Profile," and World Food Programme, "Canada and Guatemala Work Together to Improve Food Security and Nutrition;" *supra* at n. 130.

[135] *See, e.g.,* El Salvador Ministerio de Agricultura y Ganaderia, "Con inauguración de agro ferias, MAG acerca servicios a población," November 2014, *available at* http://www.mag.gob.sv/index.php?option=com_k2&view=item&id=707:con-inauguraci%C3%B3n-de-agro-ferias-mag-acerca-servicios-a-poblaci%C3%B3n&Itemid=168 ("The Minister of MAG, Orestes Ortez, said that 'the agricultural fairs are intended to highlight the entire potential of the MAG, the technologies promoted for the benefit of agriculture, such as the improvement of *see*d corn and beans; reactivation of irrigation systems; and support for domestic producers to farm.'"); Honduras Secretary of Agriculture and Livestock, "Project Enhancing Competitiveness of the Rural Economy in Yoro (PROMECOM),"2014, *available at* http://promecom.org/; The Norman Borlaug Institute, "Guatemala: AGTEC Project Conducts Course on Soil Management with Small Farmers Using Effective Microorganisms," March 2012, *available at* http://borlaug.tamu.edu/2012/03/28/guatemala-agtec-project-conducts-course-on-soil-management-with-small-farmers-using-effective-microorganisms/ ("[T]he Borlaug Institute's AGTEC (Agriculture in Guatemala: Technology, Education, and Commercialization) project hosted a training of trainers event titled; Ecological management of soil through the use of effective microorganisms: Preparing fermented organic fertilizers in solid and liquid forms…The event was coordinated with the Guatemala Ministry of Agriculture, Agri-environment Solutions, and the Guatemala National Committee of Organic Agriculture.").

E. Barriers to accessing markets

Some barriers to competition are consequences of lack of infrastructure, and improving infrastructure would help firms to compete more effectively. A recent World Bank study found that Central American countries' "road transport prices are particularly high … even relative to other inefficient developing country markets."[136] These high costs result from a variety of factors, including road conditions and security.

1. Poor roads and infrastructure and high transportation costs

Throughout the region, access to roads and the condition of roads and bridges present challenges for all; particularly small food producers. The poorest farmers often live in more remote, mountainous areas that are more likely to lack access to paved roads. Poor road quality may either prevent transport vehicles from visiting certain areas or increase the time it takes to transport crops. For perishable goods, this is a significant challenge because it increases the likelihood of spoilage in route. This may make expansion by small producers too risky or unprofitable. When vehicles can reach rural areas, they may need to be small to navigate "mountainous terrain and poor [quality roads]."[137] Smaller vehicles cannot transport as much volume, and must drive slowly, contributing to higher prices for all products transported.

2. Security and transportation

Another component of high transportation costs relates to security. Widespread violence and lack of security has significant consequences for the economies of El Salvador, Guatemala, and Honduras. It threatens government stability and rule of law, and discourages consumers and entrepreneurs from participating in the economy. There are global efforts underway to stem the prevalence of violent crime and extortion, but the perniciousness of gang warfare, drug trafficking, and corruption has made progress difficult.

Violence in El Salvador, Guatemala, and Honduras creates significant economic and social costs.[138] Some businesses pay for private security services, which increases the economic cost of doing business.[139] Security issues also limit the movement of people and of food products throughout the region. Safety concerns have meant that some truck drivers will not move goods at night.[140] In El Salvador, Guatemala, and Honduras, passengers, bus drivers and fee collectors have become targets for

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[136] Osborne, et al., "What drives the high price of road freight transport in Central America?," at 3, *supra* at n.45.

[137] Fries and Fernandez, "Agro-logistics in Central America: a supply chain approach - background paper," at 24, *supra* at n.81.

[138] World Bank Group, "Crime and Violence in Central America: A Development Challenge," 2011, at 4-5, *available at* http://siteresources.worldbank.org/INTLAC/Resources/FINAL_VOLUME_I_ENGLISH_CrimeAndViolence.pdf.

[139] *Id*. at 7. In 2011, businesses in El Salvador spent USD$ 257 million on security, Honduran businesses spent USD$132 million, and Guatemalan business owners invested an estimated USD$ 324 million in private security.

[140] Murillo, Álvaro, "Centroamérica, una carrera de obstáculos para las mercancías," *El Pais*, March 2014, *available at* http://internacional.elpais.com/internacional/2014/03/15/actualidad/1394851357_637880.html.

gang members, who demand extortion payments.[141] Rather than pay gang members, some companies have cancelled routes perceived to be too dangerous. Disruptions to public transportation affect the access of rural producers and consumers to marketplaces, making it harder for them to sell and purchase food.

In the region, "[t]he direct cost of security measures alone represent about 3 to 4 percent of total operating costs"[142]for trucking companies. For example, "[h]igh-value meat and coffee exports must pay for a security patrol or armed guard to accompany containers in transit, particularly for vehicles traveling in or through Honduras," [143] and "the price of this security service ranged from $250 to $368 dollars total per trip from cooperative to port, equal to a third of overall transport costs, or half of the ground transport service costs itself, depending on the scale, production zone and warehouse location."[144] Producers also risk loss of goods from theft and holdups.

F. Competition policy implementation capacity

Effective development, implementation, and enforcement of competition law and competition policy by a strong competition agency can help identify and reduce barriers to competition in food, agricultural, and all other markets in El Salvador, Guatemala, and Honduras. El Salvador and Honduras have each had almost a decade of competition law and policy experience, and their competition agencies have celebrated successes and identified areas for improvement.

1. Competition laws and implementing agencies

The capacity of each of the countries to address anticompetitive conduct by firms and barriers to competition supported or created by governments is constrained by weaknesses in legislation or, in the case of Guatemala, a lack of competition legislation. Another constraint is the capacity of competition agencies to effectively address anticompetitive conduct and to advocate for procompetitive legislation and regulatory policy.

The SC in El Salvador and CDPC in Honduras need stronger legislation if the agencies are to effectively address anticompetitive conduct, including as related to food security. Effective competition legislation requires, among other things: enforceable standards that assess the legality of conduct consistent with the economic purpose of the law; adequate powers for detection and investigation of suspected anticompetitive conduct; procedural standards that ensure transparency, procedural fairness, and maintain the confidentiality of business information; effective judicial review; and powers that will allow the agencies to serve as effective advocates for pro-competitive regulatory policies and conduct competition advocacy. Proposals to amend the competition laws in both countries are pending. Some of

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[141] Fogelbach, Juan, "Gangs, Victims, and Violence in El Salvador, Guatemala, and Honduras," *San Diego International Law Journal*, Vol. 12, May 2011, at 417.

[142] Schwartz, "Logistics in Central America: The Path to Competitiveness," at 7, *supra* at n.124.

[143] *Id.* at 8.

[144] Fries and Fernandez, "Agro-logistics in Central America, a supply chain approach - background paper," at 10, *supra* at n.81. Statistic is for small and large coffee exporters surveyed.

these reforms, if passed by the legislatures, will help the agencies operate more efficiently with limited resources.

Several specific improvements would improve the efficacy of laws in both countries. First, neither El Salvador nor Honduras currently has the authority to settle cases. The ability to settle cases plays an important role in agency efficiency and allocation of resources, but can raise procedural fairness concerns. Next, neither the SC nor the CDCP has implemented an effective leniency program, which many competition agencies have found to be the most effective tool for gathering evidence to prosecute cartels.

Another constraint impacts the SC. In El Salvador, the agency does not have discretion to choose which cases to investigate. It is required to investigate every complaint that meets certain legal requirements, thereby straining the agency's resources. Experience has shown that many complaints received by competition agencies come from inefficient competitors who hope to use competition law to target more efficient competitors who offer lower prices. Such complaints turn the purpose of competition law on its head, and competition agencies need to be able to dispose of them quickly, to focus their resources on conduct that undermines the competitive structure of markets.

The OECD has conducted Peer Reviews of El Salvador and Honduras, which identify additional barriers to effective competition policy and law enforcement in each country. The Peer Review of El Salvador identifies merger review requirements that burden staff with reviewing transactions unlikely to harm domestic competition, delays in the judicial review of cases, and a lack of competition culture as specific impediments.[145] The OECD Peer Review of Honduras suggested several measures that could reduce barriers to competition, including: amending merger thresholds to ensure proper nexus to the jurisdiction, which would relieve staff burdens of reviewing transactions not likely to harm competition in Honduras; increasing awareness of competition policy to other government agencies, businesses, and the general public; creating long-term strategic plans; fostering cooperative relationships and discussing competition issues with other government agencies; extending the investigative review periods; and other changes to the content of the competition law. [146] Implementing the OECD's recommendations could significantly help these agencies to more effectively protect consumer welfare and promote competition.

The SC and CDPC have succeeded in recruiting dedicated and well-educated staff. However, the skills needed to detect, investigate, analyze, and remedy suspected violations of competition law are complex and require years of training and experience. Because anticompetitive conduct and aggressive competition can closely resemble each other, effective competition law enforcement requires the application of legal, economic, and investigative skills to ensure that competition law is applied consistent with its underlying purpose. Institutional management requires effective systems for identifying and prioritizing promising cases while bringing those that are unlikely to yield results to a quick close, ensuring the highest standards of confidentiality and procedural fairness, and preserving the independence of the institution from improper influence. While Honduras and El Salvador have both made strides in these respects, both require additional support and training if they are to fulfill their promise. Guatemala will require assistance to establish a competition regime.

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[145] OECD and IDB, "Competition Law and Policy in El Salvador: A peer review," at 13, *supra* at n.71.

[146] OECD and IDB, "Competition Law and Policy in Honduras: A peer review," *supra* at n.80.

Effective competition law enforcement also requires sufficient resources[147] to hire and retain staff with the mix of economic and legal skills necessary for competition analyses, to invest in technology needed to support that analysis, and to conduct investigations that will allow the true costs and benefits of alleged anticompetitive conduct to be identified. While many government agencies have resource problems, the SC and CDPC have been under particular budgetary strain in recent years.

2. Judicial review

In these countries, as elsewhere, competition agencies' decisions are subject to judicial review. Thus, if these competition policy systems are to be effective, national courts must have an understanding of business behavior and economic theory to effectively review competition agency decisions.

Judges in general administrative and appellate courts are often unfamiliar with competition law or the economic analysis that is often key to establishing proof in competition cases. There is little case law to guide judges' decision-making, and legal materials on competition are often unavailable or unfamiliar. In some countries, this has led judges to resolve competition cases on procedural grounds whenever possible, which deprives parties of a meaningful appeal on the merits of a competition case. This situation can also contribute to delays and to legal uncertainty if opinions in competition cases are inconsistent or are poorly reasoned or drafted. The Regional Center for Competition in Latin America, (CRCAL) originally funded by the InterAmerican Development Bank (IDB), has provided online databases of competition cases that serve as a resource for both agencies and judges. However, funding for CRCAL was recently terminated by IDB, and the future of this effort is unclear.

In Honduras, procedures adopted in 2009 shortened the appeals process from competition agencies to the Administrative Disputes Tribunal, and decisions now typically take under 12 months.[148] Subsequent appeals are heard by the Court of Appeals and the Supreme Court, and each court typically takes six months to review a lower court's decision.[149] Despite the improved decision schedules overall, appellate courts have heard challenges to the CDPC's decisions for each appealing party individually, which has delayed investigations. For example, in the sugar cartel matter, the appellate courts took at least ten separate cases. In other jurisdictions, appeals with the same legal basis from the same agency decision would be consolidated and heard together. Delays have also led to uncertainty for the SC in El Salvador, where the Supreme Court takes, on average, about three years to reach a decision in a competition case before it.[150]

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[147] *See* Clougherty, "Competition Policy Trends and Economic Growth: Cross-National Empirical Evidence," at 18, *supra* at n.68 (finding that "competition policy (or at least a nation's budgetary commitment to competition policy) plays a positive role in economic growth").

[148] OECD and IDB, "Competition law and policy in Honduras: A peer review," at 24, *supra* at n.80.

[149] *Id*.

[150] While not related to the capacity of administrative courts to review competition agency decisions, delays in the civil judicial review process may pose a competitive barrier for private business. For civil court proceedings, the World Bank's Doing Business report indicates that a typical contract enforcement case moves slowly though the judicial systems in El Salvador, Guatemala,[150] and Honduras.[150] Inefficient judicial procedures and uncertainty may reduce some businesses' willingness to enter into contracts. *See* World Bank Group, "Ease of Doing Business in El Salvador, Enforcing contracts," *available at* http://www.doingbusiness.org/data/exploreeconomies/el-

3. Other supporting government institutions

Regulations and policies that affect competition are often the responsibility of other government agencies and ministries, not the competition authorities. For example, in El Salvador and Honduras, the competition agencies' sector studies, discussed above in Section IV.B, identified regulatory barriers to competition in food-related markets supported by or created by other government agencies. The power of competition agencies is normally limited to persuasion and advocacy of pro-competitive policies with those agencies and ministries. If those agencies lack the capacity to appreciate the benefits that competition can bring and how the goals of competition can align with their own goals, change is unlikely.[151]

The SC and CDPC have made recommendations to improve regulations and policies that harm competition. El Salvador developed guidelines to assess regulations that could potentially restrict competition, and implemented a program to comment on anticompetitive aspects of proposed legislation. The SC will offer comments upon request or upon its own initiative, and provides comments to a group of Executive Agency Ministers through the Office of the Legislative Secretariat of the Presidency (Secretaria Legislative de la Presidencia). The SC has also joined with other government agencies to provide comments in specific sectors.[152] Honduras, following recommendations in the 2011 OECD Peer Review,[153] adopted changes that included a role for the CDPC in analyzing legislation. Each of these initiatives supports the role of competition law and engages key players in other government institutions. To date, however, most of the SC's and CDPC's suggestions have not been accepted by other government agencies.

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salvador/enforcing-contracts/ (In El Salvador, enforcing a contract takes 786 days, with 40 days for filing and service, 381 for trial and judgment, and 365 days for enforcement of judgment. El Salvador ranks 68 out of 189 economies for enforcing a contract.); World Bank Group, "Ease of Doing Business in Guatemala, Enforcing contracts," *available at* http://www.doingbusiness.org/data/exploreeconomies/guatemala/enforcing-contracts/ (Guatemala ranks 97 out of 189 economies for enforcing a contract, and the process take 1,402 days. Filing and service takes 66 days, trial and judgment takes 796 days, and enforcement of judgment takes 540 days.); World Bank Group, "Ease of Doing Business in Honduras, Enforcing contracts," *available at* http://www.doingbusiness.org/data/exploreeconomies/honduras#enforcing-contracts (In Honduras, judicial enforcement of a contract typically takes 920 days, with 60 days for filing and service, 620 days for trial and judgment, and 180 days for enforcement of judgment. Honduras ranks 182 out of 189 economies for enforcing a contract.).

[151] *See* OECD, "Latin American Competition Forum, Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean-- Contribution from United States," *supra* at n.79.

[152] *See, e.g.*, SC, "Opinión sobre reformas a la Ley de la producción, industrialización y comercialización de la agroindustria de El Salvador," August 27, 2014, *available at* http://www.sc.gob.sv/pages.php?Id=1535 (The SC made recommendations regarding the sugar industry jointly with the Ministry of Finance, Ministry of Agriculture, and the Executive Branch.).

[153] OECD and IDB, "Competition law and policy in Honduras: A peer review," *supra* at n.80.

V. Inputs to help reduce barriers to competition

As discussed in the preceding sections, barriers to competition that undermine food security in El Salvador, Guatemala, and Honduras fall into broad categories: those caused by anticompetitive conduct, such as cartels or exclusionary business practices by dominant firms, and those caused by governmental policies and regulations that have the effect, intended or otherwise, of restricting competition. Long-term food security can be supported by an understanding of the benefits of competition among government institutions, business people, and the judiciary, and through effective application of competition policy, competition law enforcement, and competition advocacy. This section seeks to identify targeted interventions that would support more effective competition policy and law development and implementation to reduce barriers to competition.

All three countries can learn from the experiences of other countries that have worked to develop strong and effective competition law, policy, and enforcement. The United States, with more experience applying competition law and policy than any other nation, can provide particularly helpful assistance. Other countries, especially those with civil law systems that more closely match those in Central America, such as Mexico and Chile, can also share relevant experiences. In addition, international organizations have developed tools likely to prove informative in these jurisdictions. For example, the International Competition Network has adopted best practices and made recommendations as to both substantive and procedural aspects of competition law, and has developed substantial experience and guidance on how best to establish effective institutions and enforce competition law while ensuring procedural fairness.

Figure 2 provides a summary of the capacity-building inputs that have the potential to improve competition in the region and support work to further develop the enabling environment for economic development and improve food security in El Salvador, Guatemala, and Honduras.[154]

Figure 2: Summary of recommended capacity-building inputs

Activity	**Guatemala**	**El Salvador**	**Honduras**
Legislation directed at anticompetitive business conduct	Assistance in building support for competition law and policy	Improvements to existing legislation, as identified in OECD Peer Reviews	
Strengthening Institutions	Building competition enforcement agency	Transferring investigative and analytical skills to agency staff	
Building capacity of the judiciary	Workshops to build the capacity of judges to apply competition law		

[154] As discussed in section IV.E.2, *supra* at p. 29, the barriers created by weaknesses in transportation, infrastructure, and security are largely separate from competition policy issues and beyond the scope of this report, though each of these contributes to increases in food and other prices and decreases in output or innovation.

Addressing anticompetitive regulation	Incorporating regulatory review into legislation	Building capacity in competition agencies to serve as effective advocates for procompetitive policies
	Support in identifying the costs and benefits of regulation and alternative regulatory approaches	

A. Addressing anticompetitive business conduct

To take effective action against anticompetitive business conduct, such as cartels, unilateral conduct like monopolization,[155] or anticompetitive mergers, a jurisdiction must have both well-drafted competition legislation and a properly resourced and empowered agency to enforce the law and serve as an advocate within government for pro-competitive policies. Both El Salvador and Honduras have such laws and institutions. Guatemala is considering how it might best establish a comprehensive competition law and policy enforcement system.

1. Adequacy of legislation

Honduras and El Salvador both have competition laws that are well aligned with international norms. However, as with most countries that adopt new competition laws, experience has revealed the need for improvement and refinement to better allow them to fulfill their intended purpose. As noted in the preceding section and in the OECD peer reviews of both countries, the laws can be strengthened through improvements in agency governance, anti-cartel enforcement, merger notification and review procedures, fines and penalties, and judicial review.[156] Guatemala has committed to adopting competition legislation, but it is unclear how strong and effective any such law will be.

Perhaps the most important assistance that can be provided to Guatemala is to support national efforts to build domestic political support for competition laws. Competition laws can only be effective if the law and implementing institutions have political support. Otherwise, it is unlikely that an effective law will be passed, that proponents of a market-centered economic system will be appointed to enforce it, that the authority will be given sufficient resources and powers to do the job, or that measures that may be politically unpopular in the short run can be implemented. A high priority should be placed on contributing to efforts to build an educated consensus on the part of government, business, academic, consumer, and media opinion leaders that competition is good for consumers and for a country's competitiveness, productivity, and economic development. With an educated consensus in place, attention to drafting laws and regulations that are effective, substantively consistent with international and regional norms, and procedurally fair will be needed.

[155] *See supra* at n.70 (discussing the legal treatment of unilateral conduct by a dominant firm as monopolization or abuse of dominance).

[156] *See* OECD and IDB, "Competition Law and Policy in El Salvador: A Peer Review," at 32-34, *supra* at n.71; OECD and IDB, "Competition law and policy in Honduras: A peer review," *supra* at n.80.

2. Institutional framework

El Salvador and Honduras have competition laws and competition agencies with oversight and enforcement powers. El Salvador's SC and Honduras' CDPC began operations in 2006. While different in composition, both agencies are designated autonomous offices with their own budgets. The competition laws of the two countries differ in their language and organization, but each provides the competition agency with the authority to investigate and identify similar types of anticompetitive conduct and use investigative tools and enforcement procedures.

Both the SC in El Salvador and the CDPC in Honduras are within their first decade of operations, and have focused their work on the basic goods and services that are vital to consumers. The agencies were created in countries in which prior laws encouraged anti-competitive behavior,[157] and are regarded with some suspicion and negativity by the business and commercial communities. Both face local judiciaries that are unfamiliar with and have difficulties applying competition law. The SC and the CDPC are both experiencing growing pains, but are amenable to advice and counsel and open to assistance to help them develop institutional stability and expertise. Guatemala also has a history of vested interests' effective resistance to attempts to regulate anti-competitive behavior. This suggests that a competition law and agency would be particularly important for the country, while at the same time making implementation challenging.

While small size presents challenges to all three countries of the Northern Triangle, it is by no means a determining factor of whether a culture of competition can successfully take root. The basic objectives of competition policies—preventing firms from exercising market power by restricting output or engaging in anticompetitive conduct— apply to both large and small jurisdictions.[158] By means of example, Costa Rica and Chile, both smaller or mid-sized economies, have developed strong competition policy and enforcement regimes and have had notable successes in competition law enforcement cases and in supporting effective competition policies, including in their agricultural sectors.[159]

3. Inputs to strengthen the capacity of the existing institutions responsible for competition law enforcement

Assuming adequate legislation and institutional framework, the biggest challenge to effective competition law enforcement is establishing the capacity to detect, investigate, and remedy anticompetitive conduct in a way that improves markets. Unlike most areas of law enforcement, competition law enforcement typically involves prediction of future economic behavior, not simply the assessment of past conduct. Competition authority managers and staff need to learn to detect the likely effect on competition of business conduct, identify the real competition issues (which are often not the

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[157] See *e.g.*, The Honduras Code of Commerce, which specifically endorsed non-compete contracts between merchants, until the competition law derogated those provisions. *See* "Ley para la Defensa y Promoción de la Competencia," Decreto Legislativo No. 357-2005, Art. 60, published February 4, 2006, Diario Oficial.

[158] Gal, Michal, "Size Does Matter: General Policy Prescriptions for Optimal Competition Rules in Small Economies," *University of Southern California Law Review* 74, 2001, at 1438-1478, *available at* http://works.bepress.com/michal_gal/21.

[159] *See* OECD, "Competition Law and Policy in Chile: Accession Review," 2010, *available at* http://www.oecd.org/daf/competition/47950954.pdf (Chile is regarded as a "quiet pioneer" in competition policy); UNCTAD, "Voluntary Peer Review of Competition Law and Policy: Costa Rica," *supra* at n.25.

ones presented by a complaint), conduct effective investigations, and develop remedies to resolve the competitive problem.

Technical assistance from more experienced competition agencies is one way to share accumulated institutional knowledge. Successful enforcement of a competition law requires not only technical knowledge, but also experience and judgment. In developed countries, this comes from on-the-job training, experience, and institutional knowledge from more experienced colleagues.[160] Competition law enforcement is an inherently governmental law-enforcement function. Competition law enforcers are experienced in investigational techniques and analysis and have participated in training their own staffs. Training by staff of experienced competition agencies also takes advantage of the rapport and respect given to fellow professionals. Advice from fellow civil servants is understood, readily accepted, and considered credible. It also leads to ongoing dialogue and communication after the formal training concludes, which leads to greater sustainability of assistance over the long run.

One of the most effective capacity-building inputs for newer competition agencies is the use of resident advisors from more experienced competition agencies who work directly in the office of the newer competition authority for several months.[161] Investigation and analysis is best learned in the context of real cases in local context than through theoretical lectures. Advisors are thus in place when a case presents the proverbial "teachable moment" that cannot be replicated in a scheduled training program or seminar. Advisors build relationships of trust and rapport, as fellow professionals, which results in their advice being more readily sought, accepted, and applied. Their regular presence permits insights about case selection, internal procedures, and priority-setting that are not necessarily accessible to short term advisors.

Another way of "learning by doing" is to gain skills through sending staff of newer agencies on details, also known as secondments, to experienced competition agencies. The FTC has statutory authority to host staff of other competition agencies to work side by side with experienced FTC case handlers on actual cases.[162]

Another useful tool for transferring capacity from existing agencies to newer agencies are interactive investigative skills workshops. Some of these can be structured as hypothetical but realistic cases that present issues typical of those found in monopolization, cartel, or merger cases. Case handlers from experienced agencies guide participants through an interactive role-playing process of issue identification, development of an investigational plan, witness interviews, document gathering and analysis, evaluation of results, and devising an appropriate remedy. This tool allows participants to effectively watch a real investigation unwind, but with the facts tailored to those that might be encountered locally.

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[160] ICN, "Findings Related to Provision of Technical Assistance," 2007, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc366.pdf.

[161] DOJ and FTC, "For the Effective Application of Competition Laws," February 2008, *available at* http://www.ftc.gov/sites/default/files/attachments/international-assistance-program/ftcdojtechnicalassist.pdf. Observations by recipients of such technical assistance, as well as others, can be found in the transcript of a 2008 FTC-DOJ workshop on technical assistance. *See* Federal Trade Commission, "Official Transcript Proceeding," February 2008, *available at* http://www.ftc.gov/sites/default/files/documents/public_events/charting-future-course-international-technical-assistance/wkshptranscript080206.pdf.

[162] 15 U.S.C. §25a(a)(1). *See* FTC, "International Fellows Program," 2014, http://www.ftc.gov/internationalfellows.

Other short-term assistance can be targeted to a specific purpose (*e.g.*, training with respect to a particular type of investigation, assistance with competition advocacy) or as an adjunct or follow-up to work done by a resident advisor.

Newer competition agencies also face other challenges separate from the capacity of their staff. Competition law enforcement requires an amalgamation of legal and economic analysis and advocacy, which requires skilled lawyers and economists. Many newer agencies, such as SC and CDPC, cannot offer competitive salaries to such individuals, especially when pay scales are mandated by civil service regulations of general applicability. While they have nonetheless attracted dedicated staff, addressing human capital issues are a significant need.

4. Addressing the capacity of supporting institutions

Supporting institutions, such as the judiciary and regulators, also impact the effective application of competition law and policy. In cooperation with the judiciary, training for the judicial branch may be needed and welcome. The Regional Competition Center for Latin America (CRCAL)[163] has provided such training in the past and has developed a network of judges in the region who promote competition policy within the judicial community. Indeed, several such programs have already been conducted,[164] although more are needed. As a general proposition, judges tend to welcome assistance and training from fellow jurists. Consequently training directed at the judiciary would best place judges who have developed expertise in competition law in a central role.

B. Addressing governmental policies that serve as barriers to competition

As discussed earlier in this report, anticompetitive government policies and regulations can prevent competition from realizing its potential to reduce costs to consumers, increase output and consumer choice, and contribute to overall economic prosperity and food security.

1. Understanding the relationship between competition and regulation

All governments regulate markets in some way, and most regulations are motivated by legitimate needs to protect consumer health and safety or overall government economic policy. For example, food safety regulations, including SPS measures, are intended to protect the food and drug supply from contaminants and disease. Customs regulations and procedures are intended to ensure that applicable duties are paid and prohibited items are excluded from a country. Business licenses and registrations are intended to assure a level of accountability and to ensure collection of the taxes that may be needed to sustain governmental functions.

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[163] More information about the Regional Competition Center for Latin America (CRCAL) is available at www.crcal.org.

[164] *See, e.g.,* CRCAL, "Third Seminar on Competition for Latin American Judges," March 2014, *available at* http://www.crcal.org/eventos-talleres/eventos/eventos-anteriores/item/167-tercer-seminario-de-competencia-para-jueces-latinoamericanos-ciudad-de-panama-panama. This event was partially supported by USAID.

The application of competition policy does not seek to undermine the achievement of legitimate goals envisioned by regulation. However, regulations can go beyond legitimate public policy goals. They may protect incumbents from competitive entry, and there may be means to achieve the desired public policy goals while minimizing the impact on competition. Limiting anticompetitive effects of regulations while ensuring that the legitimate public policy goals are fulfilled is a major challenge in all countries. In most countries, the competition agency is the only governmental body with the institutional interest and expertise in considering the effects of regulation on competition and markets.

Some barriers to competition result from failure on the part of regulators or legislators to understand how regulations affect competition and, ultimately, consumers and producers. Often, these can best be addressed through what competition agencies refer to as competition advocacy. Through competition advocacy, a neutral and credible advocate for sound competition policy – typically the competition agency – seeks to engage with the regulator, reach a mutual understanding of both the economic effects of regulation and the underlying regulatory goals, and seek a regulatory solution that fulfills the regulators' goals while ensuring that competition can protect consumers' economic interests. This is not a simple process, but in the best case, this can become a win-win proposition for all.

When regulators perceive their interests as linked to those of the regulated, regulators may be effectively captured. This can happen in a number of ways, including, historic relationships dating from periods of state ownership, imprecise lines between the regulator and regulated, a "revolving door" between regulator and regulated, personal relationships, or pernicious influences. Special care or attention may be required to resolve such situations.

2. Inputs to strengthen the capacity of the existing institutions responsible for competition advocacy

Managing the relationship between competition and regulation is an acquired skill. While competition agency officials have long recognized and addressed the relationship between the two, it has only been in recent years that competition agencies have recognized competition advocacy with respect to regulation as a distinct aspect of their work. While the competition agencies in El Salvador and Honduras have conducted numerous sector studies that identify regulatory barriers to competition,[165] finding ways to effectively address these barriers and to build bridges to regulators has proved more of a challenge. Sharing skills developed, both through national experience and through international organizations such as the International Competition Network and the OECD, can help build the capacity to do so.

Learning from others may also be useful at other levels. Part of the process of managing the relationship between regulation and competition is understanding the costs and benefits of regulation. Empirical data can be helpful to this process, as can identification of experiences in other countries where different regulatory experiences have been tried or analyzed. Governments and international institutions may also have views that they may wish to provide.

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[165] Information about the SC's completed and ongoing sector studies is available at http://www.sc.gob.sv/pages.php?Id=1015 and http://www.sc.gob.sv/pages.php?Id=165&Id_menu=306000. Information about the CDPC's sector studies is available at http://www.cdpc.hn/?q=node/32.

In some circumstances, it can be helpful for outside experts to lend support to competition agencies. When decision-makers understand how other jurisdictions have been able to balance competition and regulatory goals, they may be inclined to take that experience into account in formulating domestic policy.