

II-1.2: INDECOPI, Peru's Competition Authority, hands down important sanctions in the rail sector in order to promote market openness in this sector

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Article Multan a PeruRail. Prensa Libre.

MAIN INFORMATION

PeruRail, the operator of Peru's famous railway line, providing service between Cuzco and Machu Picchu, was sanctioned USD\$800,000 on May 10, 2010 by the '*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*' (INDECOPI- Peru's national institute for the defense of competition and protection of intellectual property) for having restricted competitors' market entry. An appeal is underway.

CONTEXT AND SUMMARY

The '*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*' (INDECOPI- Peru's national institute for the defense of competition and protection of intellectual property) was first established in 1992 by Decree No. 25868. It is described as a 'Specialized Public Agency' that promotes the market, honest competition, consumer protection, and the protection of intellectual property. It is bestowed with legal capacity in domestic public law and, as such, benefits from functional, technical, economic, budgetary, and administrative autonomy.

In 1999, President Fujimori of Peru privatized the railway line running between Peru's capital, Cuzco, and the renowned Incan ruins nearby, Machu Picchu, in order to spur investment. He then granted a 30-year concession to Fetransa, a company charged with administrating and maintaining the railway infrastructure. The regulatory body that oversees Fetransa is the "Organismo superior de la supervisión de la inversión en infraestructura de transporte de uso público" (OSITRAN - Peru's supervisory agency in public transportation investments). The associated dominant historical railway operator is PeruRail, which is run by Orient Express Hotels Ltd, and owned by Peruval Corp., a company that invests in infrastructure, tourism, and real estate alike. What resulted from this relationship was in fact a monopoly held by Fetransa and PeruRail over the prized railway line between the capital and the tourist hub. However, the monopoly finally came to an end this past September 2009 with the entry of IncaRail and the upcoming entry of Andean Railways, which has just recently met the requirements for entry defined by the "Ministerio de Transportes y Comunicaciones" (MTC - the Peruvian Ministry of transportation and communication).

On May 10th 2010, PeruRail received a sanction emitted by INDECOPI for the amount of 657.5 "unidades impositivas tributarias" (UIT - tributary tax units), amounting to the equivalent of USD\$800,000. After a 15 month investigation responding to a complaint filed by the "Asociación de Operadores de ferrocarriles del Perú (Apofer - the Peruvian association of railway operators) accusing monopolists of abuse of dominant position, INDECOPI *Resolution 026-21010/CLC-Indecopi* has finally confirmed that PeruRail committed a "grave infraction" by "postponing, avoiding, and raising costs on competition."¹ Said "grave infraction" was identified as an administrative violation of the "Ley de Represión de Conductas Anticompetitivas" (the Law on the repression of anti-competitive behavior).

Other companies linked to PeruRail have also been found at fault and may receive sanctions for having infringed on competition: Fetransa and Peruval Corp. were found to have employed legal and judicial procedures that served to delay and hinder other companies' entry to the market. In addition to the sanction placed on PeruRail, INDECOPI may empower the MTC to solicit the termination of Fetransa's concession over the railways lines, as the contract between Fetransa and the Government stipulated that any sanction imposed by INDECOPI for "grave infraction on free competition" may be

considered a breach of contract and can result in the termination of concessionary rights.

PeruRail has announced that it will appeal INDECOPI's Resolution within the legal delay of 15 days following the date they received the sanction (May 10).

Links with other documents in the same sector

BRIEF COMMENTARY

Peru may be situated on the other side of the Atlantic Ocean, but it is evident that the country has embraced the European model of railway organization in that it has divided infrastructure administration from passenger services and has centralized maintenance of infrastructure in the hands of a private company.

The recent turn of events demonstrates Peru's growing support for free competition and intolerance of violations of the law. The fact that INDECOPI's sanction was indeed handed down is an uncontested affirmation of Peru's serious conviction to abiding by the law. However, it remains to be seen if this paradigm is extended to other sectors rather than those veered solely towards tourism. PeruRail was already unpopular in Peru due to the fact that it received its concession under Peru's disliked President Fujimori, who has recently been convicted to 25 years in prison on the grounds of mass murder and kidnapping. In addition, nationals have long been protesting PeruRail's corruption and discrimination towards the Peruvian people who cannot afford the prices but have no other option to reach the Incan site, now overrun by tourism.

In these conditions, it is difficult to know whether this advancement in supervision of market openness by the regulatory authority is simply an overreaction to a former political context—which would limit the legal and economic significance of this decision—or whether it is a wholehearted acceptance of market economy principles, in which case, we might expect to see decisions founded on similar reasoning in other sectors, such as telecommunications and energy, or even see the establishment of new national regulators, similar to the public infrastructure investment authority (OSITRAN), which would, more broadly, govern sectors in such a way as to lead them to an open economy, and furthermore promote investment and guarantee an equilibrium between the principles of competition and public service.