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TRADE AND COMMERCIAL LAW ASSESSMENT – GUATEMALA

FINAL REPORT



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Trade and Commercial Law Assessment Guatemala

FINAL REPORT

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I. EXECUTIVE SUMMARY

At the request of the United States Agency for International Development (USAID), Booz Allen Hamilton conducted a Commercial Legal and Institutional Reform (CLIR) and Trade assessment in June 2004 to analyze strengths, weaknesses, and opportunities for change in Guatemala. The assessment was conducted by a team of legal reform and trade specialists as one part of a five-country Central American regional assessment.¹ This report presents the team's findings and recommendations directly pertaining to Guatemala. A report prepared for the region will address common issues in trade development and CLIR, along with regional approaches to reform and development in these areas.

First, this report discusses common themes Guatemala's CLIR and trade environment that may be incorporated into a reform program on a crosscutting basis. Predictably, an overriding theme that emerges from virtually every topic detailed in this report is that of corruption. Guatemala's long, painful history in this area makes it a particularly difficult issue, one that in many respects is beyond the scope of this report. The discussion of its crosscutting implications here thus focuses on aspects of corruption that lend themselves to consideration in the context of CLIR and trade. Three additional crosscutting themes are set forth: obstacles inhibiting the establishment and growth of companies, corporate governance, and the imperatives of professional development.

Second, the report examines 13 subject-matter areas identified for assessment by USAID, analyzing each from a four-part perspective: Framework Laws, Implementing Institutions, Supporting Institutions, and Social Dynamics. The four-part analysis not only allows for a multidimensional understanding of specific CLIR and Trade-related challenges but also creates the basis for certain general themes to emerge. The analysis consists of the following:

- ♦ **Legal Framework.** The assessment first examines the laws and regulations Guatemala has in place that serve as the structural basis for its ability to achieve market-based development. Often discovered through this review are opportunities to make relatively small changes that may result in significant openings for business development and expansion.
- ♦ **Implementing Institutions.** Next, the assessment examines the administrative bodies with primary responsibility for implementation and enforcement of the legal framework and subsidiary laws, regulations, and policies governing one or more of the areas addressed in this report. For example, courts are usually a crucial institution in the examination of CLIR. Here, problems uncovered often relate to bureaucratic inefficiency, lack of resources and training, and, of paramount concern, real or perceived corruption. With respect to the flow of goods, services, and people, customs and immigration authorities are the chief implementing institutions.
- ♦ **Supporting Institutions.** The assessment then considers the environment of firms, individuals, and activities without which the legal framework or policy agenda cannot be fully or efficiently developed, implemented, or enforced. Examples include notaries,

¹ The five countries examined as part of the regional assessment are Costa Rica, Guatemala, El Salvador, Nicaragua, and Honduras.

bailiffs, trustees, banks, consumer groups, business support organizations, professional associations, and other similar ancillary service providers. Of particular interest with respect to supporting institutions is whether they have any meaningful involvement in *what the law says*. Where there has been “buy-in” from affected constituencies, a law is more likely to be understood, to be used properly, and to achieve its purpose.

- ♦ ***Social Dynamics.*** Studying social dynamics entails asking whether the affected constituencies of a law or policy perceive a need for change and, if so, how they are demonstrating this need. Are they effectively lobbying those institutions that can make a change? Is the media seizing the issue as a topic of public concern? Are individuals speaking out? Or, have social dynamics taken a less positive approach—for example, is the “informal economy” growing as a response to overly burdensome conditions for market entry? Are companies and individuals simply paying the bribes, large or small, that are asked of them, rather than seeking action from higher authorities? Analysis of social dynamics may affect how an assistance project is ultimately designed. Where outside participation is strong and public understanding high, a reform program may simply involve a relatively small number of government officials who are capable of meeting the demands. In contrast, where mistrust and misunderstanding are abundant, an approach that involves significant engagement of “end users” will likely be necessary.

With respect to the 13 subject matter areas addressed in this report, the general findings are summarized as follows:

- ♦ ***Company Law.*** Guatemala’s company law is generally sound and covers most internationally recognized business entities. Minority shareholders are generally protected, and the incorporation process is among the more efficient in the region. Mechanisms of corporate governance, however, are weak, particularly with respect to internal controls over company administrators. Moreover, in virtually all instances, judges take an inflexibly formalistic view toward the notion of “lifting the corporate veil”; the legal personality of a company is generally protected even when it has been abused by its officers and directors. In addition, informal businesses are proliferating in Guatemala because of a myriad of bureaucratic obstacles that conspire against those who would prefer to conduct their business in an “aboveboard” fashion. The Government is incapable of taxing these “informal economy” businesses, of course, and unregistered companies miss out on the opportunity to secure credit and grow.
- ♦ ***Contracts.*** Significant improvements are needed in the area of contracts. First, the legal framework could benefit from the development of provisions for modern contracts, such as leasing, as well as from the establishment of provisions for consequential and punitive damages. In addition, implementing and supporting institutions, including most lawyers, judges, and arbitrators, lack understanding of the contractual concepts used by modern international business. Notaries are not properly regulated, and many cases of fraud can be traced to them. The contract enforcement procedure is lengthy, complex, and unreliable.
- ♦ ***Real Property.*** The inefficiency of Guatemala’s Real Property Registry hinders the effectiveness of the country’s real property system. Although the legal framework generally supports property rights, the Registry is slow, has experienced corruption, and

has been a source of misleading information. Automation of data within the Registry started but failed because of technical problems. There is uncertainty about the information that is registered and the correct manner of registration. In addition, no accurate cadastre information is available. With respect to the problem of squatters, police raids occur infrequently, and legal actions to evict the invaders are difficult to enforce because of political and social issues. Moreover, restrictions imposed on foreigners with respect to acquisition of land in certain parts of the country represent a serious obstacle to foreign investment.

- ♦ ***Collateral Law (Secured Transactions).*** Guatemala's current system for secured transactions is inadequate to meet national and regional commercial credit needs for economic growth, particularly those of microbusinesses and small and medium-sized enterprises (SME) wishing to expand or improve their commercial activities. Financing continues to rely predominantly on mortgage-based loans and personal guarantees. Microbusinesses and SMEs find themselves paying interest rates in excess of 30, 40, and sometimes even 50 percent per year in their borrowings from private lenders (including nongovernmental organizations, associations, and cooperative companies) that purportedly offer simpler and non-real-estate-based solutions, as opposed to those usually required by banks. The scarcity and high cost of commercial credit force smaller Guatemalan businesses to finance themselves from limited savings and thus hinder the economic development that reasonable rates of interest would make possible.
- ♦ ***Commercial Dispute Resolution.*** Without a firm foundation in the rule of law, commercial dispute resolution remains problematic at best. The country needs stable legal institutions to overcome the effects of its recent violent history. As a central issue, corruption undermines the judicial system and drives businesses to alternative dispute resolution. Corruption of all court personnel is a problem, especially in rural areas and in criminal courts. Moreover, judges' lack of knowledge of certain specific subject matters of a fundamentally technical nature, along with the volume of work accumulated in the courts, inhibits prompt resolution of disputes.
- ♦ ***Bankruptcy.*** Guatemala's legal framework does not facilitate efficient, transparent, and reliable methods for recovering debt, either within or outside normal bankruptcy proceedings. Rules on bankruptcy are not integrated with the broader commercial system; in fact, because of amendments to the Commercial Code, specific bankruptcy rules were repealed in 1970, and only procedural aspects are currently regulated. Among other problems, the lack of specific substantive regulation severely limits a creditor's ability to ascertain the validity of transactions conducted by a bankrupt individual or entity once it became insolvent, a factor that in turn may significantly confine the number of assets that may be available to such creditors to satisfy their debts. In addition, because of protracted and formalistic judicial procedures, the notion of efficient and impartial resolution of bankruptcy procedures effectively does not exist.
- ♦ ***Competition Policy.*** Since the early 1970s, Guatemala has engaged in efforts to open markets by removing regulations limiting trade and free competition. Only prices for the generation and distribution of electrical service continue to be regulated by the state. Otherwise, foreign exchange regulation has been eliminated and tariff reduction has occurred. Although Guatemala has not enacted a competition law, it has a series of

independent regulations that attempt to prohibit unfair competition and, at the same time, impose monetary penalties and prison sentences on those who try to engage in unfair competition. However, such provisions generally are not enforced.

- ♦ ***International Trade.*** Many implementation issues must be resolved in order for Guatemala to fully benefit from freer trade. The public and private sectors are aware of the need to harmonize many laws (within the region and in light of the Central American Free Trade Agreement [CAFTA]), enact more regional laws, improve trade infrastructure, educate the general public, and provide training to public officers. In addition, reform of Guatemala's Customs Service is of paramount concern with respect to the ultimate ability to implement both CAFTA and the Customs Union. Efforts should concentrate on expediting the clearance process (including improved risk-analysis systems and targeting methodology); continuing to reduce opportunities for corruption; helping deter smuggling, drug trafficking, and terrorism; and generally promoting a healthy trading environment.
- ♦ ***Flow of Goods and Services.*** Increased efficiency and security in the flow of goods and services are essential to Guatemalan economic growth and development. Guatemalan traders and consumers currently incur unnecessary costs due to high security demands, inadequate infrastructure, and unnecessary and overly burdensome bureaucratic procedures. For exporters, profit margins are squeezed because of the addition of extra security patrols and delays at the border. For consumers, the prices of goods increase as costs climb with delays due to the inability of goods to move at night and due to unnecessary delays at the border. Achieving solid results will not take place by simply focusing on procedures; it also must include improvement in the capacity of key institutions, including customs and other public and private players. Within the public institutions, appropriate legal authority, staffing, equipment, and training are key to making streamlined processes work. Within the private sector, finding ways to work constructively with the public sector is crucial.
- ♦ ***Flow of People.*** Guatemala's laws and its public and private institutions generally support trade-related people flows. Annual visitors to the country numbered more than 4.2 million in 2003, up from 636,000 in 1998.² Tourism is Guatemala's second most important source of foreign exchange (behind coffee), producing an annual income of \$770 million in 2004, up from \$322 million in 1998.³ The poor security situation, however, reduces legitimate people flows. Moreover, the flow of illegal persons undermines the country's ability to present itself as an attractive place for foreign investment and a place from which exported goods and services are seen as safe and reliable.
- ♦ ***Financial Crimes.*** Guatemala recently has been removed from the Organization for Economic Cooperation and Development's Financial Crimes Action Task Force's list of non-cooperating countries. To achieve this result, Guatemala had to prove it had made certain improvements to money-laundering enforcement. Nevertheless, drug trafficking and corruption in Guatemala continue to support money laundering and other financial

² Guatemala Country Profile 2004, Economist Intelligence Unit, 2004

³ *Id.*

crimes. As documented recently by the U.S. Drug Enforcement Administration, rampant corruption permeates all levels of law enforcement, the judiciary, the military, and other governmental agencies in Guatemala.⁴

- ♦ ***Flow of Money.*** Guatemala's laws and its public and private institutions generally support trade-related money flows. Cross-border goods and services transactions reflect a significant amount of monetary exchange that pays for those goods and services traded—approximately \$8 billion in goods and \$1.9 billion in services traded annually in 2004. Of the goods flows, \$3.0 billion was exported, and \$4.6 billion was imported. With respect to services, \$1 billion was exported, and \$900 million was imported. Remittances also represent a major trade-related financial flow. In 2004, \$2.5 billion dollars poured into Guatemala through remittances of Guatemalan workers and families abroad. Trade finance products are available to large traders, and foreign currency exchange is widely available and easily exchanged for all traders. Guatemala is challenged, however, by illegal money flows as the nation has become a major transit link in the drug trade between South and North America as well as a location where criminals can hide illicit profits.
- ♦ ***Supporting Infrastructure for Trade.*** Guatemala's portfolio of trade infrastructure sufficiently meets the existing demands of the marketplace. Guatemala's transportation infrastructure has benefited from successful implementation of public-private ventures. Although areas of the nation's transportation infrastructure are considered quite good, other areas require expansion and upgrades to facilitate trade. Specifically, a detailed corridor analysis should be conducted to evaluate trade flows from the Caribbean coast. Based on this analysis, consideration for highway upgrades from the Caribbean coast should be analyzed with respect to implementation of a national rail intermodal system. In addition, seaports located along the Caribbean coast should be evaluated as a system of facilities and developing a dedicated-purpose built-container facility to facilitate future trade should be considered. The existing facilities should be evaluated for continued use as dedicated cargo facilities as appropriate. Lastly, the nation's airports require expansion and modernization to further facilitate trade. This includes the potential for developing a new international airport elsewhere within the region of Guatemala City.

⁴ International Narcotics Control Strategy Report 2003, Bureau for International Narcotics and Law Enforcement Affairs, March 2004

II. COMMERCIAL LEGAL AND INSTITUTIONAL REFORM AND TRADE IN GUATEMALA: CROSS-CUTTING THEMES

Along with the specific findings in 13 subject-matter areas, certain crosscutting themes emerged with respect to commercial legal and institutional reform (CLIR) and trade in Guatemala.⁵ It is important to consider and incorporate these themes but not necessarily through stand-alone initiatives. Rather, it would be prudent to address them within the context of any reforms undertaken, as detailed below.

A. CORRUPTION AND ECONOMIC DEVELOPMENT

Corruption—the misuse of public office for private gain—encompasses abuses by government officials, such as embezzlement and nepotism, as well as abuses linking public and private actors, including bribery, extortion, influence peddling, and fraud. Corruption arises in both political and bureaucratic offices and can be petty or grand, organized or unorganized. In the private sector, corruption increases the cost of business through the price of the bribes, the management cost of negotiating with officials, the risk of breached agreements or detection, and the efficiency losses from the market distortion. Ultimately, the costs of corruption can be either internalized by the private sector or passed along to the consumer.

In its 2004 Corruption Perception Index, Transparency International listed Guatemala in a tie at 122nd of 146 countries evaluated, with a score of 2.2 of 10, signaling a state of “rampant corruption.”⁶ The 2004 Corruption Perception Index is a distillation of 18 surveys conducted by 12 independent institutions, reflecting the perceptions of business people and country analysts, both resident and nonresident. The perceived level of corruption in Guatemala is currently the worst of the Central American Free Trade Agreement (CAFTA) countries. In Latin America, only Paraguay received a lower score.

Corruption in Guatemala is of such profound historical depth and current political import that a full discussion of its foundations, implications, and current machinations lies well beyond the scope of this report.⁷ Nevertheless, certain aspects of corruption can be isolated and addressed for the purpose of CLIR and trade development. In this report, the following observations can be found:

- ◆ Decades of authoritarian rule have left Guatemala with an inefficient, slow, and corrupt judicial system and have also resulted in pessimism and public mistrust in public institutions, justice, and security. It is widely asserted that judicial and administrative proceedings work for and are accessible to only a very few.
- ◆ Throughout Guatemala, a number of scandals from the previous administration involved the theft of government funds, nepotism, and general mismanagement. Complete

⁵ These themes and others appear throughout many of the chapters, and have been left in despite some repetition so that the individual chapters read as a complete piece.

⁶ See Transparency International Corruption Perception List 2004, <http://www.transparency.org/cpi/2004/cpi2004.en.html#cp2004>.

⁷ A useful summary of public corruption issues in Guatemala can be found at the website of the United Nations Online Network of Public Administration and Finance, <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan016029.pdf>.

investigations and convictions have often proven difficult because of pressure applied to investigators and judicial officials by very high-level government personnel.

- ◆ Corruption has been present in all levels of, and all participants in, the formal dispute-resolution process, including notaries, lawyers, court clerks, and judges (particularly criminal judges). Significant delays in justice occur, it is claimed, because many lawyers and judges receive bribes.
- ◆ Judges are suspected in particular of providing information to narcotic traffickers and of accepting bribes to dismiss cases or curtail sentences.
- ◆ Corruption of court personnel is considered a problem, particularly in rural areas.
- ◆ Corruption in the form of “slow money” is commonly mentioned as an ongoing issue in the Commercial Registry.
- ◆ Port-based counter-narcotics operations have been impeded by corruption at all three major ports.
- ◆ International visitors who seek work permits for extended stays routinely experience difficulties and report that Immigration Agency procedures are burdensome, nontransparent, and suffer from petty corruption.
- ◆ With respect to flows of people, as well as to goods and money, the most pressing issue is that of security. The primary supporting institution in this area, the National Civil Police (*Policía Nacional Civil* [PNC]), is not viewed as a strong institution for mitigating this problem. The police force is grossly understaffed and ill-equipped, and has a reputation for corruption.

Against this backdrop, one anticorruption initiative in Guatemala’s commercial and trade sectors stands out as noteworthy for the positive impressions it has generated. Namely, since 2002, the Customs agency has made tangible efforts to reduce both the documented instances and public perceptions of corruption. Customs officers who work with the public now display identification badges and wear a Customs agency shirt indicating that they are government personnel. Other initiatives have included removal of rent-seeking officers, certain financial disclosure requirements, increased appeals to professionalism, and increased automation. In addition, a new training program is being designed to incorporate integrity components. A great deal of work remains to be done, but improvements that are visible to the public (thereby engendering greater trust) or facilitative of greater transparency (thus reducing opportunities to obscure impropriety) show significant promise with respect to other institutions in Guatemala.

Namely, all the institutions engaged in some way in CLIR or trade could benefit from similar initiatives that strive to counter the motives and opportunities for corruption. The courts, registries, trade-related executive agencies (such as the Ministry of Economy and Immigration), and other institutions would benefit from multifaceted donor-sponsored programs that do the following:

- ◆ Work with relevant leadership to study the relationship between the institution at issue and the motives and opportunities for corruption, developing a detailed management plan for addressing the corruption
- ◆ Annually survey and report to the public about the costs of corruption, in an effort to promote a sense among consumers of public services that they should avoid participating in the market for corruption
- ◆ Embark on a meaningful and effective program to protect the security of higher-level decision-makers, including judges, who may succumb to corrupt practices ultimately because of fear for their personal security
- ◆ Establish, particularly among professional groups, codes of conduct that are created through a deliberative and consultative process, and ensure that these codes are shared with consumers of the public services
- ◆ Develop a system of financial disclosure, which *includes public disclosure*, for executive officials and judges
- ◆ Increase the perceived formality of certain administrative positions and processes, through means such as identification badges, uniforms, and prominently posted information concerning fees, schedules, and dispute-resolution mechanisms
- ◆ Employ automated systems in a way that encourages accountability and reduces opportunities for corruption (considering whether and to what extent the automation of a process may create new corruption opportunities for certain parties, such as information technology [IT] professionals)
- ◆ Increase the quality of and the opportunities for training in various CLIR and trade-related jobs.

Anticorruption initiatives can incorporate approaches such as short- and long-term technical assistance, resident advisors and mentoring, training curriculum development and execution, and public information programs. In the absence of continued reforms in the area of corruption, Guatemala's ambitions for economic development will be greatly frustrated.

B. OBSTACLES INHIBITING THE ESTABLISHMENT AND GROWTH OF COMPANIES

As discussed throughout this report, businesses in Guatemala—in particular micro-enterprises and SMEs—face numerous obstacles within the legal, bureaucratic, and competitive environment that inhibit their abilities to become formally established under the law and to grow and expand. More than 50 percent of businesses in Guatemala operate in the informal sector — compared with, as a benchmark, fewer than 17 percent in Organization for Economic Cooperation and Development (OECD) countries— revealing the difficulties enterprises face.⁸ An entrepreneur seeking to establish a company in Guatemala confronts procedural inefficiencies and corruption when trying to register; restrictions in using collateral to secure

⁸ See World Bank, Snapshot of Business Environment—Guatemala, at <http://rru.worldbank.org/DoingBusiness/ExploreEconomies/BusinessClimateSnapshot.aspx?economyid=81>.

debt; and threats to the very property on which the new company may operate, both from squatters on the land and from the performance of the Property Registry. Companies seeking to enforce their contracts face obstacles from notaries who have superfluous but mandatory involvement in the process and by judges who engage in formalism over substance. Moreover, companies that wish to expand their opportunities through international trade often face extreme inefficiencies within the agencies that are charged with regulating and facilitating their transactions, along with constant threats to the security of their goods.

Throughout this report, obstacles are identified and recommendations for change are suggested. The theme that emerges from these individual points is that relatively small changes may result in significant improvements to the business environment. The costs and challenges of implementing all the recommended changes vary, but each should be considered in the context of the overall environment for enterprise growth. As summarized recently in *The Economist*,

Laggards sometimes argue that reforms would be difficult and costly to enact. But what could be simpler than scrapping a stupid rule? Simplifying procedures is harder, but not too hard. There are plenty of examples to learn from, and the World Bank estimates that the benefits of the reforms it advocates are 25 times the costs.⁹

A nationwide effort to remove damaging constraints on business start-up and operation would encourage more new businesses to formalize their operations, thereby increasing opportunities to do business and improving access to capital. Formal incorporation in turn improves the environment for sound systems of corporate governance, leading to a higher degree of investor confidence.

C. CORPORATE GOVERNANCE

Improving the environment for domestic and foreign investment in Guatemala will take commitment at all levels to the foundations of a welcoming investment environment, including the rule of law, efficient judicial and regulatory systems, reduced corruption, and a commitment to competitiveness. Good corporate governance is a critically important part of this.

Corporate governance is the system by which companies are directed and controlled. Good corporate governance requires both a company law and a business environment in which persons who control a company—including directors, managers, and controlling owners—are fully committed and accountable to investors in the company. It requires a system in which there is adequate disclosure of financial and other information so that investors can have a meaningful voice in choosing directors and effective ability to choose and protect their investments. It also requires a court and judicial system in which investors can enforce their rights if necessary by litigation against a company or against persons who control it who abuse their positions of trust.

Guatemala currently has relatively strong systems in place relating to certain aspects of corporate governance, including internal and external company control, management transparency, and

⁹ “Measure First, Then Cut,” *The Economist* (September 9, 2004) [summarizing World Bank, *Doing Business in 2005: Removing Obstacles to Growth* (2004)].

protection of minority shareholders. Guatemala's company law generally requires businesses to delineate the rights and responsibilities of its different participants in their founding documents—including its board(s), managers, shareholders, and other stakeholders—and to spell out the rules and procedures for making decisions on company affairs.

As more complex corporate matters arise, a more sophisticated understanding and implementation of corporate governance will be needed. Lawyers in Guatemala will need training in how to counsel their clients in matters of corporate governance. Further, donor-sponsored business assistance programs, including those that assist micro-enterprises, SMEs, state-owned enterprises, and publicly owned enterprises, should include practical components in corporate governance, including the purpose of and protections afforded by corporate structures that provide for limited liability; the importance of enlisting legal counsel to assist with business formation; contracts and other transactions; disclosure requirements; enforcement of debts and, if necessary, dissolution; and additional principles and practices of corporate governance, such as director duties and shareholder rights.

D. PROFESSIONAL DEVELOPMENT

Throughout this report, weaknesses in institutions are observed to be significantly grounded in inadequate professional capabilities. For example—

- ◆ The officers of the Commercial Registry are poorly trained.
- ◆ The administration of the Property Registry is slow.
- ◆ With respect to the Collateral Registry, the perception is not that corruption is at the heart of its ineffectiveness; rather, inefficiency and lack of training are seen as more significant problems.
- ◆ In the courts, judges tend to overemphasize formal, process-oriented decision-making, instead of basing their decisions on the substance of the commercial laws they are asked to interpret. They typically do not search for the reality of corporate matters, it is said, but rather seek for compliance to the formalities.
- ◆ A lack of standardized and specialized training creates a lack of uniformity in customs procedures administration. This means traders are faced with procedures that lack transparency, predictability, and simplicity. These conditions slow down movement of goods and hamper the trading environment.

These and other oft-cited weaknesses in the performance of public servants warrant crosscutting consideration. Even in the context of low salaries, poor physical facilities, and other negative circumstances, the opportunity to *learn more* and *do better* likely will find an audience in the various CLIR and trade-related institutions this report surveys. There are various means that reform programs can use to confront and address poor command of subject matter, poor management and problem-solving techniques, and lack of institutional consistency.

Namely, professionals from all dimensions of the CLIR and trade communities could be encouraged to see their work as not simply a series of procedures to follow but as an opportunity

to solve problems, serve the public, and make a difference. Through improved access to and quality of continuing education, strengthened professional organizations, and increased public understanding of what they are entitled to expect, Guatemalans in public service can be encouraged to do better. Similarly, in the private sector, successful business leaders should be challenged to set an example for improved systems of corporate governance through better accounting practices, more efforts at transparency, and stronger protections of minority shareholders. Incentive structures for improved performance should be considered and implemented.

III. COMPANY LAW

A. INTRODUCTION

Guatemala's company law is generally sound and covers most internationally used business entities. Internal control of the administrators is lax. Minority shareholders are protected and the incorporation process is relatively efficient compared with the region. Problems lie in the formalistic view judges have about companies, in which under almost no circumstances can the legal personality be disregarded when it has been abused. Likewise, the presence of unregistered businesses is constantly mentioned as a major problem.

As a consequence, informal businesses are growing, the Government is incapable of taxing them, and businesses tend to remain small because of excessive registration obstacles and fear of heavy taxation.

B. LEGAL FRAMEWORK

The Commercial Code of 1970 is the governing law for companies. It provides rules regarding the different kind of legal entities used by international business that can be formed to undertake business operations. The most widely used incorporation structure is *Sociedad Anónima*, in which company liability is separated from shareholders' liability. In many cases, companies own other companies as a way to evade liability, including tax liability.

For a business to be legally incorporated it must be registered with the Commercial Registry. By-laws and articles of incorporation are filed along with evidence of the initial capital contribution having been paid. Failure to register makes shareholders jointly and unlimitedly liable vis-à-vis third parties. In the case of a non-registered entity, assets of both the company and the shareholders are subject to seizure by legitimate creditors.

The Commercial Code requires a minimum level of capital for the incorporation of all sorts of companies. The minimum requirement is roughly \$500. Shareholders must pay 25 percent of the promised contribution, which can be paid in cash or in kind.

Businesses can issue various kinds of shares. Bearer shares were reported to be commonly used by businessmen. No concerns were expressed about the possibility of such shares being used to evade responsibility, launder money, or engage in any other fraudulent activities. In spite of that, some international businessmen mentioned that bearer shares have been used in the context of corruption cases in which the shares of a company were in physical possession of a governmental officer, although his name did not appear on day-to-day operations of the company. Financial institutions, however, cannot issue bearer shares. This is a good restriction to avoid money laundering.

Companies are able to trade shares publicly but none has done so, perhaps because the stock market is not very sophisticated. Many companies trade bonds in the stock market, but not equity. As a consequence, small investors are deprived of alternatives to invest in companies through portfolio investment and this affects the growth of the economy. However, there are a

few private companies with as many as 4,000 shareholders. In at least two cases, employees have been reported to own shares in those companies through stock plans, according to interviewees.

The Commercial Code establishes a positive framework for mergers and acquisitions. They have been reported, although not in large volume. Acquisitions are undertaken primarily by foreign companies.

Control of company administration is relatively fair; minority shareholders can use internal and external mechanisms such as auditors and special legal actions to make companies' administrators liable. The Commercial Code allows shareholders to appoint a special control body "*órgano de fiscalización*," but this mechanism is rarely used because there is no enforcement mechanism. External auditors are required to be appointed by law. In general, external auditors follow international accounting principles.

Minority shareholders are well protected. Company directors are elected by accumulative vote, which guarantees that one or more directors can be appointed by minority shareholders. Shareholders owning at least 10 percent of the company can initiate legal action against the administrators for wrongdoings that make them liable to the company. In this case, shareholders can sue for the whole amount of damages and not just for their ownership ratio. Shareholders who voted in favor of not dismissing the liable administrators are not allowed to initiate legal action to dismiss administrators.

By law, all the information registered by companies is public. Thus, individuals have access to registration data. The problem is that not all the information is updated and not all registered corporations comply with the requirement of filing relevant corporate documents such as annual accounting reports and shareholders' meeting resolutions. No enforcement mechanisms are in place for lack of registration of those documents.

C. IMPLEMENTING INSTITUTIONS

In Guatemala, the foremost implementing institution in the area of company law is the *Registro Mercantil*—that is, the Commercial Registry. Companies need to register with the Commercial Registry to be formally in business. However, companies might not register with the Commercial Registry and still conduct business informally. The consequence of not registering with the Commercial Registry, in the case of *Sociedad Anónima*, is that the administrators will be personally, jointly, and unlimitedly liable for company activity. Courts would enforce that liability.

Registration of a company is reported to be expensive, although not necessarily slow. Temporary registration of a company can be obtained in less than one week. Temporary registrations retain temporary status to allow a period when interested parties can oppose the registration. After this period, registration is made permanent automatically. Nonetheless, oppositions to permanent registration rarely occur. All of these issues discourage local businesses from formalizing, which in turn affects the economic growth of the country.

There is only one Commercial Registry for the entire country. Regional offices exist but they are authorized only to receive documents and are not empowered to grant registration. They are not

interconnected nor do all of them have computers. Comments were made that the lack of more Commercial Registries in the country is another reason not to formalize business.

As set forth in the following table prepared by the World Bank, entrepreneurs can expect the process of registering a business to entail 15 steps, lasting an average of 39 days. This time lapse is significantly less than the regional average of 70 days, but it is 2 weeks longer than the average business registration period of states belonging to the Organization for Economic Cooperation and Development (OECD). The cost of incorporation equals 62.8 percent of gross national income (GNI) per capita. Would-be businesses must deposit at least 33.4 percent of GNI per capita in a bank to obtain a business registration number, compared with the regional average of 32.3 percent of GNI and the OECD average of 47.0 percent of GNI.¹⁰

Nature of Procedure (2004)	Proc #	Duration (days)	U.S.\$ Cost
Search the company name	1	1	0.13
Obtain a letter from the notary	2	1	0
Deposit the subscribed capital in a bank	3	1	0
A notary public draws, notarizes, and records the deed	4	3	870.99
The notary buys the fiscal stamps	5	1	70.45
File documents with the Commercial Registry	6	8	159.97
Present the edict of company organization for publication	7	9	82.39
Prepare the notaries' act of legal representative	8	1	16.27
File for registration of appointment of company's legal representative	9	2	9.61
Register with the tax authority	10	1	6.40
Obtain company license	11	4	25.62
Get authorization for the company accounting books	12	1	1.92
Obtain trading license	13	4	21.13
Obtain the authorization of a book of salaries	14	1	0.64
Register for social security	15	1	0
Totals:	15	39	\$1,265.52

Source: World Bank.

In general, the public perceives incorporation costs as expensive for local standards and compared with other developing countries. This may explain why many SMEs remain informal. Thus, the cost of registering a company is a disincentive for starting a business.

The Commercial Registry is internally automated. However, information is not available online. Information in the Commercial Registry is not confidential. Commercial Registry officers have a high level of discretion when it comes to registering a company. In one case, it took a company almost two years to register. In this case, a competing firm allegedly bribed officers to slow the process.

¹⁰ <http://rru.worldbank.org/DoingBusiness>.

The officers of the Commercial Registry lack sophistication due to poor training. Many problems faced by the Registry are caused by the inefficiency of its officers. In a reported case, they rejected a document because the by-laws had legal but complicated shareholder meeting and administration body provisions. Corruption in the form of additional payments to accelerate processing procedures is commonly mentioned as a permanent issue in the Commercial Registry.

Guatemalan courts are important implementing institutions in the area of company law. Courts handle actions against companies and administrators to protect the interests of shareholders as well as cases of bankruptcy. Courts generally are perceived to be very inefficient, slow, and corrupt. There are roughly 12 courts in Guatemala City responsible for commercial and civil matters, including claims related to company law. Courts are understaffed and lack the financial resources to provide good service.

Arbitration is an alternative to a slow court system, but the option of third-party arbitrators is not widely known. Furthermore, arbitration is expensive and in many cases the arbitral awards are not final, as rulings are often brought back to the judicial arena. For more detail on arbitration in Guatemala, see the section on Commercial Dispute Resolution.

Judges are very formalistic and consider the legal personality of a company as an absolute concept. Most of them ignore the *lifting the corporate veil* doctrine, not to mention any other doctrine allowing the disregarding of the legal personality in exceptional circumstances. Many business people take advantage of this fact and create entanglements of companies to avoid liability.

D. SUPPORTING INSTITUTIONS

Notaries are involved in the company registration process. Most people perceive notary fees as too high for local standards. Notaries not only write the articles of incorporation but also confirm the veracity of the identification of the parties incorporating a company, research the name of the company to determine availability, and file documents with the registry. It might be unnecessary in most cases. Notaries are sometimes the source of fraudulent activity. For example, they have filed false shareholders' resolutions on many occasions. In those cases, under the assumption that information provided by notaries is true, the Commercial Registry has been defrauded.

It has been reported that, although notaries provide some level of security to business transactions, their presence is required in too many processes. This requirement causes inefficiencies in the company registration process. Interested parties without notaries' involvement, for example, could do the company-name-availability research and file documents with the registry.

The Commercial Registry cannot confirm all the information it receives and this issue of capacity makes it necessary to trust notaries. To diminish fraud, the Registry has compiled a database of the electronic signatures of active notaries. Because all documents presented to the Registry need to be notarized, once the Registry receives a document, it compares the signature contained there with that in the database. This verification process has helped but has been insufficient to eradicate fraud.

There are no private services providing reliable and updated information about companies. Although information from the Commercial Registry on companies is technically accessible, information is not always updated or accurate. In some countries private intelligence-gathering companies fill that vacuum, but no such entity exists in Guatemala. Promoting private sources for information not only would create a new private industry but also would ease burdens on the Commercial Registry staff.

E. SOCIAL DYNAMICS

The business community is largely satisfied with the Commercial Registry. However, some demands have been made for restructuring. Complaints have focused on discretionary decisions, the role of notaries, and the transitory period for granting final registration.

Some methods have already been discussed to improve the operations of the Commercial Registry. Among the issues raised, training, equipment, technology, and procedural changes have priority. The Registry generates its own funds and could finance some of the changes, but more than half of the Registry's revenues go to the central Government and thus are unavailable for internal reform.

Likewise, legal education needs to be revamped, at both the undergraduate and the judicial level. The business community complains that lawyers tend to be inflexible. Judges "stay in the box" when making decisions. They do not search for the reality of corporate matters but rather seek to comply with the formalities.

In addition, judges and most lawyers lack a general knowledge of international business, specifically international business transactions.

Courts are not efficient. They are slow and in some cases corrupt. Many courts are headed by unqualified lawyers. Major reform of the judicial system is required. More courts, better judges, properly trained staff, expedient procedures, transparency, and automation of the data have been demanded.

A large part of Guatemalan business is conducted by SMEs. In many cases, small businesses remain informal because of the high costs associated with formal incorporation. In addition, many SMEs reported that they do not have any economic incentive to legalize their operations. Compulsory registrations are not efficient. By failing to formalize SMEs, the Government is losing a source of revenue and a valuable tool for economic development.

The tax system has similar problems. Businesses often prefer to remain informal to avoid taxes. There is public support for efforts to identify the current situation of SMEs, and to remove obstacles that hinder their growth and formalization. Likewise, there is public support for an agency devoted to promoting micro-enterprises and SMEs.

F. RECOMMENDATIONS

- ◆ Corporate governance principles need to be introduced both in the legislative agenda and in university curricula. Guatemala seems in relatively good shape regarding internal and external company control, management transparency, and protection of minority

shareholders. However, local companies remain small and do not trade shares publicly because of a weak stock market. It is envisaged that, as corporate matters become more complex, more sophisticated principles of corporate governance will be needed.

- ◆ The Commercial Registry needs certain reforms. Decentralization of the registration process is crucial. Likewise, a major training program directed at Registry officers that delivers guidelines to determine acceptance of registration requests is critical. In addition, internal procedures should be changed to diminish the costs of registration and shorten the time to incorporation. Elimination of the opposition period of temporary registry should be considered. The role of the notaries in the registration process should be reevaluated.
- ◆ Legal education needs to be modernized. Law schools should introduce courses that focus on less formalistic views of the law. Lawyers and judges alike need to be trained in foreign legal doctrine, substance versus form doctrines, economic analysis of law, and international business transactions.
- ◆ An assessment of the situation of SMEs is required. Many SMEs are not legally organized and hence little information is currently available. In addition, the obstacles that hinder the growth of SMEs should be identified and removed. Likewise, the corporate tax system should be evaluated. A deliverable of this assessment should be the design of economic, fiscal, and tax incentives that promote the formalization and growth of SMEs.

IV. CONTRACTS

A. INTRODUCTION

The legal framework on contracts allows parties to enter into any kind of agreement that does not violate the law or is contrary to public order.

Although there is no legal framework for modern contracts, such as leasing, the business community has been creative in designing legal arrangements to govern modern business situations such as electronic transactions.

The law is insufficient in the area of damages. There is no provision for consequential damages and punitive damages.

Most lawyers, judges, and arbitrators lack knowledge of the contractual concepts used by modern international business.

Some contracts are not valid until a notary intervenes. Notaries are not properly regulated and many cases of fraud can be traced to them. In other cases, although notarization may not be required, it is recommended because of judicial uncertainty.

Overall, the court system is in poor shape. Thus, the contract enforcement procedure is lengthy, complex, and unreliable.

B. LEGAL FRAMEWORK

All contracts are governed primarily by the Civil Code. If a business entity is involved in the contract, the Commercial Code also applies. However, in this case the general principles of contract law in the Civil Code apply and the specific provisions of commercial contract law of the Commercial Code complement the Civil Code.

Freedom of contract has constitutional status. Accordingly, parties are free to enter into any kind of contractual arrangements that are not expressly prohibited. This applies to juridical and natural persons. On this basis, lawyers design contracts to govern *sui generis* situations, such as leasing. When using the freedom to contract, parties include special provisions to protect against contractual damages and choose the applicable law and jurisdiction.

There is a lack of framework for contractual damages. There is no provision for incidental or consequential damages. Likewise, there is no provision as to how to calculate damages. When a contract does not provide a method to calculate damages, external experts are brought in to do so. The need for external experts makes the enforcement process longer and more expensive.

The law provides for legal interests to be applied to any kind of damage. However, the manner in which interests are calculated moves actual interests below market rate. There is a chance to claim compensation in excess of the interests if the claiming party proves that damages exceed the amount of interests. In the case of a contractual damage provision, parties usually draft the contract so that the contractual damages provision is triggered whenever there is a breach of contract, with no need to prove the actual damages.

Parties are permitted to choose a foreign law as the applicable law. However, in distribution and agency contracts, there is a prohibition against selecting foreign law. Likewise, parties can choose the jurisdiction, including an arbitral jurisdiction. Choice of jurisdiction is not available in distribution or agency contracts.

Contracts are generally written. In theory, oral contracts are allowed. However, proving the existence of an oral contract is difficult; witnesses are allowed but only for certain kinds of contracts.

In conclusion, Guatemala's legal framework on contracts is not an obstacle to international business, although there is a need for provisions for modern contracts, comprehensive damages regulation, and an internationally friendly framework for distribution or agency contracts. The lack of the latter might affect the country's appeal to foreign capital.

C. IMPLEMENTING INSTITUTIONS

Notaries and courts are the primary relevant implementing institutions. In many cases, notaries are required to intervene to make a contract public. Such is the case in powers of attorney and contracts for sale of real property. Notaries certify the truth of the contract, comprising the identity of the parties, certainty of the signatures, and the content of the document. Although not all contracts need to be notarized, it is common practice to do so. All lawyers are notaries. Thus, as opposed to common international practice, when contracts are drafted they are notarized to grant certainty to the contract and avoid superfluous litigation.

Commercial contracts generally are not subject to the notarization requirement. However, commercial contracts need to be in Spanish to be valid in Guatemala. Likewise, it is common practice to authenticate the signature of the parties—not the content of the document—to facilitate the enforcement process. Accordingly, if a notary has certified that the signature of the contractual parties is authentic, in the course of a trial they could not use the defense of rejecting the terms of the contract. This could expedite the enforcement process.

If the contract was notarized in another country—including another country in Central America—it needs to be notarized again in Guatemala. Foreign notarizations are not recognized. This has a serious impact on international business, because it increases the transaction costs of transnational operations. This is a situation that should be solved before CAFTA is in place, particularly in connection with regional business. Signing the Interamerican Convention on Legal Regime of Powers to be used abroad could be a first step in that direction.

Notaries are personally liable for whatever they certify, but there is little control over them. As a consequence, some notaries have been reported to be the source of fraudulent cases. Likewise, the public has a perception that notary fees are too high. Thus, involvement of notaries in a transaction can be risky and expensive. That deters the growth of business. Many businesspeople have stated that many transactions can be easily arranged without involving notaries.

Courts are the other implementing institutions for contracts. Their role is relevant when it comes to contract enforcement.

It has been mentioned repeatedly that the judicial system of Guatemala is in “intensive care.” The number of courts is insufficient. Guatemala City has 12 judges who share four or five clerks for civil and commercial matters, according to interviewees.

There is no budget for reforms, for training, or for better payment. Corruption of all court personnel is rampant in rural areas and in criminal courts.

The difficulty of enforcing commercial contracts in Guatemala is measured below (see Tables 1 and 2), using three indicators: the number of procedures counted from the moment the plaintiff files a lawsuit until actual payment, the associated time, and the cost (in court and attorney fees). An overall index of the procedural complexity of contract enforcement is calculated by averaging four sub-indices related to dispute resolution. The index varies from 0 to 100, with higher values indicating more complexity in enforcing a contract. The procedural complexity index for Guatemala is 90, compared with the regional average of 70 and the OECD average of 49.¹¹

Table 1. Indicators for Measuring Contract Enforcement Difficulty

Indicator	Guatemala	Regional Average	OECD Average
Number of procedures	37	33	18
Duration (days)	1,460	363	213
Cost (% GNI per capita)	20.0	38.0	7.1
Procedural complexity index	90	70	49

Source: World Bank.

Table 2. Enforcing Contracts

Nature of Procedure (2003)	Indicator
General jurisdiction court	1.00
Professional vs. nonprofessional judge	1.00
Legal representation is mandatory	1.00
Professionals or laymen	1.00
Filing	1.00
Service of process	1.00
Opposition	1.00
Evidence	1.00
Final arguments	1.00
Judgment	1.00
Notification of judgment	1.00

¹¹ <http://rru.worldbank.org/DoingBusiness>.

Nature of Procedure (2003)	Indicator
Enforcement of judgment	1.00
Written or oral	1.00
Complaint must be legally justified	1.00
Judgment must be legally justified	1.00
Judgment must be on law (not on equity)	1.00
Legal justification	1.00
Judge cannot introduce evidence	1.00
Judge cannot reject irrelevant evidence	1.00
Out-of-court statements are inadmissible	1.00
Mandatory prequalification of questions	1.00
Oral interrogation only by judge	0.00
Only original documents and certified copies are admissible	0.00
Authenticity and weight of evidence defined by law	1.00
Mandatory recording of evidence	1.00
Statutory regulation of evidence	1.00
Enforcement of judgment is automatically suspended until resolution of the appeal	1.00
Comprehensive review in appeal	1.00
Interlocutory appeals are allowed	1.00
Control of superior review	1.00
Mandatory pretrial conciliation	0.00
Service of process by judicial officer required	1.00
Notification of judgment by judicial officer required	1.00
Other statutory interventions	0.67

Source: World Bank.

Note: Subindex components are scored between 0 and 1, with 1 representing the highest level of complexity. The procedural complexity index is constructed by averaging the six subindices and multiplying by 100. It varies between 0 and 100.

Most steps of the judicial procedures are required to be conducted in writing. This requirement seems to be a major cause of inefficiency and delay. Countries where oral proceedings have been implemented have diminished substantially the time devoted to solving business disputes.

In Guatemala, in many cases even when a favorable decision is reached the decision is irrelevant because, during the long procedure the debtor went bankrupt, either because of fraud or because of bad business decisions. In general, it is perceived that few people can obtain legal satisfaction through the court system.

Most judges are not well trained. According to a prominent private practitioner, “Nonqualified lawyers are the only ones who are interested in a judicial career.” An exception is the case of the

Supreme Court, where most justices are very successful lawyers with a previous career in private practice.

At the low and midlevel of the judicial system there is the perception that only poorly trained lawyers who would not do well in private practice become judges. In addition, salaries paid to judges are too low to attract good lawyers.

Among lawyers there is a lack of understanding about international business transactions and international legal issues, including conventions to which Guatemala is a signatory. This lack of understanding extends to general contract principles of the United Nations International Institute for the Unification of Private Law (UNIDROIT) and the International Commercial Terms (INCOTERMS) of the International Chamber of Commerce.

A major problem is the instability of the judicial system. Justices are appointed every five years. Thus, the political influence at the high level affects the independence of the system. There is a committee within the Supreme Court in charge of reforming the Judicial Branch, but it has not been very proactive because of instability and internal political problems.

Courts are not fully automated, and there is no court Intranet system where courts can share files. Some courts use computers with outdated word processor software, but that is the extent of their automation. There is public access to court information but not online. Likewise, procedures cannot be initiated remotely with technological devices nor can the trials be followed up via the Internet. In addition, previous court decisions are not easy to obtain.

Arbitration is an alternative to contract enforcement in regular courts. However, there is only one active arbitration center. It is not widely known that the arbitration center exists and for those who are aware of its services, its fees are considered high. Furthermore, in many cases the constitutional legal action of *amparo* has been used to move arbitration procedures back to traditional courts.

In spite of all that, some lawyers think the best way to avoid litigation is with a well-drafted contract. Some banks draft contracts as *titulos ejecutivos* (e.g., letters of credit), so that if they need to sue they can use summary procedures. However, that is available only to business transactions in which special kinds of commercial instruments are involved.

D. SUPPORTING INSTITUTIONS

The Guatemala Bar Association has authority over all local lawyers. It has disciplinary functions that can be used to control notaries, but these functions are rarely used.

The Guatemala Bar Association is also active in the law-making process by advising on the merit of bills discussed in Congress as well as on the way the law should be interpreted. The Bar does not propose new laws or influence the way the courts operate.

The different Guatemalan chambers of commerce constantly discuss the problems of the judicial system. At least two of them have or will soon have an arbitration center.

Some private services provide information about trials, including names of defendants. However, information reported by these services is usually outdated.

In general, most contract law supporting institutions of Guatemala are not very strong.

E. SOCIAL DYNAMICS

There is a demand by different sectors of Guatemalan society to control the role of notaries and to diminish their involvement in superfluous areas. There is currently a draft code on notaries, but it seems to lack the political support needed to get enacted. Work with the legislature, chambers of commerce, universities, and bar associations could build the political will.

The chambers of commerce and the Guatemala Bar Association demand changes in the treatment of damages in contract law. However, no material changes have been made to the contract law.

The reform of the judicial system is demanded by society at large, primarily chambers of commerce. However, until recently, communication between Government and the private sector was almost nonexistent. The previous administration did not have regular communication with the organized private sector.

There are plans to modernize the court system, improve procedures, expand the number of courts, and lessen the amount of paperwork required. Although there is consensus that such reforms are badly needed, there is a huge lack of financial resources to implement the plans.

More arbitration centers are needed. Likewise, the advantages of arbitration need to be promoted to the whole society.

Lack of communication between the private and the public sector has dramatically affected efforts to reform the legal system in general. The new administration seems willing to open space for dialogue and compromise.

F. RECOMMENDATIONS

- ◆ Notaries need to be supervised and controlled. New legislation is needed to clearly establish the transactions to be notarized, set regulatory standards, and create a supervisory body.
- ◆ The judicial system needs to be reformed. More courts are needed and current procedures need to be more efficient. The organization, structure, and procedures of the courts need to be assessed. Donor organization involvement is needed. USAID could get involved in designing the judicial system, designing the procedures, and training personnel.
- ◆ More arbitration centers should be created. Special training for arbitrators should be implemented. Use of foreign languages and appointment of foreign arbitrators should be allowed to handle international business transaction disputes. The creation of arbitration centers should be conducted in conjunction with a promotional campaign about the advantages of arbitration. Consensus should be built to implement legal changes that

boost the use of arbitration such as changes to reduce the use of *amparo* in arbitration cases.

- ◆ Legal education should be reformed. A less formalistic view of the law should be stressed in both undergraduate and judicial legal education. The diffusion of concepts of international business transactions, economic analysis of law, and international principles of contract as set by conventions, UNIDROIT, and INCOTERMS is crucial.

V. REAL PROPERTY

A. INTRODUCTION

The real property system in Guatemala is adversely affected by the inefficiency of the Real Property Registry. Although the legal framework is not particularly adverse to property rights, it is affected by the poor Registry system, which provides misleading information, is slow, and is corrupt. Automation of data within the Registry started but failed because of technical problems. What information is registered and the correct manner of registration are unclear. In addition, no accurate cadastre information is available.

Squatters are a large problem. Police raids occur infrequently and legal actions to evict the invaders are difficult to enforce because of political and social issues. This ineffective enforcement, and restrictions imposed on foreigners on acquisition of land in certain parts of the country, are key obstacles to foreign investment.

B. LEGAL FRAMEWORK

The right of property is recognized. The Civil Code is the foremost law with regard to real property and it sets forth the general legal principles applicable to real property. Individuals and companies alike are entitled to own, acquire, donate, use, rent, mortgage, and impose any lien on any kind of real property.

Real property is transferred by consent of the owner without the need to obtain governmental authorization. However, if a title transfer is to be valid vis-à-vis third parties, it needs to be registered.

Foreigners cannot own property near the borders, and cannot rent property in the maritime zone or acquire property through *usucapión* (i.e., by remaining on property and letting time pass, purporting in good faith to be the owner).

Coastal property up to three kilometers from the sea line cannot be owned. Only Guatemalans who owned property before 1956 can keep the title for coastal properties. Owners of coastal property can transfer the title but only to local citizens. With this exception, all real estate property along the maritime zone belongs to the central Government, which can rent it. The same is true for property on rivers and lakes.

Municipalities are in charge of determining the use of property as per zones. Municipalities determine use in accordance with their internal regulations and municipal agreements. It has been reported that municipalities determine zone use without transparency and without regard to stakeholders (i.e., the community).

For the Government to expropriate, it needs to advise the owner in advance, pay compensation before the property is taken, and base the taking on public use. If the property taking is not done for public use, it is not considered expropriation but a regular property acquisition if the property price is paid, or confiscation if no compensation is paid. Confiscation is prohibited by the constitution, and when foreigners own the property, confiscation contravenes international law. In any event, according to the constitution, in the case of expropriation, compensation should be

made within a period of no longer than 10 years. Although payment is made in local currency, it can be paid in international currency if the parties negotiate such a deal.

For rural property, the Law on Land Reform allows the central Government to expropriate unused property under the above conditions. Cases of *de facto* expropriation have not been reported.

Poor people frequently invade land. Although interviewees estimated that there currently is a housing deficit of 1.8 million dwellings for poor people and that the deficit is still growing, in some cases invaders are motivated by social or political reasons. The central Government occasionally grants rights to the settlers on the invaded land if the Government owns it or if the property is not used by the owner, for which expropriation needs to be formalized.

If the property invaded is owned by a private party, the owner can evict the invaders by use of public force. However, in cases of massive invasions there may not be enough public force to enforce the eviction. In one case, an eviction order has been in place for four years without a real possibility of enforcement. Thus, the constant risk of land invasion is a major deterrent to foreign investment.

“Land invasions by squatters are increasingly common in rural areas. It can be difficult to obtain and enforce eviction notices, as land title is often clouded and the police tend to avoid actions against squatters that could provoke violence.”¹²

People can acquire a property if they prove they have possessed it peacefully and in good faith for 10 years (i.e., *usucapion*). In that case, the interested party needs to file a claim in court to obtain a supplementary title. The owner can oppose the claim at that stage. If the owner does not do so and 10 more years pass, final property title can be granted on behalf of the squatter.

Cases of double title occur occasionally. In these cases, the first party to have registered the property typically prevails as owner. However, because of poor information available at the Real Property Registry, it is often difficult to determine who holds the first title registered. The risk is such that many investors have canceled investment plans after they have been informed that there is potential for double title.

1. Law on Property Leasing

There is a special law on real property leasing, called *Ley de Inquilinato* (Tenancy Law). This law is very protective of the tenant’s rights, especially when it comes to eviction procedures, which are long and are handled by the regular courts. In one case, it took 10 years to evict a tenant who had breached a contract.

To overcome those procedures, owners rent properties to relatives or to entities that in turn sublease to the real tenant. If owners want to evict the tenant, they file suits against the related person or entity, who in turn accepts the term of the claim. Once the court authorizes the settlement, it issues an eviction order, which can be enforced against third parties, including

¹² *The Economist*, Intelligence Unit Report on Guatemala, 2004.

subtenants. There are doubts about the legality of this action,¹³ but it is widely used. As a result, there is not a big property rental market.

2. Taxes on Real Property

A 12 percent tax is imposed on any sale of real property. Because this tax is considered high, the actual selling price is rarely shown in the transaction presented to the Registry. However, because of a new law on money laundering, banks refuse to receive deposits that cannot be accurately traced—such as when part of the real property price is paid in cash and is not shown on the property deed.

Another mechanism used to avoid tax payment is through companies. Real property is contributed to the company in exchange for shares. This transaction is not subject to taxation nor is the property tax triggered.

There is a municipal tax on use of real property. The tax ranges from 3 to 9 percent depending on the value of the property. Payments are made quarterly or annually. Previously, municipalities made appraisals to determine the real value of the property, but the Supreme Court declared this practice unconstitutional. Currently, municipalities need to rely on the value of the property as stated in the Real Property Registry and the cadastre. It creates uncertainty because the Real Property Registry and the cadastre are not harmonized and that affects the Government's tax revenue capacity.

3. Securitization

Securitization of real property is possible and has been made in at least one case. A creative structure of trusts and banks permitted the public issuance of commercial instruments guaranteed by mortgage and cash. However, the fact that the trust issuing the bonds is subject to tax creates a cost that increases the price of the instrument. These high costs, problems with enforcement of the bonds, and problems encountered when registering a mortgage with the Real Property Registry can be credited as causes for low levels of securitization.

The legal framework of real property in Guatemala is affected by possibilities of invasions and double title. That damages the business climate of the country and the possibility of attracting private capital.

C. IMPLEMENTING INSTITUTIONS

Per the Civil Code, the Real Property Registry is in charge of registering all transactions pertaining to real property in Guatemala.

There is one central Registry in Guatemala City and another one in Quetzaltenango. In some rural areas, information about real property is recorded with a municipal office rather than with the main Real Property Registry. Thus, to determine the real owner of a property in rural areas it is not sufficient to check only the National Registry. Extensive research needs to be conducted or a legal action to grant a supplementary property deed needs to be filed.

¹³ In some cases, annulment actions have been filed and have succeeded.

Transactions such as sale of real property and mortgage are not valid vis-à-vis third parties until they are recorded with the Registry.

Registration of property is usually slow. Reportedly, it can take up to two weeks just to obtain information about a property. There is uncertainty about how long it takes to have a real property transaction fully registered because information on property transactions is difficult to obtain.

The Registry is not fully automated. An attempt to automate the organization failed badly because of poor technical devices, leaving many properties in limbo. Information about properties is stored partially in written records and partially in electronic records. Transactions on properties whose data are in written records are put on hold indefinitely, which discourages private investments in real property.

Registry information cannot be accessed online, nor is there any private service that provides the information.

There is no cadastre fully in place. There has been a cadastre law since 1997, but there is no cadastre agency because of a lack of political interest. The World Bank is financing a cadastre project and the first part of the project is an assessment yet to be finished. It was reported by sources interviewed that around 80 percent of owners lacked the legal documents guaranteeing title on the property they possess. Even those who have the title might have contradictory measurements because of the lack of a cadastre map.

The World Bank project does not provide for the sharing of information between the cadastre and the Real Property Registry. Connection between the two agencies is vital for a sound real property system because it will diminish the risks currently present when acquiring real property.

Because the cadastre can show different boundaries on the same land, the lack of cadastre creates problems such as double titles on one piece of land or registration of transactions for nonexistent land. That has a negative impact on investments in real estate.

Unlike other countries where registrars are required by law to obtain an insurance policy to guarantee that users be compensated for damage caused by their acts, in Guatemala there is no such requirement. The Registry has insurance only to cover damage to the organization's computer system.

The slowness, unreliability, and corruptness of the court system are also damaging the real property system. The dismal state of the court system, combined with the lack of widespread use of alternative dispute resolution, means results of disputes regarding land are unpredictable. "Resolution of business disputes through Guatemala's judicial system is time-consuming and often unreliable. Corruption in the judiciary is not uncommon."¹⁴

Because of these factors, the Heritage Foundation 2004 index of economic freedom scored the Guatemalan property rights system at 4, with 5 being the worst.¹⁵

¹⁴ U.S. Department of State, as reported by the Heritage Foundation (<http://www.heritage.org>).

¹⁵ Scores range from 1 (best) to 5 (worst) (<http://www.heritage.org>).

The *Oficina de Control de Areas de Reserva del Estado* (OCRET) is a central Government agency in charge of administering governmental property along the maritime zone, rivers, and lakes. Those properties can be rented by the same agency.

In sum, the weak Registry system and the poor judicial system are the main problems in terms of a real property implementing institution that currently affect the business climate and the flow of business.

D. SUPPORTING INSTITUTIONS

1. Notaries

Notaries play an important role in the area of real property. Sale and mortgage of real property must be documented by a public instrument. Thus, notaries draft documents, conduct research on the property to be transacted, confirm the identity of the parties involved in the transaction, authenticate the signatures and the content of the documents, and file the request for registration.

Yet, notaries are vaguely supervised and controlled. Some of them present false documents that the Registry is in no position to challenge. Their costs are considered high by the general public. Because of judicial uncertainty, documents that need not be notarized are authenticated as a way to diminish the drive to litigate. Because of this, notaries are perceived as a “necessary evil.”

2. Real Estate Brokers

There is a Real Estate Brokers’ Chamber of Commerce that puts pressure on the Government to improve the investment climate for real property. They have lobbied for a cadastre law and office and supported a new real property leasing law. However, the communication between the private and the public sectors did not go smoothly until the recently inaugurated administration took over.

There is no requirement for real estate brokers to be certified. Many purported brokers with little knowledge of the country, its legislation, and regulatory bodies have tried to sell property in prohibited areas. Other brokers have defrauded local and foreign buyers.

E. SOCIAL DYNAMICS

There is a demand to reform the Real Property Registry by the business community. The Registry needs to be decentralized, automated, and made accessible to the public. The Registry should have reliable, accurate, current, and coherent information. There is a common concern in the business community that the main problem in real property lies in the lack of a proper Real Property Registry and the lack of a cadastre.

The Chamber of Industry, the foreign chambers of commerce, and the Real Estate Brokers’ Chamber of Commerce repeatedly have requested changes in this area. However, the previous administration ignored the private sector. The new administration has opened channels of communication and has included reforms in the Real Property Registry and the activation of the cadastre among its main priorities. Funding of those projects is still a problem.

There are also demands to control the invasions of land and have effective eviction orders. However, nothing has been done in this regard. There is always a latent risk of invasion, mainly on rural properties.

As with most areas, the need for judicial reform as it affects property issues is a primary concern, and society at large demands such changes. Timid attempts at reform have been tried to no significant avail. Consensus needs to be built, and financing needs to be found.

There are also demands for control of notaries and real estate brokers. A reduction in the real property sale tax has also been requested, but no such reforms have occurred.

F. RECOMMENDATIONS

- ◆ The Real Property Registry needs to be reformed. The Registry needs to be decentralized and automated. Managerial techniques and strategy planning need to be introduced to Registry officers. Personnel should be trained and new equipment is needed. Of foremost importance is the implementation of a reliable and accurate cadastre office. Information about the cadastre office should be consistent with that of the Real Property Registry.
- ◆ Invasions need to be controlled. Consensus needs to be built regarding invasions and an action plan needs to be implemented. Incentives and a proper legal framework can encourage the private sector to start building dwellings for poor people.
- ◆ Courts need to be reformed. Procedures need to be simplified and made more transparent. Arbitration should be encouraged as an alternative for real property disputes. Likewise, notaries need to be supervised and controlled.
- ◆ Real property is subject to an annual use tax and transfer tax. Various creative mechanisms are used to evade tax payment. Guatemala requires a tax system assessment and a reform on its tax laws and tax collection system. Real property taxes should be part of that project.
- ◆ Real estate brokers need to be certified. That could diminish the surge of real estate fraud. It would also help Guatemalans residing abroad to invest their remittances safely. Real estate brokers could be allowed to promote their services in the United States, so that Guatemalan immigrants could invest directly in housing in their homeland. Passing a law on real estate brokers in Guatemala and an agreement between the United States and Guatemala to allow Guatemalan real estate brokers to promote their services in U.S. territory are necessary.

VI. COLLATERAL

A. INTRODUCTION

An effective system of secured lending is the product of: (a) an up-to-date substantive law; (b) a fully transparent, accurate, and easily accessible registry of debtors and of individually valuable collateral that can be identified by serial number or other means of individual identification; (c) an enforcement of security interests by means of extrajudicial self-help and by the speediest of judicial processes of execution of the various security interests; and (d) a sound central banking or regulatory policy that carefully monitors the lending risks and rewards prudent lenders with access to liquidity and better rates of interest.¹⁶ In mature legal systems (i.e., systems that rely on ordered and hierarchical sources of law and that articulate the functions of their key legal institutions), elements (b), (c), and (d) above are the result of proper implementation of element (a).¹⁷

Guatemala's current system for secured transactions is inadequate to meet national and regional commercial credit needs for economic growth—particularly those of micro- and small businesses wishing to expand and/or improve their commercial activities with a view to taking advantage of the benefits of CAFTA as well as preparing for post-CAFTA challenges. Financing continues to rely predominantly on mortgage-based loans and personal guarantees. Foreign investors tend to rely on sources of financing in their own or in third countries, usually at more affordable rates of interest. In contrast, micro-, small, and medium-sized Guatemalan businesses find themselves having to pay interest rates in excess of 30, 40, and sometimes even 50 percent per year in their borrowings from private lenders (nongovernmental organizations, associations, and cooperative companies) that offer simpler and non-real-estate-based solutions, as opposed to those usually required by banks.¹⁸ The same dilemma of high interest rates faces foreign investors who, based on the volume of their investment and the lack of real estate or personal guarantees, wish to obtain initial or additional lines of credit to conduct or expand their business in Guatemala.

The scarcity of commercial credit and its high cost lead Guatemalan micro-, small, and medium-sized businesses to finance themselves out of limited savings and thus hinder the economic development that reasonable rates of interest would make possible. Thus, unless Guatemalan small and medium-sized businesses could borrow at reasonable rates, such as are available to (among others) U.S. investors and exporters, Guatemala will experience a loss of micro-, small, and medium-sized businesses and will become a less attractive market to prospective foreign investors and commercial and other businesses. This risk has already been identified by the Ministry of Economy (Vice Ministry for Micro, Small and Medium-Sized Businesses), as part of what has been designated as the Micro, Small and Medium-Sized Business Crusade (*Cruzada*

¹⁶ Introduction to National Law Center for Inter-American Free Trade, *8 Financial Scenarios of Secured Lending in the NAFTA Countries* (NLCIFT, 1999); see also Boris Kozolchyk and John Wilson, *The OAS Model Law of Secured Financing*, Uniform Law Review.

¹⁷ See, Boris Kozolchyk, *Introduction to Distinguished Perspectives on the Law – Lecture Series at Charles III University* (Madrid, Spain, December 2003).

¹⁸ Rates for mortgage-based lending fluctuate between 8 and 15 percent. A representative from Banco Industrial (the largest financial group in Guatemala) noted that more than 50 percent of their loans are guaranteed by real estate mortgages.

MIPyME).¹⁹ Indeed, the primary goal identified as part of this Crusade is the implementation of a program to obtain financing at competitive rates.

If Guatemala were to modernize its secured lending law and unify it with that of its Central American neighbors, it would be able to act as an effective engine for its own and for regional economic growth. With the help of legal modernization and harmonization with its regional counterparts, the Guatemalan financial institutions would qualify for assistance and cooperation by some of the largest secured lending institutions in the United States and Europe.

B. LEGAL FRAMEWORK

According to Guatemalan legal practitioners and private sector representatives, secured transactions law is one of the areas that needs further development in the country. No comprehensive body of law in Guatemala covers security interests on personal property collateral, a fact that may generate additional uncertainty and confusion both for local companies and for foreign investors wishing to become familiar with the system. Rather, the relevant provisions are scattered among multiple sources, including the Civil Code (Decree Law 106), the Commercial Code (Decree 2-70), the General Warehousing Law (Decree 1746), and the Law of Banks and Financial Groups (Decree Law 19-2000). The rules included in these provisions are often restrictive and only some classes of collateral have been regulated, including mortgages and pledges—with an added limitation, which is the unavailability of deficiency claims.²⁰

The notion of collateral in common-law countries is far more overreaching than that established under Guatemalan legislation; hence, there are types of collateral that are not included among those regulated or permitted by Guatemalan law. In addition, those forms of collateral that have been specifically regulated require specific formalities. In many instances, their particular features and registration requirements have not been clearly regulated, which in turn creates uncertainty and confusion about their scope and application. For example, even though in principle it seems that Guatemalan law allows for more flexible forms of collateral—e.g., by using the concept of an “open pledge” (*prenda abierta*, article 913 of the Civil Code)—the term is misleading and it refers not to the ability to use fungible, fluctuating, or replacement goods but rather to the fact that new obligations can be covered under the same agreement, provided a maximum amount and the duration of the agreement have been determined in advance.

Guatemalan legislation also allows, in theory, for security interests over certain general categories of assets (article 904 of the Civil Code, which pertains to agrarian, cattle, and industrial pledges). Inventory financing is carried out by some banks but only on a limited basis and vis-à-vis clients who have already established their reputation and their access to other

¹⁹ The goal of the Crusade is to promote the development of micro-, small, and medium-sized businesses in Guatemala so that they can become part of the formal economy. The Ministry of Economy has emphasized the need for these businesses to become competitive; to achieve this goal, business centers will be created throughout the country where interested parties will have access to the Internet and will receive training and information pertaining to business activities, commodities markets and fairs, administrative tools, and access to credit. See further at <http://www.mineco.gob.gt/mineco/principal/>.

²⁰ In other words, if the amount received after foreclosure of a mortgage by the secured creditor is insufficient to cover the amount of the debt, the creditor will not have the right to a deficiency claim against the debtor (Civil Code, Article 823). The solution is the same in the case of pledges, unless the parties have expressly agreed otherwise (Civil Code, Article 881).

sources of collateral (mainly, real estate) or provided the relevant goods are deposited at a warehouse managed by the bank (*bodega habilitada*), thus severely restricting access to such goods. Alternatively, new businesses without a pre-established relationship or without access to additional sources of collateral likely would not obtain credit based exclusively on inventory financing. Overall, the concept of pledge remains restrictive and does not respond to the needs of a modern credit market.

In addition, as with most Latin American countries, Guatemalan law allows only “owners” (*propietarios*) of the movable property to become secured debtors and file security interests in their collateral. From a practical standpoint, users have noted that when a pledge is registered at the General Registry of Property (*Registro General de la Propiedad*), the person who files, for example, the public deed documenting the pledge of a car must also file a certificate of ownership (*dominio*) of that car.²¹ The requirement in this example effectively prevents the creation of most contemporary security interests in personal property, given that most secured debtors in the present financial marketplace are not owners of the collateral relied on for asset-based lending.²² Contrary to the status of mortgagors of real property, possessors of personal property can seldom prove their “historical” (or chain of title) ownership of the collateral—particularly in the case of collateral that is fungible and hence identified by a general description. A party would face insurmountable problems in identifying and recovering such goods if he or she were required to describe each one of them.

Regarding enforcement procedures, the Guatemalan legal system relies almost exclusively on the enforcement of security interests by means of judicial mechanisms—which tend to be extremely lengthy (1.5 to 2 years on average, although some interviewees reported exceptional cases that took only 3 to 4 months). Judicial procedures are also susceptible to dilatory practices, including the interposition of *amparo* remedies by debtors alleging that their constitutional rights have been violated.²³ Courts are often criticized because of excessive delays and formalistic requirements that are regarded as inefficient and conducive to corruption.²⁴

²¹ According to some of the interviewees, this might also be because, from a practical standpoint, ownership is sometimes not registered until there is also a need to register a pledge.

²² Examples of secured debtors with rights of possession include unpaid sellers of goods who retain their right to recover the goods sold to defaulting buyers, buyers of goods pursuant to a sales agreement, creditors who hold “title” to negotiable ocean bills of lading or warehouse receipts as holders or endorsees; carriers or warehousemen to whom statutory law grants a lien or right of retention of the goods they carry or store for unpaid freight or storage, “direct” or “financial” lessors of equipment, trustees of guaranty trusts, and bona fide purchasers in the “open market” of the goods bought on credit by some of the above secured debtors. Clearly, the right of these participants in the credit marketplace to possess the collateral in question falls short of the “proprietary” right required by Guatemalan law.

²³ The *amparo* is a judicial procedure that aims at protecting constitutionally established rights from alleged violations. Because of the overreaching nature of this remedy and the lack of strict control against frivolous claims, the practice of filing *amparos* has been abused and exercised as a dilatory method.

²⁴ Allegations of corruption in the judicial system were a cause of concern for most of the interviewees. Corruption permeates all levels of the judiciary, and all participants in the judicial process, including notaries, lawyers, court clerks, and judges (particularly criminal judges). Press coverage on this matter also abounds. In an article entitled “There are many corrupt people in the OJ” (*Organismo Judicial*), the President of the Judicial Body pointed out that, although it is impossible to measure the degree of corruption, the lack of certainty with respect to court decisions is “an assault against national and foreign investment in the country.” (*Siglo Veintiuno Newspaper*, June 26, 2004, at 6). Along those same lines, a magistrate of the Supreme Court of Justice has

In light of these and other substantive law shortcomings, it is not surprising that more than one interviewee concluded that the financing of micro-, small, and medium-sized businesses in Guatemala is an uncommon and risky endeavor. As in other countries covered by this assessment, some of the interviewees noted that it is common to use “guaranty trusts” (*fideicomisos de garantía*) to avoid some of the substantive law uncertainties of the repossession or foreclosure of the collateral. The *fideicomiso de garantía* is regulated under article 791 of the Commercial Code, which provides that, with respect to these trusts and in the event of default by the debtor, the trustee may carry out the sale of the goods by means of a public auction and through a notary public. The article also notes that other types of sale or repossession are void.²⁵ Because some notaries have expressed their reluctance to carry out these procedures, and also because parties have considered that this solution remains too cumbersome, some lawyers have resorted to other types of trusts, without calling them guaranty trusts (e.g., administration trusts, payment trusts, or, simply, trusts). Because these mechanisms are not specifically regulated, repossession or foreclosure pursuant to such trusts may well be deemed a violation of constitutional rights as well as of the Guatemalan prohibition of the *pactum commissorium*. In addition, these types of nonjudicial agreements have a negative side in that they can act as secret liens or as agreements entered into without knowledge of some of the creditors or bona fide purchasers.²⁶

Some of the people interviewed, as well as some of the responses to the USAID/Booz Allen Indicators, expressed the opinion that Guatemala’s substantive law allowed perfection of a security interest in a borrower’s inventory. However, the notion of “inventory” referred to by respondents is not that of the constantly revolving inventory of a business but rather that of clearly identifiable goods.

In sum, whereas article 880 of the Guatemalan Civil Code generally states that a pledge includes movable property, the collateral that can be pledged and that is pledged in practice involves mostly tangible goods and goods susceptible to registration by detailed individual description and serial number. Negotiable instruments and investment securities are as close as Guatemalan law gets to allowing intangible goods as collateral. Left unprotected are, among others, accounts receivable and proceeds financing, trust receipt financing, fixtures financing or security interests in fixtures separate from those in the real property to which the fixtures are attached, and purchase money security interests. Because of existing limitations that prevent or limit access to these mechanisms, foreign investors and local businesses are denied the flexibility to obtain financing at reasonable rates based on collateral they may have readily available; instead, they need to find alternative sources of collateral or face the imposition of higher interest rates.

stated that “it is frightening even for lawyers to be amongst lawyers” (*Siglo Veintiuno Newspaper*, June 27, 2004, at 8).

²⁵ Commercial Code, Art. 791: “Fideicomiso de garantía. Si se trataré de fideicomisos de garantía, en caso de incumplimiento del deudor, el fiduciario podrá promover la venta de los bienes fideicometidos en pública subasta ante notario, siendo nulo todo pacto que autorice al fiduciario a entregar los bienes al acreedor en forma distinta.”

²⁶ It also should be noted that most of these trusts cover real estate rather than movable property, and they have been used predominantly by highly sophisticated companies. One legal practitioner interviewed also noted that the Guatemalan government has used (and abused) this mechanism in procurement-related activities rather than resorting to formal bidding procedures.

Not surprisingly, and as a result of market pressures, attempts to amend existing code law on a piecemeal basis are beginning to emerge. Institutional lenders are advertising credit extensions on the basis of “financial leasing”—ignoring the inadequacies of their protection under existing law. Needless to say, the longer this piecemeal modernization of secured lending law goes on, the harder it will be to achieve a unified system of regulation for all the security interests, both nationally and regionally.

Finally, neither Guatemala’s substantive law nor its registry law is designed to accommodate modern, highly speedy, and voluminous commercial loans that are common and necessary for growing economies and increased foreign investment. A modern electronic registry should accommodate presentation in person as well as presentation by various forms of electronic transmittal, including mail, fax, modem, courier, electronic data interchange, etc. Ideally, registry reforms—and, overall, legal reforms to accommodate an electronic system—should be based on the guidelines established by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the Uniform Inter-American Rules on Electronic Documents and Signatures (IAREDS), which enable presentation by “any other method which is accessible for later consultation and which can be produced in a tangible form recognized by law or custom.”

C. IMPLEMENTING INSTITUTIONS

1. General Registry of Property

The *Registro General de la Propiedad* (RGP), which covers both movable and immovable property, traces its roots to the Mortgage Registry set up in Guatemala in 1776 by King Carlos II of Spain. In 1877, President Justo Rufino Barrios issued Decree 175, which created a new Property and Mortgage Registry. The institution was not changed again until 1933, when the new Civil Code took effect. At that time, the Registry was expanded to include personal property as well as real property. The current registry system is governed by Law 106, issued in 1963, which instituted a new registry book to record rights pertaining to designated personal property (*prendas*). More recent reforms in 1985, a new set of registry regulations in 1987, and a variety of other legislation form the legal framework upon which the Guatemalan Registry currently operates.²⁷

Guatemalan legislation has not envisioned the existence of a centralized registry for collateral. A centralized registry is important because it allows interested third parties—including potential lenders—to determine whether a debtor has any liens of record in a particular region or in the entire country by consulting one single, centralized registry.

Depending on the nature of the goods, security interests in Guatemala may be registered in various ways. By way of example, the pledge of goods stored at a general warehouse is perfected through the issuance of a “pledge bond,” which is registered by the company that issues such a bond. Likewise, the pledge of shares of a corporation is perfected by means of the registration of the pledge in the corporation’s Book of Shareholders.

²⁷ See further, *The Reform of Property Registration Systems in Guatemala: A Status Report*, Brian Trackman, William Fisher, and Luis Salas (INCAE, June 11, 1999).

It is important to note that, in the case of movable property, procedures are seen by legal practitioners interviewed to be complex and costly; registration of movable property is significantly limited, and it refers exclusively to identifiable movable property (Civil Code, Art. 1124).

The RGP is a public institution, and its records may be consulted by any and all interested parties. Previously, the public was permitted to review the original registry records—a practice that created opportunities for fraud (e.g., changing or removing records) and also contributed to deterioration of the records. Currently, a better practice has been implemented and interested parties are permitted to see only copies of registry records.²⁸ By virtue of an ongoing modernization process, many records have been converted to microfilm and/or have been digitalized in optical disks. It is estimated that at present the registry is 70 percent digitalized.²⁹

Currently, two main offices comprise the RGP, one in Guatemala City and the other in Quetzaltenango.³⁰ The office located in the capital maintains records for the departments of Guatemala, Sacatepequez, Chimaltenango, Santa Rosa, Jutiapa, Jalapa, Zacapa, Chiquimula, El Progreso, Izabal, Escuintla, Petén, Alta Verapaz, and Baja Verapaz. The office in Quetzaltenango has jurisdiction over the remaining eight departments: Retalhuleu, Suchitepequez, Totonicapan, Huehuetenango, Solola, Quiche, San Marcos, and Quetzaltenango. Interviewees have stated that these two offices are insufficient and do not provide adequate access to the whole country.³¹ Many of those interviewed also noted that there are more problems in rural areas, and modernization—and hence access to the information and to the economic opportunities such information affords—is also moving at a slower pace in those areas.

The Guatemalan Registry has its own operating budget, monies from which are distributed by the Registrar. Unlike the budgets of the registries in other countries in the region, and along the lines of practices followed in some developed countries, the Guatemalan registry is self-financing through the service fees collected from registry users. According to the Civil Code, these service fees must be established by an official Registry Fee Schedule (*Arancel*). The *Arancel* sets out the amounts the Registry may legally charge for each of its activities and requires that all such monies be used to pay the salaries of its employees, its administrative costs, and costs associated with records conservation and other Registry reform efforts.³² As a general rule, Registry fees are determined by a combination of the function of a transaction and its underlying value. However, users have expressed concerns because, as mentioned before, when registering a pledge they also must file a certificate of ownership of the underlying goods—and, as a result, many times are required to pay a fee based on the value of the property, rather than (and sometimes in addition to) the value of the loan that originated the pledge. Those interviewed noted that they did not see this as a corrupt practice but rather as a symptom of ignorance or inefficiency.

²⁸ Id.

²⁹ The digitalization process has not been without difficulties. Last year, the system went down and all digital records were lost. Technical service providers have changed as new administrations have taken over, which also has resulted in inconsistencies and delays.

³⁰ The registry in Quetzaltenango is referred to as the Second Registry of Property (Segundo Registro de la Propiedad) and it is an independent registry, not interconnected with the RGP.

³¹ INCAE, see above note 27.

³² INCAE, see above note 27.

To these fees, creditors and debtors must add the applicable notary fees as well as transfer taxes where appropriate, which may increase considerably the cost of the transactions. These costs reflect a vision of social wealth premised on the notion that real property transactions are the most revenue producing for the parties as well as for governmental and private sector institutions.

The filing procedure for movables faithfully echoes that which is used for real property mortgages. The deed containing the credit extension contract and the pledge are the documents presented for filing. As in most countries in Latin America, these are usually multipaged and complex legal documents. They are in sharp contrast to the single-paged and simple financing statements filed on paper or electronically with Canadian and U.S. registries. The most common secured transactions with personal property in Guatemala involve the pledge of motor vehicles or identifiable machinery. Completion of a registration usually takes several weeks. Such delays may be risky because a document may be already accepted but not yet processed; consequently, a title search of the relevant property by an interested party (foreign investor or local business) may not detect the existence of a prior security interest. Users generally are not concerned about this delay, but rather they have expressed concerns about the way the registry is structured—which enables movable property to be given as collateral several times, without the creditor having any notice of preexisting liens.³³

One focus of registry reform has been the elimination of corruption. Before reform efforts, registry staff were regularly offered (and they often expected) “grease payments” to expedite or simply complete the processing of inscription applications. Operators were sometimes offered money to process fraudulent or otherwise deficient applications, change records, or falsely certify documents.³⁴ A number of steps (including firing some registry staff) were taken to reduce both forms of corruption. In spite of this, the perception that money payments can result in faster processing persists among some notaries and members of the public. Overall, however, the perception is that corruption at the registries is not prevalent; inefficiency and lack of training are seen as more significant problems.

By way of conclusion, under its current structure, the RGP is not equipped to handle the filing of contemporary secured transactions in an expeditious, economical, and reliable manner. Legal practitioners interviewed have expressed the desirability of having a highly automated, nonevaluative type of filing in a commercial registry organized by debtors’ names. Such a registry would absorb most of the information in the present Commercial Registry (*Registro Mercantil*) and combine it with information on collateral identified by serial number. The data of such a registry would be made available to actual or potential lenders or bona fide purchasers of the collateral anywhere by computer-to-computer communications—a development that would considerably facilitate and expedite lending transactions.

³³ A legal practitioner interviewed noted some cases in which her firm’s clients had taken vehicles as collateral and the registry had no record of any previous liens, when in fact the cars in question had already been pledged twice or even three times previously. Government officials denied that such a problem existed.

³⁴ INCAE, see above note 27.

2. Commercial Registry

Registration of collateral in the Commercial Registry (*Registro Mercantil*) of Guatemala is minimal. As a matter of fact, commercial registries in other countries in the region are not involved in the registration of collateral. In Guatemala, the pledge of a business (as an economic unit) may be registered at the Commercial Registry. A pledge over a company's inventory may also be registered at the Commercial Registry. In these instances, the Registry would merely "take note" of the pledge in a book of "special annotations" (*anotaciones especiales*) or as a marginal annotation under the relevant company's main entry. Not only is this an uncommon practice, it also is not a mechanism creditors would normally use when attempting to do a search regarding liens that may affect a company's assets.

There is an overall perception that the Commercial Registry works better and is more user friendly than the RGP. Efforts to further modernize the Commercial Registry are also under way. On the basis of these considerations, some interviewees believe it might be advisable to create a debtor-based registry that would be housed within the Commercial Registry rather than within the RGP.

3. Courts

Given the inadequacies of the substantive and procedural law of pledges, it is not surprising that Guatemalan courts have not been able to clarify basic questions of applicable law and have added to the existing uncertainty. The business community thinks courts are not consistent in their decisions and that there is lack of transparency. This, combined with the tendency to rely on excessive procedural formalism, reaffirms the need for legal and judicial reform, including the need for judicial training in this and other commercial law areas.

D. SUPPORTING INSTITUTIONS

1. Notaries and Government Institutions

According to the Notarial Code (*Código del Notariado*), notaries have the power to certify and authorize acts and contracts where their participation is required by law or by the parties. Notarial services pertaining to contracts and deeds to be registered in the RGP are in the mid- to high-price range. Legal practitioners interviewed pointed out that, even though fees are established by law (in the Notarial Code), in practice there is a tendency by certain lawyers and notaries to abuse the system and overcharge by including additional services or activities.

According to in-country interviewees, there are 7,500 to 8,000 notaries in the country. The Supreme Court of Justice supervises the notaries. Even though there is a code of ethics, it is not being applied as a practical matter. There is also a Registry of Protocols, where all public documents and public deeds need to be registered. Notaries are also required to submit their own records and books to this Registry on a regular basis. A legal practitioner interviewed mentioned that very few notaries are up-to-date with respect to these requirements.

There are no bailiffs or other private or public entities or officials in Guatemala (other than courts) to carry out enforcement proceedings. Creditors sometimes resort to nonauthorized

extrajudicial proceedings to attempt to enforce their rights, including vandalism, illegal repossessions, and similar mechanisms.

2. Professional and Business Associations

Increasingly, business, industrial, and professional associations as well as nongovernmental organizations are becoming aware of the importance of providing commercial credit at reasonable rates of interest to Guatemalan and Central American micro-, small, and medium-sized businesses. Various interviewees (including legal practitioners and private sector representatives) acknowledged the seriousness and urgency of the problem and the need for a modernized regional law as a result of the small size of the individual country markets.

Overall, supporting institutions thus far have not played an active role in achieving economic and investment potential through the development and implementation of a modern and effective system of secured lending. Instead, they seem to be relying on the Government to be the engine for change. In turn, the Government seems to be responding to this challenge. Indeed, as noted above, the Ministry of Economy is working on a Crusade to promote the development of micro-, small, and medium-sized businesses in Guatemala. As part of these efforts, the Ministry has initiated discussions with the Central Bank and other public entities to develop, among other things, a general legal framework that would facilitate access to credit by these companies.

E. SOCIAL DYNAMICS

In addition to the private sector, Government officials are aware of the need to modernize the legal framework for secured transactions as well as to create a centralized, electronic commercial registry organized by debtors' names. Overall, the environment generated by the Government with a view to creating a modern secured transactions system is positive; however, some of the interviewees noted a perception by the private sector that the Government lacks clear goals and a clear legislative policy in this area. [Note that since the assessment was conducted in Guatemala, the Government has taken some concrete steps to conduct a study to reform the legal framework on secured transactions, including the assessment of experiences in other countries in the region and throughout the Americas, also taking into account the principles embodied in the Organization of American States (OAS) Model Law on Secured Transactions. In late July/early August 2004, the Guatemalan Government made a public call for bids from consultants to conduct this assessment and submit a draft law. The consultant who was awarded the contract completed the study and submitted all relevant documents to the government (including a Draft Law on Secured Transactions for Guatemala) before the end of October 2004. The Draft Law on Secured Transactions, together with other legal proposals, have been submitted to the Guatemalan Congress and, according to sources in Guatemala, will be considered by Congress in sessions to be held in March 2005.]

It will be essential to address the need for secured transactions reform as part of the efforts to implement changes to benefit micro-, small, and medium-sized companies. As mentioned by many interviewees, larger companies that have access to other sources of collateral (mostly real estate) or to foreign credit have "adapted" to the system and overall are satisfied with the status quo. However, existing solutions do not provide sufficient access to credit to micro-, small, and medium-sized companies.

In addition, it will be key to address the need for reform from a regional perspective. As noted by one legal scholar, efforts in this and other areas likely will fail if approached on a country-by-country basis; this statement takes into consideration the fact that assistance and cooperation by some of the largest secured lending institutions in the United States and Europe will be easier to obtain if dealing with the region as a whole rather than with individual countries.

F. RECOMMENDATIONS

- ◆ The shortcomings of Guatemalan substantive or procedural laws have not been remedied by Guatemalan registry and case law. Consequently, a quick and inexpensive realization of Guatemalan security interests will remain an unattained goal until a program of substantive, procedural, and registry law modernization is undertaken not only in Guatemala but also on a regional basis.
- ◆ There already is a realization among key members of the public and private sectors that the secured lending law must be modernized in Guatemala and Central America in the nearest possible future. USAID and other donors should work with the Guatemalan public and private sectors and stakeholders with a view to coordinating current efforts with the adoption and implementation of the OAS Model Law on Secured Transactions for the region. To this effect, efforts leading to the adoption of a new law and regulation(s) should include a comparison of current Guatemalan laws and developments in other countries and throughout the Americas, including the principles embodied in the OAS Model Law. The proposal also will need to look at the development of a regional electronic commercial registry and establish a work plan for the operation of individual in-country registries; it also would entail modernizing the legal framework for electronic commerce and electronic signatures in compliance with international standards.
- ◆ Training on the scope and implementation of the new legal system also should be provided to judicial and administrative officials to facilitate implementation of modernized laws and systems. Such training should include information pertaining to the new collateral structure, interconnection between the new secured transactions framework and other areas of the law, financing options available to local companies and foreign investors, and registry operations.

VII. COMMERCIAL DISPUTE RESOLUTION

A. INTRODUCTION

Without a firm foundation in the Rule of Law, commercial dispute resolution in Guatemala remains problematic at best. The country needs stable legal institutions to overcome the effects of its recent internal conflict. A number of constitutional and legal events since 1985 have improved matters: a new constitution in 1985, new laws on habeas corpus and *amparo* (court-order protection), reforms in the action of the Constitutional Court to nullify the President's attempt to dissolve Congress and the Supreme Court in 1993, constitutional reforms in 1994, and the Peace Accords in 1996 (which ended the 36-year internal conflict). On the other hand, coup attempts, failed anticorruption efforts, and human rights violations marked that same ten-year period.

Corruption undermines the judicial system and drives businesses to alternative dispute resolution. The Center for Public Integrity comments as follows:

[Comment 1]: Citizen confidence in the judiciary is extremely low. Most citizens would not choose to take disputes to a court of law and recourse to extra-judicial forms of dispute resolution is high. Most people view the judiciary, particularly the lower courts, as ineffective and corrupt. Because it can take years for cases to be concluded, many view recourse to judicial means as a waste of time and money.³⁵

B. LEGAL FRAMEWORK

1. Constitution

In Title IV of the Constitution, "Public Power," Chapter IV provides details of the structure and operation of the "Judicial Organism." See articles 203–222. Separately in Title VI, the Constitution devotes 16 articles (Nos. 263–276) to "Constitutional Guaranties and Defense of the Constitutional Order." In theory, this legal framework is certainly adequate to address the resolution of civil and commercial disputes. In practice, however, the judicial process is broken.

The Constitution provides for a regular court system and a separate constitutional court. The Supreme Court consists of 13 magistrates who serve for a five-year term. They are elected by Congress from a list of 26 candidates proposed by a commission, and they may be reelected. Below the Supreme Court are courts of appeals and courts of the first instance, whose judges are elected for the same number of years and in a manner similar to that of members of the Supreme Court. The regular civil courts, which handle commercial matters, are separate from courts devoted to criminal and also family law matters. Small claims courts and administrative courts are also provided. A completely separate Constitutional Court addresses only constitutional matters. The Constitution provides for no more than two appeals on any action. See article 211.

³⁵ See, <http://store.publicintegrity.org/ga/scores.aspx?cc=gt&intQuestionID1=6&catID>.

2. Statutes

The Civil and Commercial Procedural Code and the Law on the Judiciary clearly establish the time periods within which the courts must issue their decisions and the requirements these decisions must meet. With regard to enforcement of the judicial decisions, the Constitution establishes the principle that the courts have the power to judge and to facilitate enforcement of the decision. Similarly, the Civil and Commercial Procedural Code and the Law on the Judiciary establish the judges' authority to hear and decide disputes and the function of the agents that assist with enforcement, providing that the courts may ask the other authorities for the assistance of law enforcement personnel who contribute to enforcement of the legal decisions.

3. Arbitration

Extended delays in the court system have encouraged businesses to provide arbitration clauses in their agreements. In Guatemala, the law governing arbitration is the Arbitration Law contained in Congressional Decree 67-95, in effect since 1995.

The Arbitration Law is structured so that it governs significant aspects of arbitration, such as the arbitration agreement, the composition of the arbitration tribunal, the authority of the arbitration tribunal to hear and decide disputes, the arbitration proceedings, the issuance of the award, the conclusion of the proceedings, the challenge of the award, and the recognition and enforcement of awards, among others. The Arbitration Law of Guatemala is based on the UNCITRAL model law, Guatemala being the first Central American country to have promulgated specific legislation on the matter. Being inspired by the UNCITRAL model law, the Guatemalan Arbitration Law's application in procedural matters is, in general terms, supplementary. In other words, it is a law designed so that the parties are the ones who, in principle and exercising free will, determine the procedures by which they want their disputes resolved by arbitrators. Only in the absence of such an agreement would the procedural guidelines established in the Arbitration Law be applied. This supplementary nature, however, does not mean the substantive precepts of the Arbitration Law—which are the majority—can be replaced by the parties' will. Quite the opposite, the substantive precepts of the Arbitration Law in Guatemala are public policy. Arbitrations, also, have been subjected to the *amparo* proceedings.

In the international arbitration arena, Guatemala is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, better known as the New York Convention, approved by Executive Order 9-84 and ratified by Governmental Resolution. Guatemala is also a party to the Inter-American Convention on International Commercial Arbitration of 1975, also known as the Panama Convention, approved by Congressional Decree 35-86 and ratified by Governmental Resolution.

According to the justification statement of Congressional Decree 67-95, Arbitration Law, the new legislation had to be brought into line with the international treaties and conventions on arbitration to which Guatemala is a party, particularly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention). In fact, it says that this adjustment was one of the basic reasons for the establishment of a new law making it possible for Guatemala to comply with its obligations in the international arena.

Consequently, the Arbitration Law contains a special chapter governing the recognition and enforcement of awards. In this chapter, the law establishes that the international conventions or treaties that are binding on Guatemala in this matter prevail over the precepts of the Arbitration Law itself. Thus, in accordance with the specific precepts and provisions of Decree 67-95, foreign awards will be recognized and enforced in Guatemala only in the absence of the applicability of an international treaty or convention. If it is necessary to apply these precepts, they establish the authority of the Guatemalan courts to hear and decide disputes as well as the procedures by which a local court can enforce a foreign award.

Moreover, the precepts contained in the Arbitration Law chapter on recognition and enforcement of awards establish the procedure for enforcing local arbitration awards in Guatemala. For everything not provided for in the Arbitration Law, regarding the procedure for enforcement in Guatemala of local or foreign arbitration awards, the same law permits supplementary application of the legal provisions applicable to the enforcement of Guatemalan decisions, provided that said application is compatible with the speed and efficiency that should characterize the enforcement of an arbitration award.

Given the problematic judicial system, the availability of alternative dispute resolution is essential for commercial development. Although the use of alternative dispute resolution (ADR) is expanding in Guatemala, the cost of arbitration, as explained below, inhibits its increased use.

C. IMPLEMENTING INSTITUTIONS

The Civil and Commercial Procedural Code is the body of law that clearly establishes the rules of authority by which the various courts of law hear and decide disputes in terms of the subject matter of the dispute, the amount in dispute, and the territory or place where the proceeding must be conducted. The Law on the Judiciary governs everything related to the operation and internal organization of the courts in Guatemala.

Despite the fact that the necessary guidelines for the courts to carry out the adjudicatory function exist, it is generally believed that the number of courts currently existing in the country is insufficient to effectively perform their function, given the amount of work that accumulates in the various courts, especially those known as courts “of first instance.” In this respect, increasing the state budget earmarked for the judiciary has been and remains a pressing need.

Long delays in the Guatemalan judicial system are the rule. An ordinary civil action can take up to 10 years in the court of first instance, with the norm being three to five years. Cases of foreclosure can take up to five years, with the norm being two years.

In addition to the usual causes of delay, such as court inefficiency and lawyer tactics, the factor repeatedly mentioned is the use of *amparo*. Article 265 provides for the proceeding of *amparo*, which protects people against possible violations of rights and remedies violations that have occurred. The article states that “[t]here is no area which is not subject to *amparo*.” As a result, lawyers are able to file an *amparo* in virtually any proceeding. Several sources report repeated filings of frivolous *amparo* proceedings, the appeal of which added considerable delay to the proceedings.

The community in general, including the business community, turns in principle to the courts to resolve their differences. In the specific case of merchants, whether individuals or legal entities, domestic or foreign, they understand they have an adequate legal framework for submission of their disputes—most of which arise as a result of contracts—to the courts. But, given the lack of knowledge in certain specific subject matters, their essentially technical nature, the volume of work pending in the courts as a result of postponements and delays in the proceedings, and, unfortunately, the occasional charges of corruption, the merchants tend to avoid, as far as possible, bringing a lawsuit in the courts, especially because of the costs, in time and money, that can be involved, to the detriment of their dynamic business activity. So, as pointed out later, there is currently a tendency in the business community to seek methods other than the courts to resolve commercial disputes.

The existence of substantive and procedural commercial laws, in principle, should give the merchants certainty in terms of submitting their disputes to the courts. But the factors such as those described above have caused the business community to seek legal alternatives to the judicial methods of dispute resolution.

1. Administrative Courts

The organization and operation of the bodies that decide commercial questions at the administrative level are well established in the different specific laws that govern them. One of the principal ones is the Superintendency of Tax Administration, which has authority and state support in tax administration, collection, control, and oversight.

On the one hand, it is claimed that, in recent years, this administrative body has carried out its tax collection and oversight function effectively. In the past, tax avoidance was high. Supposedly, now the merchants want to avoid any tax dispute with the administration. On the other hand, Guatemala has been unable to comply with the tax target established in the Peace Accords signed in 1996.

2. Arbitration Tribunals or Centers

The institutions that administer arbitration proceedings are important, because their regulations can govern specific arbitration proceedings in the event that the parties so agree. Such rules are more advantageous to the parties than those established in law, in terms of time and money. Thus, although the composition of the arbitration tribunal and everything related to the qualities required of arbitrators, as well as the time periods within which they must be named, are regulated by law, the parties can avoid these regulations if they so agree.

Guatemala now has three permanent arbitration institutions to which individuals can, by contract, submit disputes: the Arbitration and Conciliation Center (*Centro de Arbitraje y Conciliación de Guatemala* [CENAC]), the Dispute Resolution Committee of the Chamber of Industry of Guatemala (CRECIG, Spanish acronym), and the Private Center for Determinations, Conciliation and Arbitration (CDCA, Spanish acronym). These institutions, which administer arbitration proceedings, have similar dispute resolution regulations and procedures. The basic difference lies in the procedures for qualifying arbitrators, with considerations such as the subject matter knowledge and well-known honesty of the proposed arbitrator being common to all.

As indicated above, submitting a matter to an arbitration tribunal does not mean the ordinary courts will have no type of participation in the arbitration process. On the contrary, there are certain proceedings—for example, enforcement of a precautionary measure—that are always subject to a hearing by and the order of an ordinary court, as provided for in the Arbitration Law. There are also other proceedings in which the ordinary courts can intervene. This is the case of assistance from the ordinary courts in the taking of evidence, motions for review of awards, and the constitutional relief actions that may be brought by the parties.

Another case in which the participation of the ordinary courts is indispensable is the judicial enforcement of arbitration awards. Despite the fact that it is said that most awards handed down are enforced voluntarily, in the few cases in which it has been necessary to seek judicial enforcement, said enforcement has been carried out effectively.

3. Mediation

In 2002, the Supreme Court implemented the so-called “Alternative Dispute Resolution Unit,” the institution responsible for coordinating the 23 mediation centers that operate in Guatemala. These mediation centers are part of the judiciary, serving not as courts of law, but as performing mediation functions only.

The main objective of these centers is to facilitate access to justice for the entire population by offering the opportunity to submit the differences that may arise between people to an informal, expeditious, free process. Most of the users of these centers, according to statistics, are low-income individuals who find in these institutions an alternative means of resolving their differences.

The mediation centers use psychologists as mediators. It is thought that the confrontational approach of attorneys is not well-suited to mediation. However, the attorney-director of one of the ADR organizations was interested to learn that attorneys have been trained in the United States to serve effectively as mediators.

The mediation centers handle almost no commercial disputes. If attorneys were trained in mediation, it is likely that mediation would spread to commercial disputes, at least through the private ADR centers.

D. SUPPORTING INSTITUTIONS

1. Legal Agents

The General Property Registry serves as a supporting institution by being responsible for the registration, annotation, and cancellation of actions ordered by a judicial decision—attachments, for example—that affect the ownership and other rights *in rem* to identifiable real and moveable property. This registry is discussed in detail in the previous section.

2. Attorneys/Legal Profession/Associations of Attorneys

According to attorneys interviewed, there are about 8,000 attorneys in Guatemala. Most of them are also notaries. All attorneys must be members of the Professional Association of Attorneys

and Notaries of Guatemala; the membership reflects a necessary requirement to practice the profession in Guatemala, because the Constitution provides for mandatory membership in the professional association. This professional association, despite the fact that it helps promote the honorable practice of the profession, at this time constitutes neither a systematic means of training its members nor an organized means of helping users choose the members who meet their needs.

3. Trade and Special Interest Groups

Special interest groups, principally of merchants and industrialists, are relatively well organized in Guatemala, having shown in different forums an effective capacity for organization. An example of this is the establishment and promotion, as mentioned before, of their respective arbitration centers: the Arbitration and Conciliation Center (CENAC), which is the center of the Chamber of Commerce of Guatemala; and the Dispute Resolution Committee of the Chamber of Industry of Guatemala (CRECIG).

With assistance from USAID, both chambers have strongly promoted the use of arbitration as an alternative means of dispute resolution and have included qualified professionals on their lists of arbitrators. For this purpose, and for the purpose of organizing seminars on legal matters of current interest, chambers of commerce of foreign countries have also played an important role. Cases in point are the Guatemalan–American Chamber of Commerce, the Guatemalan–German Chamber of Commerce, and the Royal Spanish Chamber of Commerce of Guatemala.

The costs of arbitration are high. At least one center charges 1.5 to 2 percent of the amount in dispute. As a result, the center director reports that it generally handles disputes involving about \$20 million. With such high costs, arbitration is not a viable option for small and medium size enterprises (SMEs). Some consideration has been given to lowering the costs. Increased demand for alternative dispute resolution and competition from more provider-organizations and by trained arbitrators would lower costs.

E. SOCIAL DYNAMICS

The inefficiency and corruption in the administration of justice through the courts prompts parties to submit their disputes to alternative resolution methods such as arbitration. In addition to corruption, judges' lack of knowledge of certain specific subject matters of a fundamentally technical nature and the volume of work accumulated in the courts inhibit prompt resolution of disputes.

The delayed hearing and resolution of disputes by the courts, among other reasons, explains and justifies the draft of the New General Procedural Code, which would establish the procedural guidelines for civil, commercial, criminal, and labor proceedings, *based on an oral system, not a written system* like the current code. The most significant contribution to be hoped for from an oral system would be the swiftness of proceedings. Highly qualified professionals in the Guatemalan legal arena have supported the development of this draft.

As indicated above, submitting a matter to an arbitration tribunal in Guatemala is expensive. Consequently, some question this method, referring to arbitration centers as “exclusive courts for

a small sector of society.” This criticism notwithstanding, there are considerations that may counter it, especially from the standpoint of a cost-benefit analysis. The aforementioned adverse factors are certainly considerations that could lead to a preference for incurring arbitration costs to have swifter and more efficient dispute resolutions, in keeping with the dynamic spirit of business activity.

The arbitration process has been negatively affected by the unjustified incursion of the constitutional relief action, *amparo*, which is brought as a means of delaying or nullifying the effect of the arbitration proceedings. If the constitutional relief action in this regard is not kept on track, in keeping with the juridical nature of the institution, arbitration runs the risk of being substantially adversely affected as an alternative process for resolving commercial disputes.

F. RECOMMENDATIONS

- ◆ Revive efforts to enact a new code of civil procedure to include greater use of oral proceedings and consider possible methods of limiting the abuses associated with the proceeding of *amparo*.
- ◆ Increase competition in providing arbitration, thereby reducing the fees associated with the process.
- ◆ Institute a professional training program and education requirements for arbitrators and mediators.

VIII. BANKRUPTCY

A. INTRODUCTION

Insolvency systems are an important element of financial stability. An effective insolvency system facilitates the rehabilitation of enterprises and also provides an efficient mechanism for liquidating those enterprises that cannot be rehabilitated. Increasingly, the reform of the legal framework for insolvency has become an important component of international donors' economic programs in many countries because of the impact such reform can have on that country's economic and financial system.

In the absence of adequate insolvency laws, individual creditors may compete to be the first to seize collateral or to obtain a judgment against a failing debtor. It is in the collective interest of creditors that the reorganization or liquidation of a debtor be carried out in an orderly manner.³⁶ In April 2001, the World Bank issued a report on "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems."³⁷ Even though the insolvency principles focus primarily on corporate insolvency, some of the concepts identified are also helpful for developing principles for bank and systemic insolvency.

The World Bank Report establishes that a modern economy requires predictable, transparent, and affordable enforcement of both secured and unsecured credit claims by efficient mechanisms both within and outside the insolvency system. These systems must be designed to work in harmony.³⁸ The World Bank Report includes an in-depth analysis of a number of principles, some of which are summarized here. In general terms, an effective insolvency system should (a) be integrated with the country's broader legal and commercial systems—insolvency reform is often ineffective without parallel reform of other commercial laws;³⁹ (b) maximize the value of the company's assets by enabling it to reorganize; (c) strike a careful balance between liquidation and reorganization; (d) provide for equitable treatment of similarly situated creditors—including both foreign and domestic creditors; (e) provide for timely, efficient, and impartial resolution of insolvency proceedings; (f) prevent the premature dismemberment of the debtor's assets by individual creditors; (g) provide a transparent procedure that contains incentives for gathering and dispensing information; (h) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and (i) establish a framework for cross-border insolvencies, including recognition of foreign proceedings and judgments as well as cooperation and assistance among courts in different jurisdictions.^{40,41}

³⁶ See further *Group of 22: Report of the Working Group on International Financial Crises*, October 1998, at 15 (the "G-22 Report"). Available at <http://www.imf.org/external/np/g22/ifcrep.pdf>.

³⁷ *The World Bank: Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, April 2001 (the "World Bank Report"), available at <http://www.worldbank.org/gild>.

³⁸ *Id.*, at 3.

³⁹ G-22 Report, *supra*, note 37, at 15. In this regard, international donors have also long been aware of the need to modernize the country's overall commercial legal framework. The USAID mission in Managua reported on a proposal for a uniform commercial code for all Central American countries, which would be based on best practices and experiences gained from other countries in the Americas, including Chile and El Salvador.

⁴⁰ World Bank Report, *supra* note 37, at 4, and G-22 Report, *supra* note 32, at 16 and 44 (Annex A).

⁴¹ To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it becomes increasingly likely that assets will be concealed or disposed of disregarding

Guatemala fails to meet most of the requirements established under the above principles. The Guatemalan legal framework does not facilitate efficient, transparent, and reliable methods for recovering debt, either within or outside of bankruptcy proceedings. Rules on bankruptcy are not integrated with the broader commercial system; in fact, because of amendments to the Commercial Code, specific bankruptcy rules were repealed in 1970 and only procedural aspects are currently regulated. Among other things, the lack of specific substantive regulation severely limits a creditor's ability to ascertain the validity of transactions conducted by the bankrupt individuals or entity once it became insolvent—a factor that in turn may significantly confine the number of assets that may be available to such creditors to satisfy their debts. In addition, because of protracted and formalistic judicial procedures, the notion of efficient and impartial resolution of bankruptcy procedures effectively does not exist.

Guatemala's rules on bankruptcy focus on the liquidation of business entities rather than on their reorganization. However, several interviewees noted that, unlike other Central American countries, Guatemala does provide (at least in theory) for an equitable treatment of creditors, including creditors located abroad.

As a matter of practice, there are hardly any (if any) bankruptcy cases in Guatemala. Companies would rather attempt to reach an agreement with their creditors outside the judicial process or even close operations altogether and set up a new entity without going through a formal bankruptcy procedure—effectively leaving all or a significant number of creditors completely unprotected.

In contrast, the legal framework for the liquidation of financial entities was reformed in 2002 in an effort to modernize the system and adapt it to international standards. However, the system has not been tested to date and a few ongoing cases of bank liquidations are being handled under the previous legal system—a solution criticized by many because of irregularities and lack of transparency.

B. LEGAL FRAMEWORK

Current Guatemalan legislation governing insolvency and bankruptcy is generally found in the Civil and Mercantile Procedure Code (CMPC), Decree-Law 107 of 1963, as amended.

Unlike other countries, Guatemala tends to regulate only the procedural aspects of bankruptcy proceedings; the substantive rules governing bankruptcy that appeared in the Commercial Code were repealed in 1970. This lack of specific bankruptcy and insolvency legislation has resulted in a legal vacuum that has hampered, among other things, the ability of creditors to take effective, retroactive measures to define the assets and liabilities of the bankruptcy estate.⁴²

the interests of all affected creditors. The G-22 Report also encourages widespread use of the UNCITRAL Model Law on Cross-Border Insolvency or similar mechanisms to facilitate the efficient resolution of cross-border insolvencies.

⁴² In accordance with Guatemalan doctrine, “both insolvency and bankruptcy proceedings are true collective foreclosure proceedings and, as such, should be regulated by the Procedural Code. Substantive issues may be governed by other laws, including commercial, civil and criminal laws. ... Consequently, when the current Commercial Code was promulgated, a palpable legislative vacuum was created because the substantive aspects of bankruptcy (with some exceptions) were governed by article 1320–1326 of the former Code, Government

Another distinctive element of the Guatemalan system is that the same rules apply to individual and commercial debtors—a feature that may act to the detriment of both types of debtors by failing to address their specific needs and expectations. In turn, financial institutions are subject to specific regulations set forth in Decree 19-2002, which establishes a system for transferring assets and liabilities between financial institutions in the event of economic difficulties—a system that is aimed at protecting the financial system and investors alike.

Except for the cases regulated under Decree 19-2002, Guatemala does not provide for reorganization procedures such as those found in Chapter 11 of the United States Bankruptcy Code. As in other Latin American countries, Guatemala treats bankruptcy as a foreclosure/collection action brought against a debtor, without incorporating a preventive or reorganization element into the process and thus effectively preventing the rehabilitation of viable companies. Even though corporate reorganization is theoretically possible under Guatemalan law, in practice the mechanism has not been used—likely because of a combination of the cumbersome and formalistic nature of the proceedings and the lack of knowledge by companies that ultimately may benefit from such proceedings. As noted above, based on the principles promoted by the World Bank, an effective insolvency system should, among other things, maximize the value of the company’s assets by enabling it to reorganize, and strike a careful balance between liquidation and reorganization.⁴³

1. Commercial Entities and Individuals

A debtor may declare voluntary insolvency for the purpose of avoiding bankruptcy or to dismiss a bankruptcy proceeding pending against him or her. Involuntary insolvency serves the same purpose, but it is requested by one or more of the creditors—without notice to the debtor⁴⁴—when the debtor has failed to pay current obligations. From a practical standpoint, neither insolvency nor bankruptcy procedures have been used extensively in Guatemala: the excessive formalism of judicial proceedings, coupled with cultural considerations (including the social stigma of being declared “bankrupt”) and the use of alternative (albeit nontransparent) solutions, have contributed to this status quo.

Insolvency and bankruptcy proceedings encompass all claims pending against the debtor and stay all foreclosure/collection efforts against such debtor, except for those proceedings involving mortgage debts and secured interests.⁴⁵ The CMPC clearly excludes security interests from bankruptcy proceedings, thus safeguarding the rights of secured creditors.

Similarly, the provisions governing the classification and ranking of debts (CMPC, Art. 392) do not create the significant problems that secured creditors encounter in other Latin American countries vis-à-vis other creditors. For instance, in many countries secured creditors are subordinated to labor creditors. It is noteworthy that there is no legal or doctrinal reference to the

Decree 2946, which was repealed as of December 31, 1970. Such a vacuum must be filled in some way, probably through the issuance by Congress of a specific decree governing bankruptcy.” (Aguirre Godoy, Mario, *Derecho Procesal Civil de Guatemala [Civil Procedural Law of Guatemala]* at 358).

⁴³ See supra, note 37.

⁴⁴ Experts interviewed stated that this lack of notice could be problematic in practice because it could be interpreted to violate principles of due process and, hence, be declared unconstitutional.

⁴⁵ Art. 393 of the CMPC.

rights of creditors derived from letters of credit. This may result from the limited number of bankruptcy cases that exist in Guatemala.⁴⁶

To declare a debtor in bankruptcy, and following generally accepted standards, Guatemalan law requires that the debtor be insolvent and creditors must have been unsuccessful in enforcing judgments issued against such debtor in three distinct instances of foreclosure/collection.

Article 367 of the CMPC provides that insolvency is a prerequisite to bankruptcy. If the creditors or the judge rejects the settlement agreement proposed by the debtor during a voluntary insolvency proceeding, such debtor shall be declared insolvent, and an involuntary proceeding or a bankruptcy proceeding shall follow.

The second prerequisite to declare a debtor in bankruptcy is the existence of at least three foreclosure/collection actions pending against the debtor in which the debtor does not have sufficient assets to pay the sums in controversy (CMPC, Articles 371 and 379).

The determination of the period in which bankruptcy began is an essential component of the bankruptcy order. Such determination is only provisional and may be amended subsequently on the basis of additional facts or documentary evidence.

As noted above, the lack of substantive bankruptcy law most affects the determination of the date on which bankruptcy began and the valuation of the bankruptcy estate (i.e., the estate may have significantly dwindled because of transactions conducted by the debtor before the declaration of bankruptcy and it may be difficult for creditors—in the absence of clear rules—to provide evidence that such transactions were of a fraudulent nature). The repealed Commercial Code contained a chapter specifically governing the effects of debtors' failure to pay their obligations and expressly rendered void any act of the debtors after the date on which they stopped servicing their debt or within the preceding 10 days in the case of gratuitous transfers of real or personal property, debt prepayment, or the creation of mortgages or security interests.

Guatemalan doctrine attempts to address this vacuum by applying the rules contained in the Civil Code governing the revocation of legal transactions (*acción pauliana* or *acción simulatoria*). Legal scholars maintain that the creditors may file a lawsuit to void a transaction provided they do so within 1 year of the date the challenged transaction began or took place. They also must prove that the transaction was intended to defraud the creditors. This approach generates uncertainty concerning the validity and ability to challenge security interests granted during the period before the declaration of insolvency or bankruptcy. The lack of express regulations also creates doubt about the kind of evidence that someone challenging the creation of such security interest must file to successfully void such transactions for purposes of including the asset guaranteeing such debt in the bankruptcy estate. However, because of the absence of actual cases, possible answers to these questions remain speculative.

Another point that adversely affects the rights of secured creditors is that guarantors and co-obligors of a debtor benefit under the terms of the agreement reached between such debtor and

⁴⁶ Interviews with private and public sector representatives confirmed that the number of bankruptcies in Guatemala is extremely low. In contrast, an increasing number of bank liquidations led to the enactment of Decree 19-2002.

his or her creditors.⁴⁷ This legal consequence renders personal guarantees ineffective. The notion that the agreement benefits the debtor’s co-obligors and guarantors may adversely affect a decision to extend credit. A guarantor accepted by a lender on the basis of its financial solvency—which solvency should not be affected by the debtor’s insolvency—shall no longer represent a viable means of collecting the debt originally contracted if such guarantor benefits from the terms of an agreement reached between the debtor and his or her creditors.

Another problem posed by the repeal of Guatemala’s substantive bankruptcy rules contained in the former version of the Commercial Code revolves around the fact that courts should impose criminal sanctions where there is evidence of a fraudulent bankruptcy. However, the rules of the Commercial Code defining the classification of a bankruptcy as fraudulent have been repealed, and, even though the notions of fraudulent and negligent bankruptcy are mentioned in the Criminal Code, the constitutive elements of such crimes are not defined under the relevant provisions.⁴⁸ Guatemalan doctrine refers to this situation as a “notorious incongruence.”⁴⁹ However, the judge should still determine whether the bankruptcy is fraudulent, either *sua sponte* or at the request of the creditors meeting.⁵⁰

Unlike in other Latin American countries (including El Salvador, Costa Rica, and Nicaragua), Guatemalan doctrine and experts interviewed understand that there is no discrimination against foreign creditors in a bankruptcy proceeding. However, in light of the absence of a significant number of actual cases, this statement has not been tested in practice.

2. Financial Entities

As is customary throughout the financial world, financial entities such as banks are subject under Guatemalan law to their own bankruptcy provisions. The liquidation of financial entities is currently governed by Decree 19-2002, which entered into force on June 1, 2002. The Decree controls the “regulation, suspension of operations and exclusion of assets and liabilities” of financial institutions. In accordance with article 70, every financial entity that experiences a shortfall in assets must report such circumstance to the Superintendency of Banks and provide a plan to rectify the situation (*plan de regularización*). The Superintendency must approve or reject such plan within five days of the date it is submitted. These practices are consistent with international standards and favor a transparent business and investment climate.

In the event the plan is approved, the financial institution must implement it within the time period specified by the Superintendency—not to exceed three months. Entities that are subject to

⁴⁷ Although such principle is not embodied in the law, doctrine deduces it from an interpretation of applicable legal provisions. Legal scholars provide that Article 369 of the CMPC affirms this approach. This article determines that, if the agreement is rendered void because of criminal intent or fraud, such result affects the debtor, his or her co-obligors jointly and severally, and the creditors that benefited from the fraud, unless such creditors can demonstrate that they had no knowledge thereof. Thus, as a corollary, doctrine has concluded that, if the agreement is not void, the debtor’s co-obligors, jointly and severally, benefit from any grace periods or debt discount/forgiveness afforded the debtor. With regard to guarantors, the conclusion is the same in light of the provisions of the Civil Code (Article 2109), which indicate that the guarantor may enforce any defense the debtor has against the creditor, even if the creditor has waived such defense (See Godoy, *supra* note 42, at 384).

⁴⁸ Criminal Code, Chapter II, Articles 348–354.

⁴⁹ Godoy, *supra* note 423, at 430.

⁵⁰ *Id.*, at 431.

a plan approved by the Superintendency cannot pay dividends or authorize loans to the shareholders, the general manager, or to related companies. If the plan is rejected, the institution must submit an amended proposal.

The plan to stabilize operations may include steps to reduce assets, capitalize reserves and/or earnings, increase authorized capital, issue shares to cover asset shortfalls, take out subordinated loans, and sell assets and/or liabilities.

If a bank or financial company fails to comply with the plan, pay its obligations, or experiences an asset shortfall that exceeds 50 percent of the assets it is legally required to maintain, the Monetary Board shall immediately suspend its operations (Decree 19-2002, article 75). Operations will also be suspended if the plan (or an amended plan) is not submitted or if the plan is rejected by the Superintendency of Banks.

If the operations of a financial institution are suspended, Article 77 of the Decree provides that all proceedings and injunctive measures pending against, or imposed upon, such entity shall be stayed. This provision could be problematic because it does not discriminate among the various proceedings; as a result, such proceedings allegedly could encompass foreclosure/collection actions for debts guaranteed by security interests and actions related to obligations derived from the acceptance of letters of credit or mortgages.

Decree 19-2002 provides a mechanism for excluding both the assets and the liabilities of a financial institution whose operations have been suspended. The purpose of such mechanism is to transfer a portion of the assets of such entity to a viable institution. Article 78 stipulates that a Committee to Exclude Assets and Liabilities (the Committee) will be appointed. Such Committee will report to the Superintendency of Banks, and it will have the authority, among other things, to exclude a portion of the assets that appear on the affected entity's balance sheet. The purpose of such exclusion is to safeguard the value of such assets and ultimately protect the rights of creditors and depositors. These excluded assets may be transferred to a trust fund managed by an entity chosen by the Superintendency. The Committee will also be able to transfer the affected entity's liabilities to other banks in consideration of certificates of participation in the amount of such transferred liabilities. The certificates of participation shall be issued by a trust established with the assets of the affected bank.

The Decree follows international standards as well as the modern trend of transferring assets and liabilities from affected banks. One issue yet to be resolved, probably because the Decree was enacted only a couple of years ago and it has not been tested in practice, is to define exactly which foreclosure/collections actions pending against an affected entity shall be stayed. Some of the legal practitioners interviewed were of the opinion that because the Decree does not set forth an exhaustive list of powers of the Committee (articles 78 and 79), that could be interpreted to mean the Committee has ample powers and could, for example, pay out a letter of credit by debiting the account earmarked or specially designated for that purpose. However, as noted, this assertion has yet to be tested in practice.

At present, there are three ongoing intervention proceedings affecting financial entities: Banco Promotor S.A., Banco Empresarial S.A., and Banco Metropolitano S.A.⁵¹ However, they are still being handled under the previous legal system (*Ley de Protección al Ahorro*) and, according to legal practitioners interviewed, there have not been any positive results thus far. Allegations of lack of transparency and dubious practices by both private and public entities involved are not uncommon.

Interviewees also reported on a favorable practice whereby banking institutions facing difficulties have merged or been absorbed by other banks as a way to avoid a costly and complicated liquidation process. In some other cases—particularly when public funds have been involved—the *Banco de Guatemala* (Central Bank), prompted by the Monetary Board, has proceeded to infuse funds into failing financial institutions.

C. IMPLEMENTING INSTITUTIONS

1. Courts

The ordinary courts dealing with civil matters have the primary responsibility for implementing the bankruptcy legislation for non-financial entities and individuals. As is the case with the other Central American countries that are the focus of this assessment, there are no bankruptcy courts in Guatemala, as there are also no specialized commercial courts. Civil judges of the first instance have subject matter jurisdiction over bankruptcy cases. Personal jurisdiction is determined by the location where the debtor has a principal place of business or, if such location cannot be established, the place where the debtor normally resides.

The courts of appeal are also the courts of civil jurisdiction.

Guatemalan courts do not have any extensive experience in dealing with insolvency or bankruptcy proceedings. Only a few cases have been brought to the courts' attention, and only one bankruptcy case has been successfully completed—after a costly and lengthy process.⁵² On the basis of these considerations, business persons, legal practitioners, advisors, and even judges consider the existing legislation to be inoperative. In addition, courts in general are often criticized because of excessive delays and formalistic requirements that are regarded as inefficient and conducive to corruption. Merchants prefer to avoid bankruptcy procedures and are more inclined to reach out-of-court agreements with their creditors than to face protracted and costly processes that would fail to yield satisfactory results to any of the parties involved.

2. Administrative Entities

The bankruptcy of financial entities involves an administrative phase and a judicial phase. In the judicial phase, once the assets and liabilities of the insolvent institution have been transferred, the

⁵¹ See Central Bank Report (*Procesos Recientes de Intervención Administrativa de Bancos, Adelantos y Líneas de Crédito Contingentes—1998–2004*, September 8, 2004), at <http://www.banguat.gob.gt/publica/comunica/bgcom001.pdf>.

⁵² Legal practitioners interviewed pointed out that there have been more insolvency proceedings than bankruptcy cases. However, insolvency proceedings have also been affected by judicial delays and formalisms; as a matter of fact (and based on anecdotal statements provided by some interviewees), many proceedings initiated several years ago have yet to be completed, and some have been abandoned altogether.

Superintendency of Banks may ask the Monetary Board to revoke the affected bank's authorization (Art. 82 of Decree 19-2002) and initiate bankruptcy proceedings before the competent courts (see above) after a summary procedure, as established by Article 83 of Decree 19-2002.

The entities involved in the administrative phase are the Monetary Board and the Superintendency of Banks.

Monetary Board. The Monetary Board is the entity in charge of determining the country's policies pertaining to monetary, currency exchange, and credit matters.⁵³ This entity plays a key role in cases in which financial entities are facing financial difficulties, including the ability to decide to suspend operations. If a mechanism for excluding assets and liabilities of a financial institution is initiated, it is up to the Monetary Board to designate the members of the relevant Committee to Exclude Assets and Liabilities. Once the process is completed, the Monetary Board also will be in charge of instructing the Superintendency of Banks to initiate bankruptcy proceedings before the competent court.

Superintendency of Banks. The Superintendency of Banks is the entity in charge of supervising and controlling banks, credit institutions, financial institutions, insurance companies, and other institutions designated by law.⁵⁴ All processes pertaining to the formulation and implementation of a stabilization plan must be carried before the Superintendency.

Overall, those interviewed had a favorable impression of the role played by the Monetary Board and the Superintendency of Banks, although in the case of the liquidation of some banks there have been allegations of lack of transparency that have affected both the private sector and the public entities involved. As noted above, the new system regulated under Decree 19-2002 has yet to be tested in practice; also untested are the roles these administrative entities play under such a system.

D. SUPPORTING INSTITUTIONS

1. *Síndicos* (Trustees)

The trustee is appointed in the order that declares the debtor in bankruptcy. Ultimately, the General Creditors Meeting must approve such trustee. The trustee represents the creditors both in court and out of court (CMPC, Art. 381). In addition, legal scholars consider the trustee to act as the judge's assistant and under the judge's supervision.

In addition to representing the creditors, the trustee has other specific duties: publishing the bankruptcy order, notifying the creditors of the general meeting, taking possession of the debtor's assets, qualifying the bankruptcy—determining whether fraud or fault is involved—and verifying and ranking the debts (CMPC, Articles 381, 389 and 390).

The absence of actual bankruptcy cases precludes a detailed analysis of the role of the trustee and its practical relevance.

⁵³ Art. 133 of the Constitution; Organic Law of the Bank of Guatemala.

⁵⁴ Art. 133 of the Constitution; Financial Supervision Law (Decree 18-2002).

2. Receivers/Bailees

The judge appoints a provisional receiver/bailee in the order declaring bankruptcy. Like the trustee, the designated receiver/bailee must be approved at the General Creditors Meeting.

The receiver/bailee assists the trustee with administering the bankruptcy assets by taking possession and acting as the custodian of such assets.

3. Interventors

No formal interventors are designated in the case of liquidation of financial entities. This role is exercised by the Committee to Exclude Assets and Liabilities appointed by the Monetary Board (see above).

4. Additional Institutions

There are no bailiffs or other private or public entities or officials in Guatemala (other than courts) to carry out enforcement proceedings. Professional and commercial associations have not played a significant role in legal reform proposals, although many of those interviewed were of the opinion that the current legal framework for bankruptcy does need to be revised.⁵⁵

E. SOCIAL DYNAMICS

According to the interviewees, there are many reasons why Guatemalans do not generally resort to bankruptcy procedures, including the excessive formalism of the procedures (and of judicial procedures in general, where cases often are resolved based on formalistic requirements, rather than on substantive considerations),⁵⁶ and the fact that individuals and merchants resort to other mechanisms, including guaranty and asset administration trusts. One interviewee related a case where, to prevent a bankruptcy, the debtor established three trusts: one for the company shares, a guaranty trust over the totality of the assets of both the companies and its partners, and an administration trust to manage the assets.

These types of non-judicial agreements have a negative side in that they can act as secret liens or as agreements entered without knowledge of some of the creditors or bona fide purchasers. In the example given by the referenced interviewee, the creditors acted in bad faith and distributed the assets among themselves. However, in other instances, administration trusts have proved effective—in fact, more effective than court proceedings that would result in a liquidation procedure rather than keeping the company in business.

⁵⁵ There are various proposals under consideration that would have an impact on bankruptcy legislation. One is a proposal for a new Civil and Mercantile Procedure Code that would address bankruptcy and insolvency in very general terms. There is also a proposal for a General Code of Procedure, which maintains existing provisions on bankruptcy and insolvency, with some minor amendments to make the process less formalistic. However, this proposal has also identified the need to develop stand-alone legislation on bankruptcy.

⁵⁶ Many of those interviewed expressed the concern that judges are not familiar with the issues and thus prefer to limit their analysis to whether the case complies with formal requirements (e.g., if there is a valid power of attorney, if the relevant evidence was duly documented, if pleadings were submitted on time). In the words of one interviewee, “the form *is* the substance.”

Several interviewees also pointed out that bankruptcy is seen as a social stigma, and debtors would rather agree to other types of arrangements (including trusts) than face the threat of bankruptcy. Unlike other Latin American countries, there is not a widespread perception in Guatemala that bankruptcy is usually a device resorted to by unscrupulous debtors to hide or do away with significant assets. In many instances, creditors would rather give up on collecting their debts than face a lengthy and costly court procedure. When debts involve medium and small-sized companies, an official at the Ministry of Economy pointed out that it is not uncommon for the relevant loans to be insufficiently documented or not documented at all. In these types of loans, lenders charge exceedingly high interest rates that, to a great degree, serve to cover all or part of their losses in the event the debtor becomes insolvent.

In any case, the fact that businesses are trying to come up with various legal schemes to avoid applying the law provides evidence that the law needs to be modernized, particularly as part of a concerted effort to attract more national and foreign investment in the country.

It must be emphasized that very few of the people interviewed suggested that the court system should be reformed to create a separate bankruptcy jurisdiction. There is some interest and will to amend bankruptcy laws and enact a modern stand-alone bankruptcy law. Even though it was found that bankruptcy and the problems related to it were not extensively discussed among participants in the marketplace, whether from the private or public sector, and there are no specialized associations or institutions dealing with these matters, many of those interviewed highlighted the relevance of the topic and the need for reform. However, they also emphasized their reluctance to have a new, specialized public institution to address these issues, which could then generate additional bureaucracy and corruption. When asked about the influence of local bankruptcy proceedings on CAFTA transactions, those interviewed recommended uniform bankruptcy rules throughout the region; a less favorable insolvency system (i.e., a system that fails to meet the requirements established under the World Bank principles) could seriously deter foreign investors if they perceive that other countries in the region offer a more favorable legal and judicial environment should their enterprises encounter difficulties.

F. RECOMMENDATIONS

The presence of highly formalistic and impractical bankruptcy rules and procedures has the effect of discouraging foreign investment and trade. Local businesses and foreign investors may see the existing legal framework on bankruptcy as an additional concern (in terms of complexity, unpredictability, and cost) when assessing new or additional undertakings in Guatemala:

- ♦ Guatemala should consider modernizing its bankruptcy law and harmonizing it with those of its trading partners in the region and beyond, also taking into consideration the World Bank's principles and guidelines for effective insolvency regulation.
- ♦ The present tendency among trading nations is, first, to give actually or potentially insolvent debtors the opportunity to rehabilitate themselves by Chapter 11 types of proceedings. Mexican bankruptcy law has been rewritten recently along these lines and may provide a helpful model for Central American nations to consider. A second international trend of bankruptcy law is to make such law consistent and integrated with the country's broader legal commercial framework. Insolvency reform is often ineffective

unless accompanied by parallel reform in other areas of the law; in particular, insolvency and bankruptcy principles need to be consistent with a model uniform regional secured transactions law.⁵⁷

- ◆ A uniform treatment of secured creditors in the Central American region requires a uniform determination of whether perfected security interests can succeed in retrieving collateral from the bankrupt estate or whether secured creditors are downgraded to the status of unsecured creditors once an act of bankruptcy occurs.
- ◆ For the system to be effective, judges and other participants in the system (e.g., *síndicos*) should receive better training on the meaning and consequence of sound asset management and greater powers to detect and reverse fraudulent conveyance of assets.

⁵⁷ See section on Collateral.

IX. COMPETITION POLICY

A. INTRODUCTION

Competition policy encompasses a broad range of microeconomic, industrial and commercial policies that promote competitiveness. These include classic antitrust/competition laws, consumer protection law and free trade laws.⁵⁸ The interface between competition law and, for example, privatization and foreign investment, can have a significant bearing on industrial structure and the competitive market performance of enterprises in both the private and public sector, and on economic development generally. For example, competition law and international trade liberalization complement each other by promoting trade, market access, economic efficiency, and consumer welfare. Competition law and liberal trade regimes mutually support their complementary objectives. For example, trade liberalization and competition law together can prevent powerful business interests with monopoly power from creating barriers to trade. Similarly, competition law and privatization interact to ensure that a public monopoly is not merely transferred to a private monopoly. When a sector has been liberalized through market entry of competitors, competition law and its enforcement can fill the primary role of maintaining competition while avoiding distortions caused by anticompetitive practices. Finally, while competition law seeks to improve consumer welfare, consumer protection law protects that welfare by ensuring the availability of truthful information about products and the reliability of express or implied promises.

While the government of Guatemala has engaged in significant efforts to adopt a competition law, thus far these efforts have been unsuccessful. The technical advisory board within the Ministry of Economy responsible for competition-related matters, *Dirección de Promoción de la Competencia* (DPC), does not have sufficient resources to carry out its responsibilities. Consumer protection policy in Guatemala is weak. It is unclear whether this weakness in consumer protection enforcement stems from a weak legal framework, or whether it is the implementing institution that needs reforms.

B. LEGAL FRAMEWORK

There is currently no comprehensive legal and institutional framework for promoting competition. However, certain laws have competition-related provisions, including the constitution.⁵⁹ Article 130 of the Guatemalan Constitution prohibits monopolies. Article 119 obligates the State, *inter alia*, to grant incentives for industrial development in the country's interior and to prevent "excessive practices leading to the concentration of assets and means of production at the expense of the collectivity."⁶⁰ Article 361 of the Commercial Code restates the

⁵⁸ Trade laws are dealt with extensively in the International Trade section, and will not be examined here.

⁵⁹ These laws include: Articles 39, 43, 118 and 130-131 of the Constitution, Articles 361-367 of the Commercial Code, the General Law of Telecommunications, the General Law of Electricity, the Law of Hydrocarbons and its accompanying regulations, and the Consumer and User Protection Law.

⁶⁰ Article 131 of the Constitution, however, has potentially wide-reaching provisions that limit the application of sound competition policy principles. Article 131 declares that "all commercial and tourist transportation services are recognized to be a public utility and therefore enjoy the protection of the State."

prohibition against monopolies under threat of criminal liability.⁶¹ Articles 362-367 of the Commercial Code prohibit unfair competition.⁶² Finally, there are various competition-related clauses in certain sectoral regulations, including telecommunications, energy, and hydrocarbons.⁶³ All of these competition-related provisions, however, are insufficient instruments for creating and protecting a market economy.

The first major effort to draft and adopt a comprehensive competition law began in 1998. In September 2000, a competition law bill was introduced in Congress. This bill had been reviewed by the Economics Committee and was supported by the private sector, but did not pass. Since 2000, donors and technical assistance providers have attempted to assist with the preparation of a draft competition law that reflects sound principles.⁶⁴ As of October 2004, there were two new competing drafts of a competition law. One, the “Ministerial Draft” was prepared in 2001-2002 with assistance from the World Bank. The second draft, the “Congressional Draft” was revised in 2004. The Ministerial Draft is very promising, and encompasses sound competition principles and many international norms and practices. However, a limited number of provisions may benefit from further reflection, as described below.⁶⁵ The Minister of Economy has not yet approved this law to send to Congress. The Congressional Draft, on the other hand, appears to be largely a replication of the Spanish competition law. It is currently being considered by the Economics Committee of the Congress, but is not supported by the Ministry. If the

⁶¹ Article 361 states: “Prohibition of monopolies. All companies have the obligation to contract with whoever seeks the products or services they provide, treating the various categories of consumers equally.” Criminal liability for monopolization is provided for in the Criminal Code, Articles 340 and 341.

⁶² Article 362 defines unfair competition as follows: “Any action or occurrence contrary to good business faith or to the normal and honest conduct of commercial activities shall be considered unfair competition and, consequently, unjust and prohibited.” Article 363 sets forth a list of unfair business actions, including false and misleading advertising, copyright infringement, etc. and “any other similar actions intended directly or indirectly to divert another merchant’s clientele.” The Commercial Code establishes an action with respect to unfair competition that can be brought through ordinary proceedings by any injured party, the respective trade association, or the prosecutor. According to the law, a court decision that declares the existence of acts of unfair competition shall provide for the suspension of said acts, the measures necessary to prevent their consequences and their repetition, and compensation for damages when applicable.

⁶³ Article 1 of the Telecommunications Law states the objective of the law as “... *apoyar y promover el desarrollo eficiente de las telecomunicaciones, fomentar la competencia entre los distintos oferentes, del servicios de telecomunicaciones, fomentar la competencia entre los distintos oferentes, del servicio de telecomunicaciones, estimular las inversiones en el sector ...*” etc. The telecommunications law provides for the creation of a regulator, the *Superintendencia de Telecomunicaciones* (SIT). The Law of Electricity of 1998 contains basic elements to ensure competition in the generation, transmission and distribution of electricity, and provides for the creation of the *Comisión Nacional de Energía* as a regulatory body. The hydrocarbons law and the law of commercialization of hydrocarbons and accompanying regulations establish penalties for certain practices that are against free competition.

⁶⁴ Since 2001, for example, the Ministry of Economy has received short-term technical assistance from the following providers: *Comision Economica para America Latina* (CEPAL), PROCOMPETENCIA de Venezuela, WTO, World Bank, Inter American Development Bank, USAID and the Federal Trade Commission, and UNCTAD.

⁶⁵ While there is no one “right” model of competition law, in recent years agreement has emerged as to principles and scope. In the case of Guatemala, the government may want to carefully consider promoting regional convergence, if not harmonization, in Central America. Trade and investment would benefit if all of the countries in the region strove to adopt consistent standards. For guidance, GOG could examine the competition law of Panama, which is similar to the Mexican competition law.

Congressional Draft is being considered seriously, a comprehensive review should be undertaken.

1. The Ministerial Draft

The proposed Ministerial Draft has been carefully written, and achieves an appropriate balance between offering guidance for the private sector and leaving enough room for implementing regulations and the development of agency practice. The substantive provisions on anticompetitive agreements reflect regional standards, and are similar to the Mexican and Costa Rican laws in many respects.⁶⁶ Sensibly, this law provides for abuse of dominance, allows for merger control, and entrusts the implementing agency with a strong advocacy role. The law provides for the creation of an administrative body within the Ministry of Economy, the “*Comisión para la Promoción de la Competencia*” (Commission). Similar to COPROCOM in Costa Rica, the Commission is dependent on the Ministry of Economy for budget and other financial matters, but is independent from the Ministry for decision-making, enforcement and advocacy activities. Investigations and first-level decision-making are conducted within the Commission, with appeals of the Commission decisions to the Minister of Economy.

Areas for further reflection are related to agency design, jurisdiction, and penalties. Article 51, for example, allows the Minister to hear the first appeal of the Commission’s decision.⁶⁷ A more appropriate body to hear appeals is either a specialized tribunal or the general courts, to prevent excessive influence by the Executive branch. Similarly, the appointments of Commissioners are done on proposal of the Minister by the President. Except for secondary appeals, all oversight functions exist within the Executive branch of government.

Regarding jurisdiction of the agency, the law provides that the Commission should oversee deregulation and administrative simplification. While these are important components of a sound competition policy, this role requires an enormous technical capacity and staffing resources, and appears more appropriate for the Ministry. Regarding jurisdiction over competition matters, the law appears to provide for supremacy over all other conflicting laws. A more moderate approach would be to allow the agency to maintain primary jurisdiction over competition-related matters.

The chapter on penalties is generally strong, providing for important deterrent mechanisms, including the publication of violations in the press. Article 60 allows the Commission to keep the fines it collects for prosecuting anticompetitive conduct. Agencies in many countries may charge and collect fees for the provision of services, including agencies in the U.S. This is not necessarily a problem so long as the imposition of the fee does not in any way depend on how the agency exercises its judgment or discretion. However, a conflict of interest is created when an agency is allowed to retain the fines charged using the agency’s discretionary authority. The

⁶⁶ One difference is Article 15 on exceptions. Article 15 provides a blanket exemption for joint activity relating to standards development, technological and environmental development. This exemption may be too lenient. Many of these activities can be, and have been prosecuted in the past for being, anticompetitive.

⁶⁷ The review period for appeals is ten days. Regardless of the institutional arrangements, ten days is insufficient, and this period should be made longer.

agency has an incentive to over-enforce the laws, and thus any provision granting this authority should be eliminated.

2. The Congressional Draft

The Congressional Draft appears to have largely replicated the Spanish competition law. Careful consideration is necessary to be sure that this draft reflects the realities of Guatemala. For example, the Congressional Draft only applies to activities on the Guatemalan territory, whereas the Ministerial Draft applies more broadly to activities affecting the Guatemalan territory and consumer welfare. The latter approach is preferable and is particularly important in the context of trade liberalization, as multijurisdictional mergers and international cartels involving foreign firms may reduce welfare gains of the trade reforms in Guatemala.

The Congressional Draft also appears less consistent with regional standards. For example, horizontal cartel agreements and other similar agreements are treated on a case by case basis under the Congressional draft. The Ministerial Draft, in contrast, reflects the laws of Panama, Mexico, Costa Rica, the U.S. and many other countries, by providing that the most egregious forms of anticompetitive agreements, including price-fixing, bid rigging and allocation of territories or customers are *per se* illegal.⁶⁸

Overall, the Ministerial Draft represents a more promising law. If the Congressional Draft is being considered seriously, a comprehensive review is suggested, as well as dialogue with the authors of the Ministerial Draft.

3. Consumer Protection Law

Decree-Law 06-2003 of February 18, 2003, "*Ley de Protección al Consumidor y Usuario*" is the principal law protecting consumer welfare. Guatemalan consumers, however, are either unaware of their rights or choose not to enforce them. There is no tradition within Guatemala of defending consumer rights at the individual level, and there are few strong consumer associations/organizations. As explained below, the institution that implements this law has been largely inactive.

C. IMPLEMENTING INSTITUTIONS

1. Competition

The *Dirección de Promoción de la Competencia* (DPC) is a technical advisory board that exists within the Ministry of Economy. Its principal functions are to carry out market studies, evaluate the level of internal and external competitiveness, and identify distortions within the economy. While the DPC has seven members, only one works fulltime on these matters. The others have responsibilities and projects in other parts of the Ministry. Furthermore, the Director has

⁶⁸ *Per se* illegal means that the prosecutor/plaintiff only has to prove that the agreement was made. It is no defense that the agreement was not carried out or that it did not have an anticompetitive effect. Nor does the prosecutor/plaintiff have to prove that the defendants had sufficient market share to raise prices or reduce output.

insufficient autonomy. For example, the Director is unable to independently communicate with the press, and also is unable to allocate resources. While the creation of the DPC is laudable, additional resources and independence is necessary for it to carry out its responsibilities.

2. Consumer Protection

The Directorate for Consumer Assistance (DIACO, Spanish acronym) under the Ministry of Economy administers the Consumer and User Protection Law. The agency's main functions include:

- ◆ Ensuring respect for and compliance with the laws on consumers or users and the suppliers' obligations;
- ◆ Taking the necessary steps to promote equity and legal certainty in relations between suppliers and consumers and/or users;
- ◆ Compiling and disseminating information to facilitate the consumer's or user's better knowledge of the characteristics of the goods and services offered on the market;
- ◆ Initiating administrative proceedings in the event of an alleged violation of the provisions of the consumer protection law, its regulations, and decisions handed down as a consequence thereof, *ex officio* or through the complaint of a party invoking a particular interest or acting in defense of the general interest of consumers and users; and
- ◆ Ensuring that the supply of products and services adheres to the principles governing the market economy.

This Directorate has been almost inoperative and has been limited to processing certain consumer complaints and keeping limited statistical data.

D. SUPPORTING INSTITUTIONS

Many private sector associations are represented through participation in the Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations (CACIF). Along with the chambers of commerce and industry, CACIF supports market-oriented reforms, including adoption of a competition law. Although the professional sectors and the chambers of industry and commerce voice support for competition policy, they do not appear to have engaged in significant activities that promote the adoption of the proper regulatory framework. Additional engagement by these private sector associations would be beneficial, such as educating members of the business community in competition law policy.

In other countries, think tanks and universities are important advocates and educators of competition policy.⁶⁹ There is progress in this respect: URL University is introducing a post-graduate degree in economic law, including competition law and related laws.

⁶⁹ In the region, FUSADES in El Salvador and FIDE in Honduras have been active proponents of a competition law-policy, and have made significant headway in educating legislators and the public at large about the benefits of competition.

E. SOCIAL DYNAMICS

To varying degrees during the past decade, economic policymakers in Guatemala have sought to introduce market reforms. Despite these efforts, Guatemala continues to perform poorly on global competitiveness indicators. In the Heritage Foundation's Index of Economic Freedom for 2004, for example, Guatemala ranks low among its neighbors: 87 out of 155, compared to 24th for El Salvador, 50th for Costa Rica, 67th for Nicaragua, and 121st for Honduras.⁷⁰ In the World Economic Forum's Growth Competitiveness Index Rankings, Guatemala was ranked 89th out of 102, and 81st out of 95 in the World Economic Forum's Business Competitive Index Rankings.⁷¹

Considerable efforts are needed to improve the competitiveness of the Guatemalan economy. As explained above, the establishment of the *Dirección de Promoción de la Competencia* (DPC) within the Ministry of Economy was a positive step toward reform. However, until 2004 there did not appear to be significant commitment on the part of the government to promote competition policy. In January 2004 the administration of President Oscar Berger took office. This administration took several actions in the first 100 days of 2004 as part of a new "Policy of Competitiveness." These actions included the establishment of the Office of the Presidential Commissioner for Investment and Competitiveness. That office has initiated two programs: the *Programa Nacional de Competitividad* (PRONACOM), and "Invest in Guatemala." Both projects are supported and promoted by the business community. These steps signal a change in strategy at the Executive level, and may create further opportunities for a comprehensive legal and institutional framework for competition policy. Adoption and enforcement of a competition law would likely help to roll back inefficient government regulation and promote efficiency within the public sector.

Adoption and enforcement of a competition law may also help to counteract the dangers of private anticompetitive behavior, which appears to be widespread in the Guatemalan economy. There are allegations of anticompetitive practices in numerous sectors.

Guatemala has engaged and continues to engage in a variety of market reforms. However, without introducing a comprehensive competition policy, including a competition law, Guatemala will not be able to realize the full benefits of these reforms. Actual and alleged anticompetitive practices indicate that this strategy of market reform without a competition law and policy merits reconsideration. Past resistance, however, suggests that efforts are needed to build political support for competition law and policy. More detailed recommendations for reform follow in the next section.

⁷⁰ The Index of Economic Freedom is available by country at:
<http://www.heritage.org/research/features/index/countries.html> (last visited October 27, 2004).

⁷¹ The World Economic Forum's Competitiveness rankings are available at:
http://www.weforum.org/pdf/Gcr/GCR_2003_2004/Competitiveness_Rankings.pdf (last visited October 27, 2004.)

F. RECOMMENDATIONS

1. Current Recommendations

- ◆ Pursue a dual strategy of deregulation and introduction of a competition law, and a competition agency.
- ◆ Allocate sufficient resources to the Dirección de Promoción de la Competencia so that they can properly conduct sector or industry studies to examine how lack of competition affects the competitiveness of Guatemala. The DPC can then highlight specific examples of anticompetitive practices that demonstrate the benefits that could be realized with adoption and enforcement of a competition law.⁷²
- ◆ Work with the Ministry of Economy and other stakeholders to allow the DPC additional autonomy, in particular as it relates to external communications.
- ◆ Engage the drafters of the two current versions of the competition law in dialogue to build consensus around a single draft. In revising the drafts, consider the Guatemalan experience with different types of institutions, including the *Comisión Nacional de Energía*, the *Superintendencia de Telecomunicaciones*, and the *Dirección General de Hidrocarburos*, and design the competition agency accordingly.
- ◆ Circulate the new draft to private sector representatives, consumer organizations, and local and international experts for their comments, and revise as necessary.
- ◆ Provide resources to the DPC so that it may, together with the private sector and NGOs, promote passage and implementation of a competition law through advocacy and educational efforts with decision-makers.

2. Following Passage of the Competition Law

- ◆ Develop a policy strategy to make the law operational, including institutional arrangements (e.g., staffing and training).
- ◆ Develop regional training programs for staff in cooperation with universities and bar associations.
- ◆ Continue advocacy initiatives, including reviews of government policies and regulation affecting competition, and preparing studies on key sectors.
- ◆ Develop an enforcement strategy that focuses on investigating anticompetitive conduct in sectors that are important to consumers and that address Guatemalan market failures.
- ◆ Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; engaging in

⁷² See, for example, Foreign Investment Advisory Services (May 2003), “Nicaragua: Competitiveness, Attraction of Foreign Direct Investment and Role of Competition Policy” The World Bank.

dialogue/workshops with related law enforcement officers, other government regulators, and the business and academic communities.

X. INTERNATIONAL TRADE

A. INTRODUCTION

Guatemala is the largest of the Central American Common Market (CACM) countries in terms of both population (11.5 million)⁷³ and the overall size of its economy (with its gross domestic product [GDP] for 2004 estimated at \$26 billion).⁷⁴ Like El Salvador, however, its per capita income at \$2,078.00 is in the midrange for the region. The distribution of income and wealth in Guatemala is highly skewed, with 80 percent of the population living in poverty, and two-thirds of them in extreme poverty.⁷⁵ The high poverty levels in the country are reflected in its literacy rate, which at 55 percent is the worst in the region.⁷⁶

Agriculture continues to dominate the Guatemalan economy, accounting for 23 percent of GDP and 25 percent of exports.⁷⁷ Although not reflected in official employment statistics, half the population is believed to be engaged in some form of agriculture, often at the subsistence level outside the formal economy.⁷⁸ Traditional agricultural exports—coffee, sugar, and bananas—are still important export products, although their relative importance has diminished in recent years because of both declining prices and an increase in nontraditional exports, such as cut flowers and specialty fruits and vegetables.

Manufacturing accounts for 13 percent of GDP and 72 percent of merchandise exports.⁷⁹ Official statistics are believed to underestimate the importance of manufacturing to the local economy, however, because they do not take into account *maquila* production (mostly textiles and apparel).⁸⁰ Manufactured products include prepared food, clothing and textiles, construction materials, tires, and pharmaceuticals.⁸¹

The United States is Guatemala's largest trading partner, representing in 2003, 36 percent of Guatemala's imports and 54 percent of exports.⁸² The other four CACM countries together represent the second largest market for Guatemala's exports, receiving 25 percent of the total, according to sources interviewed.

⁷³ U.S. Department of State, *Background Note: Guatemala* (September 2003) (“Background Note: Guatemala”), at 1, available at <http://www.state.gov/r/pa/ei/bgn/2045.htm>. Guatemala represents approximately one-third of the population of the CACM countries. The second most populous CACM country is Honduras, which had an estimated population of 6.5 million in 2001. U.S. Department of State, *Background Note: Honduras* (May 2003), at 1, available at: <http://www.state.gov/r/pa/ei/bgn/1922.htm>.

⁷⁴ Background Note: Guatemala, *supra* note 73, at 2.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 8.

⁷⁸ World Trade Organization, *Trade Policy Review Guatemala, Report by the Secretariat* (December 2001) (“Trade Policy Review Guatemala”), at 3, available at http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#2002.

⁷⁹ Trade Policy Review Guatemala, *supra* note 80, at 1.

⁸⁰ *Id.* Although official statistics show exports of textiles and apparel of only \$99 million for 1999, according to Agexpront, the association of exporters of nontraditional products, the value-added incorporated into Guatemalan exports of textiles and apparel that year was U.S.\$358 million. Trade Policy Review Guatemala, *supra* note 80, at 9.

⁸¹ Background Note: Guatemala, *supra* note 735, at 2.

⁸² Bank of Guatemala, *Foreign Trade Statistics*, 2003.

Most of Guatemala's freight movement is handled by its three major maritime ports: Santo Tomás de Castillo and Puerto Barrios on the Atlantic Coast, and Puerto Quetzal on the Pacific. La Aurora International Airport in Guatemala City is the only airport in the country equipped with full passenger and freight facilities, with the cargo area managed by a nonprofit private sector association, known as Combex-Im. Shipments by truck have been increasing with further integration of the CACM countries and as a result of free trade agreements among member countries and Mexico. Land transportation is hampered, however, by poor infrastructure and lack of security.

B. LEGAL FRAMEWORK

1. General Environment for Trade

Guatemala acceded to the General Agreement on Tariffs and Trade (GATT) on October 10, 1991, and became a member of the World Trade Organization (WTO) on July 21, 1995.

Guatemala is a member of CACM, which also includes Costa Rica, Honduras, El Salvador, and Nicaragua. The basic instrument of the Central American Economic Integration Program is the General Treaty on Central American Economic Integration of December 1960. To achieve a common market, the treaty provided for the completion of a Central American free trade area⁸³ and the adoption of a common Central American tariff. On October 29, 1993, the five countries signed the Protocol to the General Treaty on Central American Economic Integration, referred to as the Guatemala Protocol,⁸⁴ pursuant to which they agreed to the gradual and progressive establishment of a Customs Union.

The CACM member countries originally had plans to complete the Customs Union by the end of 2003,⁸⁵ including, among other things, the elimination of all remaining tariff barriers to trade, the implementation of common customs legislation, full harmonization of the common external tariff, and the elimination of land border customs houses (*aduanas fronterizas*) between member countries.⁸⁶ Even though significant advances have been achieved (e.g., the common external tariff is currently 92 percent uniform), the Customs Union has yet to become a reality.

In the area of common customs legislation, the most significant achievement has been the agreement on a new common customs code, the Central American Uniform Customs Code (*Código Aduanero Uniforme Centroamericano*, or CAUCA), and on its regulation (*Reglamento del Código Aduanero Unificado Centroamericano*, or RECAUCA). Both CAUCA and RECAUCA have been implemented in all five CACM countries. The Secretariat for Central American Integration (*Secretaría de Integración Económica Centroamericana*, or SIECA)

⁸³ As of 2003, 99.2 percent of goods are freely traded among the CACM countries under this agreement; 0.7 percent of goods are excluded, and there are import controls on 0.1 percent of goods.

⁸⁴ *Protocolo al Tratado General de Integración Económica Centroamericana*, dated October 19, 1993.

⁸⁵ See, for example, SIECA, *La Integración Económica Centroamericana*, PowerPoint Presentation (undated) (on file at NLCIFT); and SG-SICA, *Informe de Estado de Avance de la Integración Centroamericana, Enero 2002 al 15 de Junio 2003*, PowerPoint Presentation (June 2003) (on file at NLCIFT).

⁸⁶ Even though the elimination of land border customs is still far from becoming a reality, CACM countries have implemented both integrated and peripheral customs houses. In the past, there were also some complementary customs houses (*aduanas yuxtapuestas*). However, because of increased integration, all complementary customs houses have become integrated customs houses.

officials also reported that the Manual of Common Customs Procedures (*Manual de Procedimientos Aduaneros*) is now being applied in all CACM countries—with the exception of Costa Rica—with only some minor differences that mostly refer to the fact that each country applies different taxes.

Various other draft pieces of customs legislation are being considered by the CACM countries at the regional level, including customs valuation, contraband and fraud,⁸⁷ international transit controls, rules of origin, and risk analysis.⁸⁸

Guatemala signed the free trade agreement with the United States (CAFTA) on May 28, 2004. The Free Trade Agreement (FTA) with Mexico entered into force in March 2001. In 1998, negotiations were initiated between Central America and Chile for an FTA, which has not yet been finalized. The same year, an FTA was negotiated with the Dominican Republic. In 1999, a partial-scope agreement was signed between Guatemala and Cuba. In March 2000, negotiations began for an FTA between Central America and Panama with a view to upgrade the 1975 preferential trade agreement between Guatemala and Panama. Guatemala is also currently negotiating a free trade agreement with Canada and participating in the process of the Free Trade Area of the Americas (FTAA).⁸⁹

Guatemala enjoys the benefits of the Caribbean Basin Initiative (CBI), and it also participates in the Caribbean Basin Trade Partnership Act (CBTPA).⁹⁰

Guatemala has also signed a number of bilateral investment treaties (including with Argentina, Chile, Cuba, France, Korea, and the Netherlands). Additional investment agreements are being negotiated or are going through the legislative process for approval.

2. Domestic Laws

The second Protocol to amend CAUCA, called CAUCA III, is in effect in Guatemala since July 2002, and its regulatory instrument RECAUCA is in effect since January, 2003. However, it should be noted that Guatemala currently has not yet approved the “Administrative Norms for General Customs Procedures, that will complement by means of national legislation the rules of CAUCA and RECAUCA regarding infraction and penalty provisions.”⁹¹

⁸⁷ In the specific case of the draft law on contraband and fraud, it should be noted that private sector representatives and associations (including AmCham Guatemala) have expressed reservations about this proposal.

⁸⁸ These proposals will be further described in the *Regional Synthesis Report*.

⁸⁹ See *Strategy to Strengthen Trade Related Capacities of Guatemala* (September 2003), a report prepared by the Ministry of Economy of Guatemala with the assistance of the Economic Commission for Latin America (ECLAC) (on file at NLCIFT), at 9-10.

⁹⁰ In spite of these preferential arrangements, the textile sector has expressed serious concerns about their ability to compete against China and Vietnam once the United States eliminates quotas affecting those countries in January 2005. See “Textileros Poco Optimistas,” *Siglo Veintiuno Newspaper*, June 23, 2004, at 24 (on file at NLCIFT).

⁹¹ The only customs-related infractions that currently exist in Guatemala are contained in just one provision of the Tax Code (*Código Tributario*).

There has been draft legislation on customs valuation before Congress for over a year, which will elaborate on provisions of the WTO Customs Valuation Agreement. As an international treaty, the WTO Customs Valuation Agreement has direct application in the country.⁹²

It is important to note that alternative dispute resolution mechanisms are increasingly being used to resolve international commercial and trade disputes, particularly through CENAC. There is also a proposal to amend the Guatemalan arbitration law of 1995. Although this law is allegedly based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, it also incorporated language from other local legal provisions, which has resulted, among other things, in a rather cumbersome and formalistic system for the recognition and enforcement of arbitral awards.

3. Tariff Regime

Guatemala applies the Central American common external tariff (*Sistema Arancelario Centroamericano* [SAC]). The 2002 changes to the harmonized system were implemented by the CACM countries on October 1, 2002.⁹³ The duty rates applied are generally 0 to 5 to 10 to 15 percent, consistent with the common external tariff.

Private sector representatives have reported that customs officials have broad discretion to change the tariff classification of imported goods, and it is fairly common for customs officials to arbitrarily change the tariff classification to one with a higher duty rate. When there is disagreement between the importer and a customs official, a decision will be issued by the tariff classification unit and the Customs laboratory. The importer may challenge this decision before the Customs Director (*Intendente de Aduanas*). Appeals to the decision of the Customs Director are brought before the Board of Directors (*Directorio*) of the *Servicio de Administración Tributaria* (SAT). In turn, decisions by the Board of Directors may be appealed to the administrative courts (*contencioso administrativo*) within 90 days. The courts may review both the substance and the process. However, according to private sector representatives, the courts are generally unfamiliar with customs issues and address only matters of form, not substance.

A strong, efficient, impartial, and expedited system of judicial review of customs decisions would likely have a positive impact on importers and exporters wishing to challenge arbitrary customs classifications as well as other decisions (e.g., valuation, origin). At present, because of existing delays, often importers simply pay the duties and taxes rather than challenge the classification.⁹⁴

⁹² From a practical standpoint, the private sector often complains that the WTO Agreement is not being correctly applied by customs officials.

⁹³ The 2002 version of the harmonized system was approved by the CACM pursuant to Resolution 89-2002 of the Central American Tariff and Customs Council in August 2002. In Guatemala, it entered into force on October 1, 2002, pursuant to Governmental Accord 436-2002. See *Sistema Arancelario Tercera Enmienda*, available on the SAT website at <http://www.sat.gob.gt/pls/publico/portal.documentos?codigo=1012>.

⁹⁴ In addition, to have the goods released while the tariff classification is being challenged, the importer must post a deposit. It can take years to get a refund of the deposit if the decision is in favor of the importer.

Importers may also request SAT to issue advance rulings on the tariff classification of goods to be imported into the country.⁹⁵

4. Other Trade Rules and Laws

a. Services

The scope of Guatemala's Schedule of Specific Commitments under GATT is limited to only five of the 12 categories of services: business, communications, financial, tourism, and transport services. Between 1996 and 1998, Guatemala implemented a privatization program that was accompanied by the enactment of new telecommunications and electricity laws, which ended state monopolies and opened these activities to private-sector participation.⁹⁶ At present, the Government's main concerns, as identified by the Ministry of Economy, focus on improving the regulatory framework and institutions in vital sectors—namely, financial, telecommunications, and insurance services. The need for appropriate and extended information systems on services has been emphasized (including improved trade statistics, databases, access to technical information, and exchange of experiences with relevant institutions in other countries). The Ministry also emphasized the need for regulatory reforms, particularly with respect to the enactment of rules in the area of electronic commerce and electronic signatures.

b. Antidumping, Countervailing, and Safeguard Measures

Guatemala has adopted the Central American Regulations on Unfair Trade Practices (Governmental Decision 178-96) as well as the Central American Regulations on Safeguard Measures (COMRIEDRE IV Decision 19-96). However, these measures have been rarely applied in practice, and the Ministry of Economy sees this as an area where supervision and implementation of appropriate measures, as well as training of staff, should be a priority.⁹⁷

c. Free Trade Zones and Other Preferential Systems

The Ministry of Economy administers the permits to set up a company within the free trade zone or as a *maquila* operation, and the private sector indicated that the process is transparent. Specific rules include the Free Trade Zones Law (Decree 65-89) and the Law on the Promotion and Development of Export and In-Bond (*maquila*) Processing Activities (Decree 29-89). There are currently 13 free trade zones in operation and eight more are being developed.⁹⁸ In turn, there are close to 900 enterprises operating under the terms of the Law on the Promotion and

⁹⁵ Customs does not receive many requests for rulings relating to other matters, such as valuation, origin, or the refund of duties. Origin determinations made by SAT are reviewed by the Ministry of Economy. Ministry officials have identified the need for additional training in this area.

⁹⁶ World Trade Organization, *Trade Policy Review Guatemala, Report by the Secretariat* (December 2001) ("Trade Policy Review Guatemala"), at p. xiv and pp. 73 et seq., available at http://www.wto.org/english/tratop_e/tp_r_e/tp_rep_e.htm#2002.

⁹⁷ See, *Strategy to Strengthen Trade Related Capacities of Guatemala*, supra note 893, at 30. Guatemala has applied antidumping measures only once, against imports of gray portland cement from Mexico. The measure was withdrawn by the authorities after a panel was established to examine its WTO consistency.

⁹⁸ See *Strategy to Strengthen Trade Related Capacities of Guatemala*, supra note 893, at 11.

Development of Export and In-Bond Processing Activities, mainly in the manufacture of clothes.⁹⁹

Apart from the free trade zones and *maquila* regimes described above, authorities have noted that there are no other subsidies or fiscal incentives related to export activities.

d. Importation Certificates

Although no special import licenses are required for the importation of goods into Guatemala, the import of certain products is subject to specific administrative formalities. The importing company must register with the appropriate administrative authority and obtain an import permit before importing certain products, including animals, plants, seeds, and related products (Ministry of Agriculture); fuels (Ministry of Mining and Energy); medical and cosmetic products, as well as food products (Ministry of Public Health); fertilizers and pesticides (Ministry of Agriculture); products that may pose a threat to the environment (Ministry of the Environment); and weapons and ammunitions (Ministry of Defense).¹⁰⁰

Responsibility for fulfilling the obligations and exercising the rights set forth in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures is vested in the Ministries of Agriculture and Public Health (see section on Flows of Goods and Services). Administrative controls are also carried out by the Administration of External Trade Directorate of the Ministry of Economy. This unit is in charge of issuing and overseeing import licenses with respect to products such as apples, yellow corn, rice, and wheat.

In addition, the Guatemalan Commission for Standards (COGUANOR, Decree 1523-62) is responsible for the elaboration, adoption, and overview of international standards.

Overall, Guatemala has a comprehensive regulatory system with respect to international trade, which follows international standards as well as the requirements set forth under regional and international agreements to which the country is a party. However, the country could benefit from additional legislation, including a customs law to regulate matters that need to be addressed at the local level as well as detailed rules on valuation following WTO standards¹⁰¹.

C. IMPLEMENTING INSTITUTIONS

At the public sector level, three ministries account for most arrangements pertaining to international trade issues: the Ministry of Economy; the Ministry of Agriculture, Livestock, and Food; and the Ministry of Foreign Affairs. Another important group is the National Commission of International Commercial Negotiations (CONEI), headed by the Ministry of Economy, where these institutions meet to define international commercial negotiations.¹⁰²

The Ministry of Economy also participates in the Program for National Competitiveness (PRONACOM), the result of a regional initiative that created a Central American platform to

⁹⁹ *Id.*, at 10–11.

¹⁰⁰ *Trade Policy Review Guatemala*, supra note 99, at 35.

¹⁰¹ According to information of SAT and SIECA, the project of the “Administrative Norms for General Customs Procedures”, is already prepared and is pending approval.

¹⁰² See further, *Strategy to Strengthen Trade Related Capacities of Guatemala*, supra note 89, at 5.

address matters pertaining to productivity, investment, and international trade. Various sectors participate in this program on the basis of joint funding.¹⁰³

Export policy formulation and implementation is recommended to the President of Guatemala by the National Council for the Promotion of Exports (CONAPEX). The Ministry of Economy heads CONAPEX, and the private sector is represented by a number of chambers and entrepreneurial associations.¹⁰⁴

The Law of the Executive Body (Decree 114-97) regulates the structure, powers, and functions of the Executive Body, including those of the Ministry of Economy. The Ministry is divided into three vice ministries: Integration and External Trade; Investment and Competition; and Micro, Small, and Medium-Sized Enterprises. This structure was put into practice in 2002 following Government Agreement Number 182-2000.¹⁰⁵

Within the Ministry of Economy, the Vice Ministry for Integration and External Trade is the entity responsible for the formulation and coordination of trade policy and for conducting the negotiations of international trade agreements. The Vice Ministry includes three Directorates: External Trade Policy, Administration of External Trade, and Economic Analysis.¹⁰⁶

The Ministry of Economy maintains a Web site (www.mineco.gob.gt) with up-to-date information pertaining to the following: its structure; treaties, laws, and applicable duties; export and investment promotion programs; statistics; and links to related Web sites. In general terms, the Web site measures up to similar Web sites within the region.

There is consensus among government authorities and the private sector regarding the important role played by the Ministry of Economy in the country's international trade policy. Concerns expressed by interviewees had to do with insufficient staff and funding to carry out all of its functions. The Ministry has sought and received cooperation from other implementing agencies (including Customs, Health, and Agriculture) throughout both the negotiation and initial implementation phases of CAFTA. CAFTA interagency meetings are ongoing with these public entities to update the national action plan to address all relevant CAFTA requirements; overall, there is a perception that the dialogue between the public and the private sector has improved and that the various public agencies—particularly the Ministry of Economy—are able and eager interlocutors in trying to promote an improved business and investment climate.

D. SUPPORTING INSTITUTIONS

1. Customs Service

SAT was created in February 1998 as a result of commitments made under the 1996 Peace Accords. There are three *intendencias* (intendances) within SAT: *Aduanas* (Customs), *Recaudación* (Collections), and *Fiscalización* (Audit).

¹⁰³ *Id.*, at 10.

¹⁰⁴ *Id.*, at 5.

¹⁰⁵ *Id.*, at 14.

¹⁰⁶ *Id.*, at 15.

Initially, the newly created Customs Service faced a host of problems: the customs legislation applied by Guatemala dated from the 1960s, infrastructure was inadequate, the organization was centralized and slow, and computer systems were deficient. Corruption and low levels of professionalism existed among customs officials, and importers, transporters, and customs brokers were not complying with the customs laws.

A number of areas were addressed as part of SAT's modernization process. In addition to updating the customs legislation by adopting CAUCA III, the Customs Service strived to be professionalized. There were also improvements in equipment and infrastructure. New customs houses were established along the Mexican border, such as Aduana Tecún Umán II, to combat contraband coming into Guatemala from Mexico.

After the creation of SAT, corruption levels decreased significantly. However, subsequent changes in government administrations and also within SAT brought back increasing levels of corruption, and professionalism declined. Currently, the Customs Director under President Berger's administration has committed to reduce the level of corruption.

The Customs Service recently created a risk analysis unit that is at its preliminary stages of operation—according to customs officials, the 12-person unit started its activities in March 2004.¹⁰⁷ In the meantime, as of June 2004 the level of physical inspections averaged 50 to 60 percent and sometimes reaches 90 to 100 percent of shipments. The goal under the current customs administration is for these levels to reach 30 percent of shipments and, ultimately, 10 percent.¹⁰⁸ Customs is currently operating 24 hours a day, seven days a week, at the airport. At other ports of entry, it is anticipated that the first facility to start operating 24/7 will be Puerto Quetzal.¹⁰⁹

Guatemala introduced an electronic system for submitting customs declarations (*pólizas*), referred to as the *Sistema Informático Aduanero de Guatemala* (SIAG) in early 2001. SIAG replaced the Automated System for Custom Data, ASYCUDA (or SINUDEA in Spanish), implemented by Guatemala in 1987; it is a computerized system developed by SAT based on the Mexican model.¹¹⁰ According to customs officials interviewed, SIAG interconnects with the ASYCUDA system in El Salvador via a bridge that was put in place by the authorities of both countries. There is an ongoing process of developing an interface to interconnect the systems with the other Central American countries.

SIAG functions as an Intranet; it is not Internet-based and access to the system is available only to authorized users through the use of a password. The IT department (*gerencia informática*) within SAT manages the system, but the software that allows access to the system has been developed and supplied by private companies.

¹⁰⁷ Training for risk analysis has been provided by Canada, with funding from the Canadian International Development Agency (CIDA).

¹⁰⁸ SAT officials interviewed also mentioned that they are starting to implement post-importation audits. However, it will be a while before any concrete advances in this area are evidenced.

¹⁰⁹ SIECA officials reported that, with the exception of Costa Rica, customs houses are operating 24/7 in all CACM countries.

¹¹⁰ Much of the technical expertise, including software development and installation, came from Mexico.

SAT has a web site (www.sat.gob.gt), which includes a Customs section (*Aduanas*). Customs information available on the website includes general information about customs; customs legislation (including CAUCA and RECAUCA); the Central American common external tariff; and directories of customs brokers, carriers, and courier companies authorized by SAT. Users can also review specific import transactions online via the link *Pólizas de Importación* under *Consultas por Internet*. Shipments can be located by tariff classification, product description, or customs regime.

In general, private sector representatives indicated that the Customs section of the SAT Web site is good and that they use it on a regular basis. The biggest and most consistent criticism was that circulars containing changes in procedures are not published on the Web site and thus notice is not provided to customs brokers and other interested parties. Overall, the private sector has a very high opinion of current SAT authorities.

2. Professional Associations and Specialized Services

The private sector participates in the country's trade policy design and negotiations through CONAPEX and CENCIT.¹¹¹ CENCIT is a multisectoral organization that gathers representatives from the Federation of Small and Medium-Sized Companies; the Chambers of Finance, Industry, Agriculture, Commerce, Construction, and Tourism; professional colleges; the National Coordinator of Transport; and the Nontraditional Exporters' Association (Agexpront).

Agexpront promotes the growth and development of nontraditional exports in Guatemala by providing training services through its School of Foreign Trade, facilitating the exchange of information and analysis and promoting the development activities of the country by including small and medium producers in the exporting process.¹¹²

There are many individual lawyers and economists with expertise in matters of international trade. The Guatemalan bar association, however, does not have a section dedicated to international trade issues--such a section would be a valuable development.

There are a large number of freight forwarders and customs brokers. The private sector is organized into chambers and trade associations, and many interviewees indicated that the chambers have been active in promoting changes to the laws and the modernization of institutions. The chambers and associations also participate in a joint private-public sector National Committee to Facilitate International Trade (*Comisión Nacional de Facilitación del Comercio Internacional* [CONAFACIL]).

Representatives of the private sector interviewed in Guatemala were highly supportive of the regional customs union process. They believe the creation of a customs union—which recently has been accelerated—will facilitate trade and promote investment within the region by eliminating many of the problems they are currently experiencing with customs procedures, including simplified procedures for goods in international transit. They are concerned, however,

¹¹¹ CONAPEX is the National Council for the Promotion of Exports, and CENCIT is the Entrepreneurship Commission for International Trade Negotiations.

¹¹² See further at www.export.com.gt/default_en.aspx.

that in the past the private sector was not adequately consulted, and they hope this situation will change under the current administration.

It should be noted that Guatemala has a large rural population that has little or no knowledge of CAFTA or how it will affect them. Fear can spread quickly through this sector, stirred on by the labor unions that oppose CAFTA, if an education program is not undertaken to promote the benefits and opportunities of free trade.

SIECA is currently working with chambers of industry, commerce, and other sectors and associations to educate the trade community on regional trade integration and free-trade. The local media also report regularly on the most recent developments pertaining to trade at national and regional levels.

E. SOCIAL DYNAMICS

Many implementation issues remain to be resolved before CAFTA can be effective in Guatemala and in the region. The public and private sectors are aware of the need to harmonize many laws within the region and in light of CAFTA, improve trade infrastructure, educate the general public, and provide training to public officers.

Most of the private sector and legal practitioners interviewed believe that, in particular, the Customs Service faces many problems that should be addressed to implement CAFTA. The main concerns include the following: (a) corruption; (b) the constant flow of contraband and counterfeit goods into the market; (c) insufficient training of customs officials (classification, valuation, rules of origin, and other areas); (d) lack of harmonization in the electronic transmission of documents; (e) inadequate risk analysis techniques, which result in a high volume of physical inspections; and (f) insufficient information on customs procedures in general and regional integration processes in particular. Other related concerns include: (a) insufficient security of people and cargo, both on the roads and at the ports; and (b) poor infrastructure, which results in delays and exceedingly low speeds in the transportation of goods throughout Central America.

F. RECOMMENDATIONS

- ◆ An efficient, well-staffed, trained and transparent Customs Service is absolutely essential to ensuring free trade. Efforts should concentrate on expediting the clearance process (including improved risk analysis systems and targeting methodology); reducing opportunities for corruption; helping deter smuggling, drug trafficking, and terrorism; and generally promoting a healthy trading environment.
- ◆ Trade capacity depends on affordable and accessible trade finance. It is essential to facilitate access to credit, especially to small and medium enterprises (SMEs) by modernizing and harmonizing laws relating to the provision of collateral on a regional basis and creating a centralized registry of debtors and collateral (see the collateral section of this report). A related key factor will be modernization of the country's legal framework on electronic documents and electronic signatures.

- ◆ A strong, efficient, and functioning system of judicial review of customs decisions (e.g., regarding classification or valuation matters, compliance with origin requirements) needs to be strengthened.
- ◆ It is necessary to encourage regional solutions to problems in the trade facilitation, investment, and customs area. Technical assistance should be provided to establish a regional customs school¹¹³ and to promote the use of the recently approved regional dispute resolution systems for intra-regional trade, among others.

¹¹³ A regional trade project of the European Union is working to establish a Regional Customs school in Honduras.

XI. FLOW OF GOODS AND SERVICES

A. INTRODUCTION

In 2003, flows of goods measured more than \$12 billion with \$4.6 billion in exports and \$8.1 billion in imports.¹¹⁴ Guatemala's top five trading partners include the United States, El Salvador, Mexico, South Korea, and Costa Rica, with the United States accounting for almost 54 percent of exports and a 36 percent of imports and with other traders accounting for about 10 percent or less. Major products flowing out of the country include coffee, sugar, bananas, and oil. Major products flowing into the country include consumer goods, automobiles, food, raw materials, and capital goods. While coffee and bananas have been a significant part of the Guatemalan economy for 100 years now, in 2003 these products accounted only for 11% of total exports. The economy has become more diversified and exports include fresh fruits, vegetables, flowers, processed foods, textiles, clothing and apparel pharmaceuticals, chemicals, plastics, cosmetics, rubber and paper products, beef, and oil.

There is no doubt that increased efficiency and security in the flows of goods and services are essential to Guatemalan economic growth and development. Small, medium, and large businesses need lower trading costs to make their export goods more competitive in the United States and other markets. Producers, like *maquilas*, need lower trading costs and the ability to access cheaper inputs for their manufacture. Farmers need lower transit costs and higher standards to make their goods competitive on the global market. Consumers need lower prices and higher income to reduce poverty and increase the standard of living.

Currently, Guatemalan traders and consumers incur unnecessary costs due to high security demands, inadequate infrastructure, and unnecessary and overly burdensome bureaucratic procedures. The price of these impediments adds up. For exporters, profit margins are squeezed through the addition of extra security patrols and delays at the border. For the consumer, the prices of goods on store shelves increase as costs climb for delays due to the inability for goods to move at night and unnecessary delays at the border. Overall, this situation will not support significant growth, and the impediments need to be addressed comprehensively.

Simplifying and streamlining procedures can reduce transaction costs for traders. This will make Guatemala as a whole more competitive. However, achieving solid results will not take place by simply focusing on procedures. It must include improvement in the capacity of key institutions, including the main institution, Customs, but also key public and private players. Within the public institutions, appropriate legal authority, staffing, equipment, and training are key to making streamlined processes work. Within the private sector, it is finding ways to work constructively with the public sector. These components form the core of a strategy to achieve enhanced flows.

Recent developments in Guatemala have the potential to address these issues and transform Guatemala's trading system. The incumbent Government aims to modernize the trade-related institutions and integrate more deeply with its Central American neighbors.

¹¹⁴ Guatemala Country Profile 2003, Economist Intelligence Unit., 2004

The following sections provide a framework for improving and increasing trade flows. There are, however, specific areas in need of support or reform and specific areas where the law, public institutions, and private institutions are moving in the right direction. These are set forth below.

B. LEGAL FRAMEWORK

Although several factors are impeding the flow of goods and services, the state of the law is one of the least problematic areas. For trade facilitation, it is most important that the legal and regulatory framework provide the following: (a) adequate and coherent authority structure for the essential trade-related institutions, and (b) regulations and procedures that strike the balance between facilitation and necessary control. Overall, the legal framework for the flow of goods and services is in place for an orderly and well-functioning system. Top priorities to improve the legal framework include amending Guatemalan law to allow for critical trade facilitation procedures and implementing CAFTA legal requirements.

1. Overall Legal Framework for Goods

The uniform customs law of CAUCA, in effect since 2002, governs Guatemalan Customs. Regulations implementing CAUCA and RECAUCA have been enacted as well.

Under CAUCA and RECAUCA, the main implementing institution, Customs, has ample authority for implementing its mandate, and so do the supporting public institutions, the National Police, Ministry of Economy, Ministry of Agriculture, and Ministry of Health. Moreover, the lines of authority among these public institutions are generally clear and coherent. Customs has the authority to regulate goods crossing borders, including clearance of goods, collection of revenues, and regulation of the trading community such as brokers. Customs has no criminal law enforcement authority. As is common in Latin America and in many nations around the world, primarily the national police, PNC, carry out law enforcement activities. The Ministry of Economy manages trade negotiations and treaty administration, including trade disputes, quotas, and rules of origin. The Ministries of Agriculture and Health have jurisdiction for agriculture and food safety inspections, respectively.

The main laws regarding trade in services involve commitments under trade treaties, such as WTO and CAFTA, which provide or restrict market access for service providers, and investment laws, which facilitate or constrain the activities of service providers. In general, both the trade commitments and the foreign investment laws do not restrict market access, and Guatemala's service imports and exports are quite vibrant.

The Guatemalan market is relatively open and offers real potential for companies in the services sector. It offers the largest market in Central America, with 12 million people. There is a significant international service company presence, especially in services such as telecommunications, energy distribution, tourism (automobile rental agencies, airlines, etc.), and food franchises. Regional integration will spur investment, growth, trade, and continued market opportunities for U.S. firms. CAFTA will encourage strengthened legal protections, market harmonization, and greater market access.

2. Legal Authority Regarding Flow of Goods

Despite some legal impediments, the legal framework generally supports Customs management, operations, and procedures. Fundamental provisions that are in place that help speed trade flows *and* control goods flows, include the following:

- ♦ The law provides appropriate authority for personnel, including recruitment, training, and retention. In Guatemala, Customs' parent agency, SAT, has the authority for personnel recruitment, training, and retention matters.
- ♦ The law also provides critical integrity provisions, such as a written code of conduct that is available publicly; prohibition of bribery, including favors, gifts, and other inducements; and an independent investigative body to enforce a code of conduct and other violations.
- ♦ Customs procedures are generally in conformity with the Kyoto Convention on the Simplification and Harmonization of Customs Procedures, and Guatemala has adopted the Harmonized System of Classification and the WTO Customs Valuation Agreement.
- ♦ As previously noted, the customs law enforcement function, although authorized in CAUCA, is not within the jurisdiction of Guatemalan Customs. Customs does not have arrest or investigative authority. However, the PNC does have these authorities to work with Customs when criminal matters arise.
- ♦ On the books, the law provides an uncomplicated and well-ordered adjudication process for traders appealing Customs actions. This appeal process is defined under CAUCA and RECAUCA, and appeals on Customs decisions generally are handled administratively but can be further reviewed at the judicial level. The importer has the right to an administrative review of the Customs decisions with respect to the valuation, tariff classification, reimbursement of customs duties, admissibility, and other customs issues.

In addition to CAFTA, Guatemala has recently stepped up its participation in international markets. Whereas Guatemala has been part of CACM since 1960, it became a WTO member in 1995. Guatemala has trade agreements with Mexico and has yet to ratify free trade agreements between CACM and Chile, Panama, and the Dominican Republic. (El Salvador has ratified all three, and Costa Rica has ratified FTA with the Dominican Republic.) The country is an active member of the World Customs Organization.

3. Legal Authority Regarding Flow of Goods

Although the legal framework is not a major impediment for Guatemalan trade facilitation, Guatemala can take a number of specific legal steps to improve the flow of goods.

First, a significant legal obstacle that impedes trade flows is the Guatemalan legal requirement that makes it necessary for printed declarations to accompany original documents at clearance. Even though the law requires that all declarations be electronically transmitted, the law still demands paper copy; thus, traders need electronic and paper documentation. CAUCA allows for electronic transmission to be the legal declaration, and Guatemalan law should too. Electronic-

only documentation will eliminate an unnecessary and cumbersome requirement and speed the flow of goods.

Second, the Customs Service does not issue binding advance rulings for customs valuation, tariff classification, duty drawback, rules of origin, and other customs issues. Traders can make an inquiry on a specific issue, presenting all elements of the issue, and an opinion will be issued. Yet, this response is not a ruling; nor is it subject to appeal. It applies only to the specific case, and it is not published or made available to the public. Advance rulings are a key facilitation component that provides compliant traders with certainty, transparency, and predictability. Also, this is a CAFTA requirement for which Guatemala must reform its legal regime.

Third, as noted, Guatemala will need to address a number of trade-facilitation-related legal issues across the agencies related with trade, including advance rulings, rules of origin, express consignments, and sanitary and phytosanitary standards. Proper legal implementation of these requirements will be essential to proper administrative implementation. Proper and prompt implementation should help assist trade movements. Guatemala will need some donor assistance to address these issues. (The Inter-American Development Bank is undertaking a study that plans for the legal implementation of CAFTA countries.)

Fourth, the law provides for Customs to apply the rules, but handling of civil and criminal violations is passed on to other entities. For criminal violations, the issue is referred to the PNC for investigation and to the Prosecutor's office for criminal proceedings. For civil infractions, Customs has no system to dispense administrative penalties. If the issue is seen as an error or misinterpretation of specific provisions, additional revenue is collected by Customs without penalty. Customs needs the ability to administer civil penalties for proper civil enforcement.

Fifth, although the 1998 foreign investment law sought to streamline and facilitate foreign investment, investment still suffers from burdensome administrative procedures, subjective bureaucratic impediments, and corruption.

C. IMPLEMENTING INSTITUTIONS

With the incumbent government, Guatemala as a whole and Customs, its primary institution governing the movement of goods, are in a period of significant transition. One of the Government's top priorities is promoting a secure, efficient, business-friendly environment across public institutions, and Customs is one of the key institutions in this transformation.¹¹⁵

The commitment for a transformed Customs is serious, real, and promising; yet these efforts are still ongoing. A modern Customs Service should have basic organizational capacity with solid leadership in management; well-trained staffing in appropriate numbers; and the ability to execute key functions, such as risk management, payment collection, automation, basic procedures, inspections, public-private sector cooperation, and regional integration. Customs has

¹¹⁵ Customs is the primary implementing institution in the overall goods and services area. Other than the Ministry of Economy, which negotiates trade in services offering, the public institutions that govern trade in services are spread across various institutions involved in regulating service providers generally, and other agencies, which regulate certain service sectors. The diagnostic focuses on the openness of the services (legal framework) market and the actual market activity (supporting institutions) and potential market activity (social dynamics).

new and competent management, sufficient staff, and adequate capacity in its automation function and has made strides in integrating with its neighbors, especially El Salvador. Customs' greatest challenges include (a) implementing a risk management system, (b) improving personnel through a major overhaul of its hiring and training curriculum, (c) standardizing procedures across borders as a result of expanding the Customs Union, and (d) maintaining and consolidating gains on integrity. This section provides an overview of the institution and its current capacity as well as a discussion of the improvements that can greatly enhance its ability to securely speed the flow of goods.

1. Customs Organization Overview

Customs is one of three administrative divisions within SAT. The other two divisions of SAT are revenue and enforcement, which administer and enforce the collection of other government revenues, such as income taxes. SAT operates as a semiautonomous revenue agency with a board of directors. The president of this board is the Minister of Finance. The chief operating officer of SAT is the Superintendent. SAT has its own operating budget derived from a percentage of revenue collection, fees, and donor money, which can be provided directly to the agency.

Customs management functions are clearly defined within SAT operating procedures. Customs is responsible for revenue regimes, technical operations, planning and coordination of Customs functions, manifest review, formalization of declarations including risk management, and dealing with complaints and disputes through the legal department. Clearly, one of Customs' greatest roles is collector: approximately 40 percent of the nation's revenue, which includes duties, additional taxes on liquor and cigarettes, fees, and value-added tax.

Customs is headed by an *intendencia*, which is equivalent to a director general. There are about 900 officers currently assigned to Customs, who are apportioned across four main sections: risk assessment, special regimes, legal, and technical. Personnel and administration is handled by SAT. Customs handles review of goods at all the major border crossings: international airports; the ports of Quetzal, Barrios, and Santo Tomas de Castilla; and various border crossings with Mexico, Honduras, and El Salvador. Primary land border crossings include Hachadura with El Salvador and Tecun Uman with Mexico. In total, there are 102 separate entities and three regional offices that perform customs functions.

2. Customs Management and Operations

Before the current reform efforts, Customs was seen as an extraordinarily corrupt, bureaucratic, and inefficient organization. Processes were complicated and nontransparent and officers demanded illegal payments. The new management seeks to create a modern Customs organization that will facilitate trade by creating a healthy institution and streamlined processes that ably move goods. Although there are a number of serious issues to address (in the next section), there are a number of positive factors as well, which are detailed below:

- ♦ At its core, Customs has a functional management team and structure. Many were recruited from the private sector to promote the Government's desire for a more competitive business-oriented atmosphere.

- ◆ Generally, there is an appropriate level of professional and administrative staffing to carry out its mandate. Personnel systems for recruiting, managing, and retaining employees are all of good quality.
- ◆ Customs has sufficient funding to pay wages perceived as adequate to all staff, including front-line officers. In fact, for many Customs positions, salaries significantly exceed those prescribed for like positions by the National Civil Service.
- ◆ For integrity and efficiency purposes, Customs has appropriate controls in place for handling revenues. Almost all payments are made electronically.
- ◆ Customs also has core systems in place for procedural efficiency through its reasonably well-developed, proprietary IT system.
- ◆ Intraregional trade and international transit movements provide few facilitation issues. International transit movements have minimal Customs intervention and under the customs union with El Salvador there is electronic interface regarding transit movements. In general, there are no specific issues concerning exports and, other than bill data that must be provided before departure, the export process within Customs is simple and nonintrusive.
- ◆ There is a post-audit unit that is functional. The enforcement section SAT performs post-audits and verifications. (As part of SAT, Customs is a revenue agency and many of the traditional customs functions are dispersed within SAT.)
- ◆ The Ministry of Economy with occasional participation of Customs personnel performs other functions such as verifying certificates of origin. The Ministry of Economy is in charge of textile quota administration.
- ◆ Despite its simple selectivity, there are positive aspects to the operations. The name of the examining officer is chosen at random, encouraging integrity. A detailed examination findings report is filed through the automated system, which remains part of the permanent record. Examination facilities are generally of good quality.
- ◆ Examination facilities at the ports and airport are adequate, secure, and conducive to quality inspections. Labor and equipment for loading and unloading are timely, provided by the operators. However, the inspectors have no hand tools to assist in inspections.

3. Customs Management and Operations Issues to Address

The following sections provide a discussion of major challenges and impediments for Customs to address to improve the flow of goods. They are ordered in priority from most to least significant. In identifying and prioritizing these issues, criteria such as economic impact, institutional impact, implementation prospects, and current capacity were considered. For example, institutional impact reflects the significance of the program to improving the institution itself.

a. Risk Management

Customs does have enormously high inspection rates, whereby in some cases 80 percent of import shipments are designated “red” by the rudimentary selective system. This rate is decreasing, but current levels are unacceptable. Customs has a newly created risk management section in headquarters. The risk assessment section has a staff of 12 and it is envisioned that a more sophisticated operation will be developed that will reduce the number of examinations, which are necessitated by the old system’s broad parameters. The risk management section is in the process of designing a risk module, which will identify the need for additional review by using analytical information on compliance. Currently, they are working to redesign the module to be product and importer specific and become more target oriented to reduce the number of fruitless and time-consuming physical examinations. The planned risk module will access both electronic bill of lading and declaration data. Canadian officials have provided training, yet more is needed.

b. Training and Specialization

Another major principle for modern Customs administration that builds on risk management is providing a well-trained staff, including staff specialization. The lack of standardized and specialized training creates a lack of uniformity in Customs procedures administration. These conditions slow down movement of goods and create a difficult trading environment. Four years ago, there was a specific Customs training program for new recruits. Yet, Customs training was decimated under the previous administration, whereby now most officers have little formal training and are trained mostly on the job with some additional special training provided by in-house personnel. There is no commodity specialization within headquarters or the field, and valuation is in a process of transition and has yet to be fully implemented.

c. Standardized and Streamlined Procedures and Operations

In addition to addressing risk management and personnel, Customs is seeking to improve dramatically procedures and operations. Standard operations, particularly across borders, have the ability to dramatically reduce delay times. Currently, pressure to maximize collections results in excessive documentation and a high level of examinations to verify classification, value, and origin. Customs officers are reported to question the correctness of a value, which the client often finds easier to pay to avoid excessive delays in release. The valuation database is of little assistance to the field officers. Moreover, a redundancy of reviews, verifications, and documentation causes delays, adds costs, and adds little value to the result. Add to this the requirement for filing original paper documents to initiate release.

There are a number of critical restructuring steps in this area, including:

- ◆ Seeking to instill a customer service attitude across the agency
- ◆ Providing 24-hour daily (24/7) operations—currently implemented at the airport; and soon to be implemented at the ports and major border crossings
- ◆ Reviewing all procedures with the goal of removing unnecessary or burdensome regulations and including the trade community and other trade-related government entities in the review process

- ◆ Establishing a more efficient system of declaration processing and reducing the number of physical examinations from current rates that are as high as 80 percent to approximately 30 percent by the end of the year and 10 percent or less in the near future
- ◆ Improving communications within Customs as to how to maximize and promote better communications to develop greater standardization and transparency.

Each of these developments is extremely important for reducing unnecessary obstacles in the system. Customs must take the necessary steps to streamline procedures, adopt sound risk management systems, and enhance audit-based controls.

d. Integrity

As noted, corruption became endemic during the period 2000–2004, and integrity measures are now a top priority. Customs seeks to rebuild and maintain integrity in several ways. Widespread corruption is being addressed through removal of officers. Selective verification of information is performed on an as-needed basis. Officers are required to update their financial changes annually. A new training program is being designed to incorporate integrity components. Customs officers working with the public have identification badges displayed and wear a Customs Service shirt indicating that they are government personnel. There is little doubt Customs has a long way to go, and the Government needs continued support for these efforts.

e. Automation

IT systems are another key component for a modern customs system, and Guatemala's custom-built system provides the agency with the appropriate staffing and tools. The system software employed to support Customs is proprietary SAT software, known as the *Sistema Integrado Aduanero de Guatemala* (Guatemalan Integrated Customs System). There are currently nine programmers within the IT group. The system is in-house designed with a central shared SAT database. Brokers transmit their information through the intranet system using an authorized password. Shipping agents and warehouses also use the Intranet. The examination system requires considerable input when physical inspections are designated. This information is stored and can be accessed.

Whereas Guatemala and Costa Rica have proprietary, custom-made systems, El Salvador, Honduras, and Nicaragua use ASYCUDA. Regardless of the system, it is important to enable these systems to communicate, which is an ongoing process under the Central American customs union initiative.

f. Security

Security is probably the most significant issue currently facing the Guatemalan trading system. Cargo security is a major issue because of high crime rates that result in whole containers being stolen. Goods move under a special SAT seal and under convoy with armed personnel accompanying the movements. Generally, goods move only during daylight hours because of security issues on the highways. Physical security is a major issue and the added cost in Guatemala is currently being addressed at the presidential level to increase the number of police.

As noted in the legal framework section, Customs has a minimal law enforcement role. Its main enforcement function is centered on fiscal enforcement—collection of duties. Guatemalan law specifically delegates criminal activity, such as smuggling counterfeit goods or drugs, to the PNC. If customs officers suspect or uncover fraudulent activity or smuggling during a customs transaction, then jurisdiction passes to the PNC. Accordingly, Customs plays no role in surveillance, special enforcement actions, undercover activity, or any like action. In fact, Customs at the land border does not conduct full customs processing. Import documents are accepted and entered into the automated system. Those that the system designates as required for inspection proceed to the inland processing facility.

Even though Customs has a small role in criminal law enforcement, the agency is an essential partner in improving the security environment. Providing Customs with some simple equipment, such as density meters (busters) and probes coupled with training on their use could lead to more significant findings. The U.S. Embassy is working to train enforcement personnel in the area of antiterrorism and identifies and provides tools for detection of weapons of mass destruction (WMD). Additionally, there is a software package that will be provided to analyze the manifest and target bill data to identify potential shipments that pose a threat in the area of WMD, dual-use goods, and drugs.

g. Public-Private Sector Cooperation

Under the current administration, Customs has greatly improved its relationship with the private sector, and the trade community is encouraged to work with Customs to promote a more efficient and business-friendly process. This process is relatively new but the business community has been very complimentary about this ongoing dialogue; in spring 2004, a committee named CONAFACIL was established to facilitate public-private sector communications. This committee was established with technical assistance provided by USAID. The Committee has been fostered by the private sector and has become a very active and useful forum for problem solving and relationship building. CONAFACIL is working to streamline and standardize customs procedures. CONAFACIL include Agriculture and Health ministry personnel to discuss issues of mutual concern. With Canadian cooperation, Guatemala is working to develop a one-stop approach to food and agricultural imports with the Health and Agriculture ministries.

D. SUPPORTING INSTITUTIONS

Although Customs is the main implementing institution for the movement of goods, an efficient system is an interdependent process that includes other public sector institutions and the users of the system. Their capacity can result in significant costs (or savings) within the trading system, and trade facilitation depends on their active involvement as well.

Major issues involving the supporting public and private sector institutions include public sector partnerships to streamline trade processes, public-private partnerships to resolve problems, and the overall security environment. Most significant of these is security. Guatemala is suffering from an epidemic of violent crime.

1. Public Institutions: Overview

Similar to Customs, the supporting public institutions are in the initial phases of modernization and reform as demanded by the new Government. Most are trying to develop a pro-business mentality and respond to trade issues, but they lack the staffing, training, resources, and technology to perform this change. For example, the PNC is under tremendous strain to improve security within the country but is understaffed and under equipped to meet this challenge effectively.

The highest level of the Executive Branch must continue to pressure and support these agencies to streamline procedures and provide consistent, transparent, and predictable service to the trade community. Lack of transparency throughout this sector produces a credibility factor that affects these agencies' effectiveness in implementing change. Other major issues include the processing of agricultural and food products.

a. National Police

Clearly, one of the greatest issues facing Guatemala today is the security problem. Growing crime, particularly violent crime, has greatly affected the movement of goods. Transporters rarely travel at night. Shipments are accompanied by armed security and often travel only in convoys. In transit, whole containers are lost to theft. The perpetrators of these acts are often part of organized crime.

Guatemala does not have a dedicated force responsible for border control or security. Rather, this falls to the regular PNC unit. PNC responsibilities include patrolling the areas between official border sites to prevent smuggling of goods and people, assisting with traffic decongestion at the land borders, and handling security in and around the border area. The PNC is one of three departments within the Ministry of Interior.

Although lack of adequate security is the most pressing national problem and a major impediment to the expansion of international trade, the PNC lacks the staff, training, and equipment to improve the situation. Using internationally accepted norms for number of police per unit of population, the civil police force is understaffed by 15,000 positions. The Government's new program of "zero tolerance" on corruption should further deplete its ranks.

The Border Police unit was established as a special unit within the PNC in 1999. This unit is charged with assisting Customs in ensuring proper duty and tax collection, specifically for the discovery of fraud, contraband, and intellectual property rights (IPR) violations. Because Customs has no authority to stop a violator, it uses this unit to participate in examination and make any resulting arrest, seizure, and prosecution. This unit also stops transporters of international traffic on the road to review documentation and verify customs clearance. However, the Financial Police cannot break the seal on a container without the presence of personnel from both Customs and the Prosecutor's office.

As of June 2004, the Border Police has a staff of 114 and is present at all the ports and three land border crossings. Each officer receives an additional three months training and periodically attends courses on fiscal issues such as valuation. A 1999 study showed the unit would need 584 additional positions to adequately cover all border installations. The unit's intelligence

department is currently not staffed. As a result, the unit has a problem securing quality information on smuggling schemes. Cooperation with Customs appears to be good, as are communications between the police units in neighboring countries.

A second PNC special unit is the antinarcotics team, SAIC. As of August 2004, this unit will be part of a multi-agency team at the ports that will target high-risk export and import containers from advance manifest data. The team will include representatives from Customs, SAIC, antiterrorism personnel from NPC, and the Port Authority. This program is known as the Port Security Program (PSP), which seeks to improve counternarcotics interdiction at the seaports. PSP is financed through a fee charged to shipping companies. These fees in turn provide financial and equipment support to the antinarcotics agents who operate. Additionally, the United States provides technical assistance, logistical support, and training. Guatemalan law enforcement interdicted 8.8 metric tons of cocaine in 2003, up from the previous year's 2.4 metric tons.¹¹⁶

Under the new procedures, 1,000 containers per month, instead of the current 200, will be targeted at each location. These teams have adequate facilities at the port to conduct their examinations but need more modern technical equipment to conduct examinations.

Recently, in response to complaints by the trade community using the corridors between Guatemala and El Salvador, the Ministry directed the appropriate police units to assist in decreasing traffic congestion at the posts and to intensify their efforts to protect transporters moving in and near these areas. Results are not yet evident.

Also, the President recently announced an initiative to expand the police force and weed out corruption. This is a difficult task but a necessary one if Guatemala is to build the conditions conducive to growth. Neighboring El Salvador faced similar problems in the late 1990s and the security environment is difficult. However, through anticorruption and force expansion efforts, El Salvador has been able to significantly improve its trading environment.

b. Ministries of Agriculture and Health

The Ministries of Agriculture and Health are other key ministries to trade facilitation. Many requirements must be met to import food into Guatemala. The requirements are complicated, and inconsistent application often delays the release of cargo. Two principal agencies administer these requirements. The Ministry of Health's Division of Registration and Control of Medicines and Food is the principal authority for regulating processed food imports. All such products must be registered with this department before importation. This unit also determines and oversees labeling requirements. The Unit of Norms and Regulations of the Ministry of Agriculture Livestock and Food is responsible for issuing import licenses, which are required for each shipment of food of animal or vegetable origin. It also regulates the importation of agricultural products. The Government demands a microbiological certificate on each import of animal and unprocessed food. This must be provided by the exporters and must be certified by their local chamber of commerce. Importers view this agency as the most inefficient and as the cause of major delays in release of cargo.

¹¹⁶ 2003 *International Narcotics Control Strategy Report*, US State Department, Bureau for International Narcotics and Law Enforcement Affairs, March 2004

Both of these units need to modernize procedures. Registrations and licenses are granted only by the headquarter offices. The sanitary registration process by the Ministry of Health takes six to eight weeks to complete because only its laboratory can perform the analyses. The product registration number is then good for five years. Certification of private laboratory analysis must be adopted to expedite approvals.

Applications for the Ministry of Agriculture Livestock and Food import certificates can be made with copies of documents and generally are approved within 24 hours. Documentation requirements are too extensive. One license is required for each commodity in the shipment. Because the application must include shipping data, the process cannot begin until export. Approved licenses must then be brought to the importation site for presentation to customs to obtain release.

The *Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA)*, is a long-standing regional inspectional food safety entity in Central America. It operates from Belize to Panama and was created as an autonomous regional unit to be less susceptible to corruption. Its officers are located at the ports, air, and land borders to ensure that the required paperwork has been completed, to conduct a visual inspection of the imported product, and to fumigate all incoming vehicles. This agency, funded by each participating country, enjoys a good reputation among the trade community.

c. Intellectual Property Rights (IPR)

Protecting IPR is another key part of providing secure trade. IPR administration is within the jurisdiction of the Ministry of Economy's Registry of Intellectual Property. If the party of interest has reason to believe products are imported in violation of its IPR, then the party files a complaint with judicial authorities and receives a judicial order. When that order is provided to customs, they can detain the imported product. There is no specific training or expertise within Customs to identify and detain goods for possible violation of intellectual property laws. This area will need to be addressed.

Governmental responsibility for IPR lies with the Registry of Intellectual Property under the Ministry of Economy. This office approves patents, registers trademarks and copyrights, and is charged with implementing and enforcing IPR legislation. The current laws on patents, trademarks, and copyrights meet all current international IPR standards and, with few adjustments, should meet CAFTA requirements. Guatemalan IPR legislation is considered the most advanced in the region.

It takes two to three years for the patent office to approve an application. Each year, 300 applications are received and 50 approvals are granted, according to interviewees. Registration of trademarks is about a six-month process and, when completed, is good for 10 years. Current procedures whereby a local representative must present the application stand to be updated with electronic registration as CAFTA implementation goes forward. Also, Guatemalan law currently does not permit registration of a trademark involving sound or smell.

SIECA has undertaken a major project to develop a culture of respect toward IPR and promote knowledge of these issues within Central America so that protection of the right holder will be

both understood and enforced. This effort generally has resulted in improvements in national IPR promotion and protection. SIECA is in the process of determining the number of successful prosecutions in each country, none of which keeps such statistics. Although SIECA has trained more than 5,000 judges, prosecutors, and patent examiners, knowledge of IPR issues is still poor.

The most contentious IPR issue deals with data protection. This is a sensitive public health issue affecting the availability of low-cost pharmaceutical and agrochemical products. Decree 9-2003 gave companies the right to be the only beneficiaries of their processes and products for five years to protect their investment in research and development. This is in accordance with CAFTA requirements but several constitutional challenges are pending.

The Registry of Intellectual Property Rights has a limited number of dedicated and professional personnel who are technically competent. However, more personnel and implementation of modern business practices including development of automated procedures and databases are required, particularly to control trademark registrations.

IPR issues are still viewed as an obligation imposed by outside interests rather than as a means of developing and encouraging national innovation and creativity. Therefore, although the legislation required to meet its international obligations is in place, effective enforcement is lacking. Enforcement efforts are also hampered by the lack of understanding of IPR issues and policies within both the judicial and prosecutors' offices. The Registry does not have sufficient personnel to meet this training need.

A study should be undertaken to determine where changes in the law and enforcement are required for CAFTA implementation. Training needs should be identified and undertaken on a regional basis. IPR specialists should be sent to the U.S. Patent and Trademark Office to review its operation and then be responsible for adapting best practices within their own environment. One of the major changes required by CAFTA will be the movement of control of IPR to the border. Customs currently has neither the authority nor the training to intercept IPR infringements. Customs access to IPR-related databases as well as extensive training of the customs officer in detection of potential IPR violations will be required.

d. Secretariat for Central American Integration

SIECA was established as a result of the General Treaty for Central American Economic Integration of December 1960. The purpose of this regional entity is to assist the Central American countries and the Council of Ministers of Economic Integration (COMIECO). Currently, one of its main efforts is directed at institutionalizing and expanding the Central American Customs Union. This concept first appeared in article 1 of the above-noted 1960 law. However, for many reasons, it was not until 1992 that Guatemala and El Salvador, the two countries that represent 50 percent of the intra-regional trade within Central America, decided to proceed. In 2000, Nicaragua and Honduras were incorporated into the Customs Union, and in 2002, Costa Rica signed on to the concept but has proceeded at a slower rate of integration.

The goal of the Customs Union is to develop a common external tariff, allow for the free movement of goods between the Central American countries, eliminate all border posts, and harmonize trade policies including those dealing with IPR and registration of items such as food,

drugs, agricultural products, and petroleum-based derivatives. Currently, with few exceptions, trade between these five countries is duty-free. However, local taxes are still collected.

The Central American Customs Directors meet monthly to promote integration efforts, as do the technical committees on transit with IT, valuation, customs law, procedures, tariffs, registries and risk assessment. The committee on customs law just finalized draft legislation dealing with fraud and contraband material that has been presented to the ministries for consideration. An automated system for control of transit cargo and a common database for risk analysis and selectivity are being developed.

To date, the external tariff of all five countries is 92 percent harmonized and a common customs code and procedures have been implemented. Integrated border stations were established in March 2003 between Guatemala and El Salvador, with Nicaragua and Honduras set to implement by August 2004. Costa Rica will follow. With this approach, all export controls by representatives of the four border agencies—Customs, Immigration, Quarantine, and Police—are to be eliminated. In addition, all electronic transmissions of the transit and customs documents are accessible to all the border agencies. In the case of Central American trade, no payment of taxes is required until the cargo arrives at the customs warehouse in the final destination country. About 25 percent of this trade is still subject to customs examination. SIECA should work with the Customs authorities to reduce or eliminate this intervention by adopting a post-audit strategy.

Another aspect of the integrated border approach is a one-stop processing window for imports and exports arriving or going outside Central America. As of March 2004, El Salvadoran and Guatemalan Customs have offices in the ports of each other's countries to clear international goods destined for their countries. Importers in El Salvador and Guatemala can electronically transmit their documents and proof of payment to their national customs authority. These transmissions are then available to customs in the country of arrival for transit purposes and to the importing country's customs officers stationed in the arriving port. The latter, upon receipt of the transmission, process the importation through selectivity. If the shipment does not have to be examined, it can proceed directly to the importer's premises, with all customs formalities concluded. If an examination is required, the truck proceeds directly to the customs examination facilities in the destination country.

The major problem encountered in implementation is the general unreliability of the IT communication network that links the national customs processing systems. Often transmitted data are not received or the system goes down, causing delays. SIECA has secured USAID and Inter-American Development Bank funding to resolve these problems.

Another impediment is the lack of full commitment to the process by some of the border inspectors. In addition, the relatively new procedures have not been properly disseminated, either to the trade community or to public agencies. SIECA is attempting to correct this through use of its Web site, seminars, and publication of pamphlets to detail the Customs Union requirements. As a result, there are still border delays that the General Director of Customs is trying to address.

2. Supporting Institutions: Private

a. Importers and Exporters

The Guatemalan import and export community is a growing and improving sector that seeks to expand its opportunities and to address issues such as the cumbersome and excessive requirements that hamper its expansion and to improve its ability to compete in the international marketplace. Importers generally use the various Chambers to represent their collective interests, whereas AGEXPRONT (*Asociación Gremial de Exportadores de Productos No Tradicionales*) represents and promotes the development of exporters of nontraditional products.

AGEXPRONT has about 1,000 members representing mostly small to medium firms in the agricultural, manufacturing, and textile sectors. It enjoys a strategic alliance with Customs and is very supportive of customs reform. Its development office focuses on training new members in modern business practices. This organization is aggressive and effective in assisting the Guatemalan small and medium-sized businesses in developing export opportunities as shown by the fact that, according to knowledgeable sources interviewed for the assessment, 54 percent of all current exports represent new products.

The American Chamber of Commerce (AmCham) represents more than 450 Guatemalan and international firms that trade with the United States. This group promotes a healthy business environment within the country through lobbying for legislation and hosting conferences with government officials. One of the major problems identified is the lack of adequate IPR law and enforcement within the region. In addition, the current law on the free importation of samples, article 37 of Ministerial Decree 969-99, is too restrictive. It allows only for free importation of samples for purposes of registration. Although informally this privilege has been extended to samples for exhibition and trade promotion, the weight cannot exceed two kilograms. This provision needs to be liberalized to correlate with modern promotional business practices.

There are more than 250 textile drawback operations (*maquilas*) in Guatemala. Their activity is regulated under the Law of the Promotion of Export and Drawback of 1989, Decree 29-89, and its regulatory norms, Degree 533-89 of August 2, 1989. The purpose of the law is to promote and develop Guatemala as a producer of goods to be exported outside Central America. Companies operating under this regime can either import components to be assembled duty and tax free if the finished goods are exported within one year or receive duty and tax refunds on imported products used in the manufacturing process upon export. Applications to receive the benefits of this program are reviewed and approved by the Office of Industrial Property within the Ministry of Economy. Although drawback procedures are detailed by their very nature, a review should be undertaken to streamline and expedite the process, particularly the timeliness of the refund.

The major issue confronting international traders is security. The expense incurred by the private sector to deal with this because of inadequate protection from national authorities adds significant costs and risks to the import and export community. Recently, shipping rates to Guatemala increased. The carriers cited both poor port performance and road security as the reason. Insurance rates are already high because of the same security concerns. Because import fees are assessed on CIF values (cost, insurance, and freight), high rates in any of these areas mean increased duty and tax liabilities for the importer.

The impact of customs modernization is being felt. The automated customs operating system enhanced and simplified the import and export procedures as well as decreased opportunities for the solicitation of bribes. However, problems with customs processing still continue in the areas of uniformity, consistency, and transparency. Because there is no national code or regulations, too much discretion is left to customs officials. Nor are there any time limits as to when an officer must release cargo or make a decision on a pending issue. This environment gives customs officers the ability to manipulate the process. Clear, standardized, and published guidelines, which include specific time constraints, are required to create a level playing field for the trade community.

The entire import process should be systematically reviewed, preferably in a joint effort by the trade community and the involved public agencies, to streamline the procedures and eliminate unnecessary reviews and documentation. The objective is to significantly decrease the preparation and processing time and thus delays and costs. The ultimate goal should be regional harmonization of the process. This effort must have high-level support within the affected ministries so, at the conclusion, support for required legislative changes will be available.

Importers view the Ministry of Agriculture as the agency most difficult to deal with because of its lack of clear procedures and its failure to publish new requirements in advance of implementation. When a policy is published, there is no system for the trade community to challenge the policy. In the past, this department's principal role was to protect the national agricultural sector. Therefore, its rules and requirements were promulgated to restrict competition rather than expand imports. This attitude is just starting to change. The Ministry of Health's procedures for registering a processed food commodity are too lengthy, taking 8 to 10 weeks to complete. Private laboratories must be certified to perform the required analysis.

A continual problem that adds costs to each shipment is translation services. All documents not only must be translated into Spanish but also must contain the sworn and certified statement of the translator and then notarized. This process is too cumbersome.

b. Customs Brokers

The Guatemalan brokerage community is of minimal quality and needs to be upgraded to meet the expanded market demands. Fees are \$20 to \$60 per transaction, which is low for the sector. There are around 113 licensed people, most of whom operate as individuals. Most were previously customs officers. Customs for a short time granted licenses at a company level, when three or four firms qualified. However, because of lack of national legislation authorizing this practice, it has been stopped. Only about 10 brokers are considered professional and well trained in their responsibilities. It is reported that, for a fee, some licensed individuals give their access password for the customs electronic system to unlicensed parties.

Because of the lack of legal authority to issue administrative penalties, customs can move only to suspend or revoke the license. Grievances must be major such as complicity in fraud or smuggling to initiate the process. Only two or three revocations and/or suspensions have occurred.

Guatemala has two major broker associations that are fairly competent in representing their industry. When these vehicles are unresponsive, brokers use alternative associations such as CUTRIGUA, an association of transport service users, as vehicles of change. The associations are currently working to improve the quality of their services by partnering with Customs to remove unqualified individuals and hosting training for their membership in areas such as valuation and classification.

Brokers are concerned about the unpredictability and inconsistency in customs processing within and among field posts mainly because of the lack of national procedures, law, and regulations. Because Customs does not publish its procedures, transparency is also an issue. Methods for handling consolidated shipments need revision. The technical expertise of the customs officer needs to be upgraded, particularly in the areas of valuation. Too many unwarranted challenges to declared values are being raised, which cause delays in release and add to shipment costs. Customs staffing is considered adequate, even with the move to a 24/7 operation.

Brokers believe corruption among customs officers is decreasing because of the limited opportunities within the automated processing environment and the “no-tolerance” approach of the current customs authorities. However, because many of the brokers previously served in customs, collusion between the brokers and customs to circumvent legal payment of duties and taxes is recognized as an ever-present threat.

c. Vessel Carriers

There is sufficient vessel capacity at the Atlantic and Pacific ports to accommodate both the present and the long-term international trade demand in Guatemala. Most of the carriers are major international companies that meet industry standards for electronic data transmission and security. Shipping rates to Guatemala are high mainly because of lack of adequate security on the road. Because private concessionaires operate the ports, the carriers do not have operational terminals within them. Services for short-term storage of containers and/or goods for the carriers are provided by the port. Major carriers have terminals off site for normal operations regarding preparation of containers and longer-term storage.

In Guatemala, manifest data are submitted before arrival and departure to multiple entities including Port Authorities, Customs, National Anti-Narcotics Police, and Agriculture. Each agency processes the data independently and the carriers must wait until each separate process is completed and updated in its system before loading or releasing the goods for delivery. Under the new port security requirements, as of July 1, 2004, most ports will implement a one-stop window where all interested parties will coordinate their actions, which should expedite release.

There is a Guatemalan association of vessel carriers and agents to which most of the sector belongs. It is a vocal and effective organization in representing the concerns of the sector before the appropriate government agencies and, when necessary, the Legislative and Executive Branch of Government. When required, the association uses the press for advocacy purposes. The group’s ability to effect change was recently evident in its successful petition to lower stevedoring fees at Santo Thomas. The association also participates in the recently formed CONAFACIL committee, which addresses trade facilitation issues across the international trading sector.

Vessel carrier representatives noted that the public agencies it had to deal with were generally approachable, attentive to the trade's concern, and sincere in seeking and implementing solutions. In particular, the pro-business attitude and practical approach that has been adopted by the new Customs management team is beginning to spread throughout the agency.

The carriers identified the lack of security for transport over the roads as the major problem confronting not only its industry but also the general expansion of international trade and investment in the country. Because of the high number of incidents of highway crime, most carriers will not transport cargo after 5 p.m. without the recipient providing a written waiver of responsibility. Daylight movements are done in convoys where possible, with an armed guard in every truck and an armed vehicle both leading and following the transport. Stops can occur only at designated sites, where there is wide visibility of the surrounding area, which is scouted just before arrival. This process adds both significant additional costs and delays to every transport.

The carriers noted problems in predictability and uniformity in customs actions that cause delays in release. This is created by the lack of local administrative norms that complement CAUCA and RECAUCA, under which the agency operates, are necessarily general in nature and therefore open to wide discretion in their interpretation by the local inspector. Customs also does not consistently or promptly publish changes in procedures. Awareness that a new requirement has been imposed occurs when the import or export documentation is presented. All these factors create a climate of legal uncertainty for the users, which impedes trade facilitation and growth.

d. Road Carriers

The international trucking companies are well represented in Guatemala by several major associations that are very active in presenting the industries' concerns and problems to the appropriate public sector groups. There is sufficient capacity for present needs, both of drivers and of equipment. Each trucking company conducts background checks as part of normal procedures when hiring drivers. The drivers are unionized. The fees, \$1 to \$1.10 per kilometer for a 20- to 22-metric ton load, are competitive with the rest of Central America.

With the incumbent Government, the dialogue between the trucking associations and the public sector has increased dramatically. Both consider themselves partners in improving the competitive position of Guatemala. Customs has been particularly responsive to the industry's concerns, seriously seeking practical solutions to problems. However, lack of consistency continues to be an issue. Representatives of the truckers were involved in designing the new port security program, which will reduce the previous three checks done by public agencies within port limits to one.

The trucking associations actively promote the Central American Customs Union, which has reduced border delays between Guatemala and El Salvador from five hours to one hour. The current delays, of about 20 minutes, which should not occur, are due to traffic congestion at the border and unreliability of data transmissions and communication systems between the national Customs Services exchanging information.

Security of transport on the highways is a major issue. Often trucks are hijacked, the loads are taken, and sometimes the drivers are killed. Seals are of poor quality and can easily be removed. As a regular procedure, armed guards usually accompany a load when it is within Guatemala.

Stops on the road by the PNC are frequent and often without cause and serve only to secure a bribe for the officer. Customs corruption has been dramatically reduced recently.

e. Warehouses and Free Zones

Guatemala has 11 bonded or fiscal warehouse proprietors, all with facilities located around the capital. These operate under law 447-2001 and are under the supervision of both SAT and the banking regulatory authorities, the latter of which is unusual in the trade. Merchandise, usually highly taxed commodities, can be stored there with payment deferred until withdrawal. The operations are of high quality, the operators are well experienced and adequately bonded, and security and inventory control procedures are comprehensive. Cameras record each step in the arrival, opening, and unloading of the cargo on arrival at the warehouse.

Space is underutilized. These facilities were designated as customs warehouses for the receipt of merchandise covered by CACM but the anticipated increase in activity has not yet occurred. The operators would like this designation for all international goods.

Costs of using these facilities are very high, almost to the point of being uncompetitive. This is because Guatemala is the only Central American country where the services of the customs officers assigned there are fully reimbursable. In addition, Customs requires extensive oversight and review of the operation; as a result, six or seven customs officials are assigned to each facility. Performance of the customs officers is adequate but more technical training is required. Standardization and publication of procedures is needed to limit officer discretion and promote predictability.

More reliance on post-audit verifications of the operator's inventory control procedures and movements in and out of the facility would reduce the Customs presence and its related cost. Other Central American countries such as Costa Rica have adopted this approach. Customs and representatives of the operators should conduct a joint study to determine what procedures are required to achieve a high level of compliance with minimum customs intervention, perhaps using "best practices" in the region. Regional harmonization of procedures should be the ultimate goal. Recently, the chairmen of each national Central American association of fiscal warehouse operators agreed to seek a regional harmonization of procedures for these operations and will use SIECA as their partner. The influence of Guatemala's association, although active, is limited by the small size of the sector.

The warehouse at the airport for the receipt and short-term storage of import and export cargo is one of the most efficient and secure facilities in the region. It was opened in 1992. The affected agencies, the airlines, the airport authority, and the freight companies created COMBEX to undertake the storage, movement, and security of export air cargo. The operation has since expanded to include imports. Storage fees are minimal at \$10 per airway bill for the 10 days merchandise is allowed to be stored. Profits are used solely to improve operations. Security measures are excellent and include bar coding of all packages on receipt, thumbprint access to

the export storage area, and multiple cameras. The customs area for examinations is adequate as is cooperation between the operator and customs.

All free zone sites in Guatemala are operated by private companies. These sites are used principally for storage and warehousing. The National Authority for Free Trade Zones approves the applications and notifies Customs and Internal Revenue when approval is granted. All equipment and articles produced in these zones are duty- and tax-free; a 10-year exemption for internal taxes is also granted. Operations dealing with sensitive products such as sugar and coffee are excluded from zone activity. Although generally sufficient space is available for expansion, recently one operator had to turn away a potential user because he could not remove squatters who were occupying the required space.

f. Service Sector

Guatemala has undertaken several significant privatizations, including electricity production, electricity distribution, telephone, and the Internet. A private concession was also granted to a private firm to operate Guatemala's postal system. Several telecommunications companies provide a high-quality transmission of voice and data, multimedia signals, and Internet access. This, in turn, has led to some, albeit small "call center" service companies. As reported by persons knowledgeable of the situation, franchising is a significant market and there exist approximately 175 franchising companies in Guatemala with approximately 800 outlets. The United States leads the franchise market with a 90 percent market share. These companies operate mainly in the fields of fast-food restaurants, physical fitness centers, car rentals, hotel operations, dry cleaners, lawn and garden services, professional painters, learning centers, shoe repair, pest control, discount stores/pharmacies, automobile repair, computer learning centers, security, advertising, real estate, convenience stores/pharmacies, casual clothing, cosmetics and toiletries, and video rentals. Nonetheless, one foreign investor has successfully established a satellite-linked data processing operation that employs more than 1,400 workers.

E. SOCIAL DYNAMICS

A high level of political will and leadership to undertake change, coupled with active support and involvement of the trade community, are essential ingredients for modernization and trade capacity building within a country. These requirements are present in Guatemala. Many believe it is the best business climate in the country in the last several decades. The incumbent Government has created a pro-business environment and established an effective partnership between the private sector of the international trade community in an attempt to make Guatemala the most competitive and open market in the region. Many key government officials were previously members of the business community, know where the impediments to trade exist within the governmental institutions, and are eager to route them out. Practical solutions to business problems are welcomed and the private sector is eager to present them. Government institutions, particularly Customs, are not only responding promptly and openly to change but are championing the reform. As an example, Customs recently expanded its service to a 24/7 operation.

Progress is already noticeable, particularly in the Government's anticorruption efforts, which have reached the highest level of the ministries. However, only a sustained and comprehensive

strategy will allow these efforts to affect the mid- and lower levels of the agencies. As many technicians have been removed, the international donor community should assist the Government in helping fill the resulting vacuum of knowledgeable personnel through intensified training assistance.

Dialogue between the public and private sector is under way. Many groups are ready to participate in this process of improving the country's trade capability. The various business Chambers are some of the principal players. The Guatemala Chamber of Commerce predominantly represents the Guatemalan import community with fewer exporters as members. The Chamber of Industry works more closely with the transportation sectors. Each is effective in supporting both national and foreign investors and in presenting the issues of its constituency before the involved agency.

The recent formation of CONAFACIL has created the opportunity for all sectors of the international trade community to join forces in a common purpose. This committee is composed of representatives of both the private and the public sectors and meets weekly to identify and propose solutions to Guatemala's and the region's obstacles to trade facilitation. This group has given the various sectors of the trade community a collective and powerful voice to address issues directly to representatives of the public agencies. Currently, the group is working with Customs and has identified several problems with procedures at the land borders that are causing delays. Pro-Committees for trade facilitation, like CONAFACIL in Guatemala, have been established in the rest of the Central American countries, and the concept has been expanded to the regional level with the creation of a regional committee called COFACECA .

The media is also a player in this dynamic and is used at times by the various trade groups to publicize their position or direct attention to a problem. However, investigative reporting is limited because many in the sector fear the consequence of uncovering a scandal involving major criminal activity. Such reports, when they do occur, usually do not divulge the name of the reporter.

F. RECOMMENDATIONS

1. Implementing Risk Management System

Guatemala's current risk management system is inadequate to provide real benefits to the organization. Risk assessment can significantly increase the efficiency and security of trade flows by allowing compliant users to use the system with fewer delays and by helping Customs more accurately target illegitimate goods. It should decrease the overall number of inspections, thereby lowering the transaction cost of traders. It should increase the incidence of identifying illegitimate trade, thus increasing revenues. These outcomes may increase the volume of exports and improve the overall environment for foreign investment.

Risk management has the ability to transform Customs on a number of levels. Once high-risk commodities and/or traders are identified, the natural consequence is to reallocate staff to address these threats and to have program officers dedicated to the periodic and systematic review of low-risk shipments or sectors to ensure their continued compliance.

Guatemalan Customs has made a good start with its existing system, and programmatic assistance can build on this start. A few targeted programmatic interventions can assist Guatemala, including the short-term assistance for technology analysis, economic sector analysis and training, and audit training.

2. Improving Staff Through Major Overhaul of Hiring and Training Curriculum

The new administration will soon revive the training system to provide new customs recruits with approximately three months of training. In addition to this initial training, there is a need to offer specialized training on valuation, classification, and rules of origin.

Standardized and specialized training should produce uniformity and predictability in customs procedures administration. This, in turn, should lead to fewer delays and hurdles, and thus cheaper transaction costs, and a better overall trading environment.

3. Standardizing Procedures Across Borders and Expanding the Customs Union

Supporting the transition to the Customs Union is an important way to support this principle. Guatemala and El Salvador, in particular, have made great strides in streamlining cross-border procedures, especially at the Hachadura border crossing. These initial steps are to be extended over 2004 and 2005.

In addition to providing electronic release, Guatemala should institute “pre-arrival release”. Pre-arrival release provides for goods to be released before their arrival at the border. Currently, all goods must be processed upon arrival. Pre-arrival release is also an example of the types of benefits Customs may extend to conforming users. Importers who are scrupulous members of the trading community should receive benefits that encourage continued good performance.

4. Strengthening Public-Private Sector Cooperation

The public-private partnerships with groups like CONAFACIL and PRONOCOM are making serious and rapid changes that are greatly facilitating trade. Many individuals in the trade community view that as a positive, see a new “customer service” approach within the current administration that took office in January 2004, anticipate many changes within Customs, and have stated that they are starting to see improvements, such as 24-hour daily staffing (24/7) throughout the country. It is critical to encourage this work.

5. Maintaining and Consolidating Gains on Integrity

In addition to its current initiatives, Customs should consider implementing a dedicated call line for reporting customs corruption. The line should be advertised, as should the tangible results of information and tips provided.

6. Improve IT Integration with Other CAFTA Countries

It is critical to enable the regional systems to communicate. To do this, the IT systems and personnel will need further improvements and additional training, respectively. To promote the

Customs Union, integration of electronic systems has started with El Salvador, with some exchanges already in place.

7. Improving the Security Environment

Even though Customs has a small role in criminal law enforcement, the agency is an essential partner in improving the security environment. Providing Customs with some simple equipment, such as density meters (busters) and probes coupled with training on their use, could lead to more significant findings. The U.S. Embassy is working to train enforcement personnel in the area of antiterrorism and identifies and provides tools for detecting WMD. Additionally, a software package will be provided to analyze the manifest and target bill data to identify potential shipments that pose a threat in the area of WMD, dual-use goods, and drugs.

XII. FLOW OF PEOPLE

A. INTRODUCTION

Annual visitors to the country numbered more than 4.2 million in 2003, up from 636,000 in 1998.¹¹⁷ Roughly half of Guatemala's arrivals enter via the land borders, half from the airport, and less than 2 percent by sea. The greatest share of visitors comes from other Central American countries at 43 percent. Almost two-thirds of these visitors travel from El Salvador. This is partly due to proximity but also because of the easing of restrictions on movement within the Northern Triangle (Guatemala, El Salvador, and Honduras) and the Central American Four (CA-4, which includes the Northern Triangle plus Nicaragua). North American visitors account for 33 percent of total visitors, and Europeans make up 16 percent. Tourism is Guatemala's second most important source of foreign exchange (behind coffee), producing an annual income of \$612 million in 2002, up from \$322 in 1998.¹¹⁸

Guatemalan laws and its public and private institutions generally support trade-related people flows. However, the poor security situation almost certainly reduces legitimate people flows. Additionally, the flows of illegal persons further worsen the country's ability to present itself as an attractive place for foreign investment and a place from which its exported goods and services are seen as safe and reliable.

B. LEGAL FRAMEWORK

The legal framework for people flows is generally sufficient. Laws and regulations require no undue burdens for those traveling on temporary tourist or trade-related business. The law does not require a visa for visitors from the United States, European Union, Canada, Mexico, and the CAFTA countries. With regard to regional harmonization, the CA-4 requirements provide a model in the immigration area. These new requirements allow CA-4 members to travel freely without passports and will soon allow international travelers to move within the CA-4 with only one immigration review at the point of entry.

As in many countries, laws and regulations regarding longer stays and immigration are more restrictive. Business leaders identified temporary work permits as a major priority for reform and liberalization. The law is seen as overly restrictive when it comes to temporary workers, who could provide key knowledge transfers, such as computer scientists, doctors, and engineers. Creating an immigration classification that facilitates these kinds of temporary workers could significantly benefit the country.

C. IMPLEMENTING INSTITUTION

Overall, the major implementing institution, the Immigration Agency, has a clear mission and is adequately staffed, equipped, and funded. Officials are posted at border crossings and the airport and are trained and equipped, including passport reading technology at the major airports and border crossings. However, the assessment did find that electronic passport reading equipment was inoperative at one of the border visits.

¹¹⁷ 2003 Guatemala Country Profile, Economist Intelligence Unit, 2004

¹¹⁸ *Id.*

Regulations require an airport tax on departure, but the \$30 fee is nominal. The fee is collected by airlines and often is included in the price of the airline ticket. Both of these measures create a transparent and streamlined process for the movement of people. In other countries, these fees require an extra stop at a separate window and/or payment in local currency (which can lead to another stop at another window to obtain payment).

Those international visitors who seek an extended stay and work permit, however, have a fairly difficult experience. Procedures are burdensome and nontransparent, and petty corruption is said to be widespread. (Local Guatemalans find their experience with the immigration agency to be negative as well because of its inefficiency and corruption.)

Within the area of security, the issue of illegal people flows remains a significant problem. Guatemala's borders with Mexico, Honduras, and El Salvador are long and porous, particularly with Mexico, and Guatemala serves as a key transit country for illegal immigration to the United States.

On the positive side, Guatemalan immigration officials use watch lists from the United Nations, United States, and other sources to monitor the entry and exit of dangerous persons through the use of electronic passport readers. Also, Guatemala immigration officials are viewed as responsive to international officials seeking dangerous persons.

D. SUPPORTING INSTITUTION

The greatest issue that affects people flows, as well as goods and money flows, is that of security. With the poor security situation in Guatemala, people flows are significantly reduced and hindered by the country's high crime rate. The primary supporting institution in this area, the PNC, is not viewed as a strong institution for mitigating this problem. The police force is grossly understaffed and ill equipped and has a reputation for corruption.

Guatemalan officials have taken some steps to remedy the issue generally and specifically with visitors. For example, the PNC has established a specialized unit regarding tourism, Politur. In 2004, 420 National Police agents will graduate in tourist security, tourist culture, first aid, and crime-fighting laws. These police will focus on special areas, such as Guatemala City's historical central plaza and central market.

E. SOCIAL DYNAMICS

Trade-related people flows are generally supported at all levels of the Government, as evidenced by the CA-4 initiative and Guatemala's procedures and operations for visitors. People flows, particularly in the form of tourism, are widely supported and encouraged at all levels—Executive branch, legislature, private institutions, and the general public. Some attempts are being made to address the security issue through programs such as the tourism police. However, the encouragement of legitimate and discouragement of illegitimate visitors could both be stronger through strengthening the police and enabling visits for long-term foreign nationals.

F. RECOMMENDATIONS

1. Improve and Encourage Knowledge Transfer by Facilitating Process for Longer-Term Visitors

Attracting knowledge and skills from beyond Central America should be strongly encouraged. Knowledge and skill transfer will help counter the drain that exists from skilled Guatemalans moving abroad, encourage more skilled Guatemalans to stay, and encourage more foreign direct investment. Those persons who are trying to support existing multinationals in Guatemala by residing in the country should find a process that is rapid, predictable, transparent, and inexpensive. Those persons with skills needed by Guatemala (i.e., doctors, engineers, computer scientists) should be encouraged to stay and also find an uncomplicated and reasonably priced system.

2. Strengthen and Add to the Security Force

Illegitimate people flows make an already insecure Guatemala even less secure. Guatemala suffers from the costs these impose on the system and the indirect costs to foreign trade and investment. Making cities and towns safe for Guatemalans and international visitors will help increase tourism and commerce. Providing police focused on tourists and tourism sites will help, but solving the larger problem of increasing security in the country through greater numbers of police and a police force with integrity is essential.

XIII. FINANCIAL CRIMES

A. INTRODUCTION

Guatemala has recently been removed from the Financial Crimes Action Task Force's (FATF) list of noncooperating countries.¹¹⁹ To do so, Guatemala had to satisfy FATF that it had made certain improvements to money laundering enforcement. Nevertheless, to the extent that money laundering is derived from drug trafficking and corruption, the situation in Guatemala is still not a good one.

B. LEGAL FRAMEWORK

At the time of in-country data gathering for this report, Guatemala was still on the FATF list of "non-cooperating countries"—those that lacked laws prohibiting money laundering. On July 2, 2004, FATF removed Guatemala from the list. In doing so, FATF stated:

Guatemala took significant steps, including passing laws requiring offshore banks to be licensed and supervised; requiring enhanced customer identification for financial institutions; and requiring reporting by banks to authorities of any suspicious transactions.¹²⁰

Before being delisted by FATF, the Government and the banks were very concerned about bringing the country into compliance.

Guatemala has had a high level of tax evasion. The tax laws have changed frequently as a response, in part, to the low level of collection. But the tax laws focus on so-called "special taxpayers"—those from whom collection is more readily obtained.

The economic activity of the rather large, informal economy goes untaxed. Together with widespread corruption, the Guatemalan Government loses considerable tax revenue.

C. IMPLEMENTING INSTITUTIONS

The main institutions involved with financial crimes are the Superintendency of Banks and the Public Minister (i.e., Attorney General). One would expect customs officials at the airport and the borders to be engaged in detection of money laundering; however, they apparently have minimal involvement. Customs officials at the airport detain persons found to possess cash that has not been declared and turn them over to the Public Ministry. At the borders, little detection of money laundering seems to occur. The problem seems more to be that government officials are tempted to accept bribes from those attempting to expedite the border-crossing process.

Within the Attorney General's office, two different units deal with money laundering and corruption. One unit handles only money laundering and most of those cases involve cash hidden on the person. As a result, few of its cases thus far have resulted from bank transfers. Currently, however, the anti money-laundering unit is working on some corruption cases with the

¹¹⁹ See http://www1.oecd.org/fatf/FATDocs_en.htm.

¹²⁰ FATF Press Release, July 2, 2004 (www.fatf.gafi.org).

corruption unit. Although the anti corruption unit has more people working within it than the anti money-laundering unit, the money-laundering unit has the advantage of going through the Superintendency of Banks to get access to bank account information without a court order. Ordinarily, the anti corruption unit would require a court order, so the law provides an implied incentive for the corruption unit to look for money laundering and to cooperate with the money-laundering unit.

The Superintendency of Banks has considerable resources, including lawyers, economists, and accountants, compared with five people in the Attorney General's money-laundering unit. Obviously, they have been attempting to convince their contacts at the U.S. Financial Crimes Enforcement Network (FINCEN) that they have been vigorous in pursuing money laundering. Some government officials remain unconvinced that the Superintendency of Banks has made a sufficient number of referrals of suspicious transactions. Friction exists between several agencies tasked with tracking and enforcing financial crimes.

Since the money laundering law was enacted late in 2001, the Attorney General has prosecuted three cases from the Superintendency of Banks, resulting in two convictions and one acquittal. Several other cases are ongoing. The relatively small number results from more than 1,000 suspicious transaction reports (STR). Supposedly, many are still being investigated. Most of these are said to be unimportant. Seven cases being pursued are said to represent \$60 million.

D. SUPPORTING INSTITUTIONS

In addition to the courts, which are discussed in the section on Commercial Dispute Resolution, the primary supporting institutions are the banks. They are quite concerned about their relationships with correspondent banks in the United States. FATF "demand[s] that financial institutions give greater scrutiny to transactions with persons, businesses, or banks in listed countries or territories with inadequate anti-money-laundering and counter-terrorist financing infrastructures."¹²¹ To a lesser extent, those in both the public and private sectors promoting foreign investment are also concerned that Guatemala be found in compliance by FATF to improve the country's image to potential investors and trading partners.

The Banking Superintendency issued some regulations, but no law was enacted until after September 11, 2001. The effect of being put on the FATF list primarily may involve Guatemala's reputation. Some have speculated that being put on the list results in correspondent banks charging higher interest rates to banks in the noncomplying country. Apparently, however, the rates charged Guatemalan banks were not changed as a result of its designation on the list.

The real "supporting institutions" are the American correspondent banks that put pressure on the Guatemalan banks to exercise due diligence.

E. SOCIAL DYNAMICS

On the basis of anecdotal information and news reports, the existence of widespread corruption seems to be well-acknowledged. In particular, U.S. investigators are said to be pursuing corruption charges against the former president. It appears that members of the current Attorney

¹²¹ FATF Press Release, *supra*.

General's office in Guatemala may be cooperating with that investigation. If news reports about the extent of drug-related corruption under the former regime are accurate, it will take considerable effort to root it out. Even if the new regime is committed to doing so, it apparently does not have the necessary resources. In any event, improving the situation will take considerable time.

In addition to the problem of corruption, the extent of legal formalism in Guatemala poses a challenge. In particular, as relates to money laundering, there is reason to wonder what will happen now that Guatemala is off the "noncooperating country" list. To get off the list, government officials and banks seem to have taken vigorous action. Now that the goal has been achieved and as their anxiety subsides, the social dynamic of the country suggests that, in practice, the situation will slide back somewhat. How much of a regression occurs will depend on the relationship between individual Guatemalan banks and their U.S. correspondent bank, along with the efforts of the current Government. FATF, of course, will continue to monitor the situation.

As several persons interviewed stated, the principal obstacle to commercial development in Guatemala is the lack of commitment to the rule of law. The country has to contend with the legacy of a 36-year civil war, dominated by lawlessness on both sides. With that kind of recent history and some of the participants in the civil war now involved in organized crime, Guatemala has a long way to go to establish a culture in which the rule of law is meaningful.

F. RECOMMENDATIONS

The problem of corruption appears to be so widespread that the usual, narrowly targeted recommendations seem grossly inadequate. Under the circumstances, broader recommendations are offered:

- ◆ Bring in outside mediators to facilitate better cooperation between the Superintendency of Banks and the prosecutors in money-laundering activities.
- ◆ Under the new tax law, implement consistent enforcement as an aid to reducing money laundering.
- ◆ Study the feasibility of bringing in outside personnel to assist in the investigation and prosecution of corruption.

XIV. FLOW OF MONEY

A. INTRODUCTION

Cross-border goods and services transactions between Guatemala and its trade partners represent significant money flows. Remittances are also a significant money flow across Guatemala's borders. In 2004, an estimated \$2.5 billion in remittances flowed into Guatemala from abroad.¹²² Overall, Guatemalan laws and public and private institutions support these trade-related money flows. Trade finance products are available to large traders, and foreign currency exchange is widely available and easily exchanged for all traders. Guatemala is challenged, however, by illegal money flows, as the nation has become a major transit link in the drug trade between South and North America and a location where criminals can hide their illicit profits.

B. LEGAL FRAMEWORK

1. Trade Finance

In Guatemala, the legal framework regarding the efficiency and security of financial flows is generally sufficient. Foreign and domestic private banks operate throughout the country. The Trade Finance Guidelines by the International Chamber of Commerce are generally applied, and the laws are in conformity with the Uniform Customs and practice for Documentary Credits. The legal structure for trade-related finance allows for payment through wire transfers, foreign checks, commercial letters of credit, standby letters of credit, documentary collections, and open accounts. Importers and exporters do not find the legal framework as overly cumbersome or complicated.

a. Currency Exchange

The legal framework for currency exchange also provides for suitable flexibility for traders. Guatemala's official currency is the *quetzal*. The central bank, Bank of Guatemala, is the sole issuer of national currency. Under the law, traders have the freedom to exchange currency at financial institutions and nonbank institutions alike. There are no restrictions on repatriation of profits by foreign businesspeople. Products that allow traders to hedge financial risk are also legal.

b. Illicit Financial Flows

Laws addressing illegitimate financial flows are also in place. Guatemala has enacted and implemented a law criminalizing the laundering of proceeds of crime. Guatemala was recently removed from the FATF watch list because of its enactment and implementation of legal and institutional reforms. However, the U.S. State Department continues to list the country as of money-laundering concern. After years of difficulty, Guatemala has made progress through the passage of laws and the creation of a financial crimes unit to combat money laundering. Active implementation of the laws is just developing. (See financial crimes section.)

¹²² Economic Intelligence Unit (2004), Country Profile for Guatemala..

C. IMPLEMENTING INSTITUTIONS

1. Trade Finance

There is a well-developed banking system that includes some 18 private domestic and international banks, of which almost all provide some form of trade financing. The banks maintain correspondent relations with U.S. banks and other international banks. Their trade finance offerings include basic letters of credit, foreign exchange, and hedging contracts.

Importers find that common methods of payment are cash in advance and irrevocable letters of credit. Many Guatemalan imports are financed through short-term lines of credit (60-day), which are extended directly from the exporter to the Guatemalan importer. This method of financing is usually available only to large importers and long-term clients. Many large Guatemalan importers finance their trade through domestic banks and holdings abroad.

Although these financial institutions offer trade finance to domestic importers and exporters on reasonable terms, qualifying for these terms can be very difficult for smaller and medium-sized traders. This is due to a poor legal system for enforcing contracts and because collateral is primarily limited to real property. Few alternative facilities are in place to assist would-be traders (i.e., export finance banks).

Further financial impediments include the fact that banks do not generally facilitate access to foreign credit information or advice to exporters, in particular new exporters. Outside of major banks and major traders, there is not a generally available computerized database for providers of financing, payment services, credit insurance, and credit information.

a. Currency Exchange

The Central Bank of Guatemala manages exchange rate policy and regulation. The institution has sufficient capacity to administer the exchange rate function. Currency exchange occurs at numerous institutions, including banks, currency exchanges, and hotels. Currency exchange operates at rates that are highly competitive, and fees for wiring money abroad are less than 10 percent of the amount of money to be wired. Although not a formally dollarized economy, the dollar is generally tradable in the market—accepted by merchants large and small in the exchange of goods and services. Although the legal framework allows for derivative instruments in currency, few clients use currency hedging.

b. Illicit Financial Flows

Through recent efforts, the main implementing institution for money laundering—the financial crimes enforcement unit—is now finally working to attack money laundering. It is early in the development of this capacity, but it is believed that the institutions are cooperating on this very critical issue.

D. SUPPORTING INSTITUTIONS

The national supporting institutions that facilitate trade-related finance are relatively weak. Guatemala has no Government-sponsored export credit agency. The Banker's Association is

viewed as not a very effective instrument for advocacy in Guatemala. Guatemalans do benefit from the Central American Bank for Economic Integration (BCIE).

The supporting institutions that address illegitimate financial flows—banks, regulators, prosecutors—are generally cooperating. (See financial crimes section.)

E. SOCIAL DYNAMICS

The lack of access to trade finance credit is a serious issue in Guatemala and receives a good deal of attention at all levels. The Government, banks, smaller exporters, and potential traders are all interested and focused on the need for change.

The issue of money laundering too is one that receives attention at many levels. The Government has been working to improve its capacity to deal with the problem through the passage of legislation and establishment of the appropriate institutions and processes. The private sector, in turn, has been responsive to implementing its responsibilities, such as know-your-customer regulations.

F. RECOMMENDATIONS

Improve access to credit for small and medium-sized importers and exporters. A more vibrant trade system will provide small and medium-sized traders with the ability to finance their export and import activities. The current system requires them to self-finance their activities, which in turn imposes a significant cost on their respective product or service. This added cost makes their product less competitive in export markets and the domestic market as well. Trade and financial institutions must develop strategies to more effectively provide credit to reliable firms. These strategies should include such activities as developing the establishment of associations among producers for pooling of resources and risks, establishing a guarantee fund that provides credit to a group of exporters for fewer guarantees than currently demanded, increasing producers' knowledge of bank instruments.

XV. SUPPORTING INFRASTRUCTURE

A. INTRODUCTION

Guatemala is the most northern and western of the CAFTA states, bordered by Mexico to the northwest, by Belize to the east, on the southeast by Honduras and El Salvador. It is bordered to the south by the Pacific Ocean and to the north by the Atlantic Ocean. Its total land area of 42,042 square miles makes it approximately the size of Connecticut and the third largest nation in the region, after Nicaragua and Honduras. The nation extends approximately 270 miles from east to west and 280 miles to the north to south at its widest points.¹²³

Overall, Guatemala's portfolio of trade infrastructure sufficiently meets the existing demands of the marketplace. Individual infrastructure components are generally well maintained and in reasonably good condition. Both recent improvements and contemplated transportation projects employ industry best practices in design and construction. However, broad differences in capabilities and service levels exist between the various components, as noted by the overall findings, according to the following definitions:

- ♦ **Highly Competitive.** Deployed infrastructure systems exhibit high quality in both fixed assets and operations, are uniformly deployed nationally, and have significant opportunities for growth.
- ♦ **Competitive.** Deployed infrastructure systems adequately meet market demands, may exhibit potential inconsistencies nationally, and have opportunities to maintain service levels over time through thoughtful capital planning and implementation.
- ♦ **Less Competitive.** Deployed infrastructure systems currently suffer from problems inhibiting efficient trade.
- ♦ **Developing.** Infrastructure systems have only recently been deployed, providing very limited existing service capabilities and consequently are immeasurable.

Table 3 presents the following findings that indicate that Guatemala has experienced consistent success in implementing its infrastructure investment program. The country does not suffer from significant bottlenecks or service gaps from a national perspective. However, initiatives targeted to create a seamless infrastructure environment is required going forward.

¹²³ See: <http://www.larutamaya.net/history/facts.html>

Table 3. Summary Infrastructure Assessment Findings

Infrastructure Component	Overall Assessment	Key Positives	Key Negatives
Roadways	Competitive	<ul style="list-style-type: none"> Recent development of high capacity 4-lane divided highways south of Guatemala City Successful public-private partnership initiatives Sound pavement systems with limited wearing surface deterioration Good geometric design with appropriate escapes 	<ul style="list-style-type: none"> Lack of bypass routes around densely populated areas Dense traffic conditions within city limits Under-capacity overpasses and bridge structures Limited capacity, 2-lane road to Caribbean Coast Private sector mass transit users—system misuse System security/safety
Seaports	Competitive	<ul style="list-style-type: none"> Successful public-private partnership initiatives Availability of modern handling equipment Recent ISPS certification—strict access control West coast landside access 	<ul style="list-style-type: none"> East coast capacity issues East coast landside access Variable port management models Strength of labor unions
Airports	Less competitive	<ul style="list-style-type: none"> Proximity to city Multiple international airport facilities Facility security measures 	<ul style="list-style-type: none"> Limited runway/terminal capacity Limited expansion capability Mature facilities Publicly administered facility Capital budgeting constraints National airline operating standards nonexistent
Railroads	Developing	<ul style="list-style-type: none"> Recent privatization of railroad infrastructure Recent deployment of discrete rail services Existing rail access corridors to port infrastructure 	<ul style="list-style-type: none"> Narrow-gauge system Overall system requires upgrades and repairs Mature equipment deployed Limited services
Border crossings	Less competitive	<ul style="list-style-type: none"> Existing dedicated facilities Centralized national Customs inspection facilities IT coordination with neighbors 	<ul style="list-style-type: none"> Lack of vehicle queuing facilities—traffic congestion Customs Union initiatives have precluded investment IT system reliability issues
Electrical	Competitive	<ul style="list-style-type: none"> Multiple power-generation sources Private sector participation 	<ul style="list-style-type: none"> Perceived monopolistic power transmission environment
Telecom/IT	Competitive	<ul style="list-style-type: none"> Open & competitive market Advanced technology 	<ul style="list-style-type: none"> Perceived negative impacts of CAFTA on telecommunications market

Specifically, Guatemala should focus its efforts on the following areas.

a. Roadways

Guatemala's roadway infrastructure has seen significant improvement in recent years. This is evidenced through recent development of four-lane divided highways and private toll roads located toward the south of Guatemala City. Overall, Guatemala's primary roadway system is in good condition, providing good access to major destinations. However, the nation's roadway network suffers from inconsistent capacity development along heavily traveled ways. Of particular importance is the nation's highway capacity between Guatemala City and the Caribbean coastal ports of Barrios and Santo Tomas, which is currently a two-lane road traversing mountainous terrain, limiting free flow of goods. This constraint increases transit times with corresponding costs negatively affecting the nation's competitive position. Second, Guatemala must consider development of highway bypass corridors around major population

centers. Currently, the nation's road network requires most all-waterborne traffic to transit Guatemala City, detrimentally increasing traffic congestion within the population center. Development of bypass corridors will greatly improve overall transit times around population centers, reducing costs, improving reliability, creating opportunities for industry development along the corridor, and improving the attractiveness of the nation as an industrial trading center. Third, Guatemala's portfolio of overpasses and bridge structures suffers from bearing capacity constraints, limiting passage of high-capacity truckloads. Improvement in this area along key freight corridors will reduce transit costs and truck traffic counts, saving labor requirements. Lastly, Guatemala must proactively implement highway security measures to eliminate loss of valuable cargo to highway piracy. Near-term measures should include eliminating any bottlenecks and vehicle slowdown areas and may include developing strategically positioned secure zones for vehicle parking and increased security patrols along the nation's corridors.

b. Seaports

Guatemala has experienced recent success in privatization initiatives at the nation's seaports. These initiatives have enabled the nation to deploy efficient cargo-handling equipment, providing an attractive cost-savings measure for ocean carriers. In addition, the nation's facilities operate within a highly secure environment, recently implemented and International Ship and Port Security (ISPS) certified. Puerto Quetzal represents a model example for port operations within the region. However, the nation's port infrastructure suffers from key deficiencies along the Atlantic Coast. Landside access is a key improvement area, particularly along the primary highway corridor to Guatemala City and the local road networks providing direct access to the two ports. In addition, the Atlantic facilities are approaching the limits of their operational capacities, necessitating expansion and modernization. Consideration and development of port terminals dedicated to specific cargo types would greatly improve the service characteristics of the nation's port infrastructure, creating attractiveness for shippers and carriers. Lastly, the nation's primary ports operate under distinctly different organizational structures, ranging from Government-owned and -operated facilities to fully private port authorities. These differing structures create inconsistencies in service characteristics among the facilities. Efforts to improve overall service should include implementing organizational characteristics to model industry best practices providing opportunities to uniformly meet the expectations of the nation's customers.

c. Airports

Guatemala's airport infrastructure is reaching the end of its useful life, particularly at La Aurora International Airport, the nation's predominant air traffic gateway. The facility is best described as mature, having significant constraints to accommodate larger aircraft and with little opportunity for growth because of its proximity to Guatemala City and corresponding land constraints. Guatemala has and should continue to consider developing a modern airport facility located outside the city.

d. Railroads

Guatemala's railroad infrastructure, although a historical component of the nation's transportation network, is currently in its infancy. The facilities were recently privatized and are currently operating at a very small scale. Considering that the economics of rail transportation are best realized through length of haul, Guatemala should evaluate its rail infrastructure in

conjunction with that of its neighboring nations to realize its full potential. Support in this area is key to providing a regional transportation program that would benefit both Guatemala and the region as a whole.

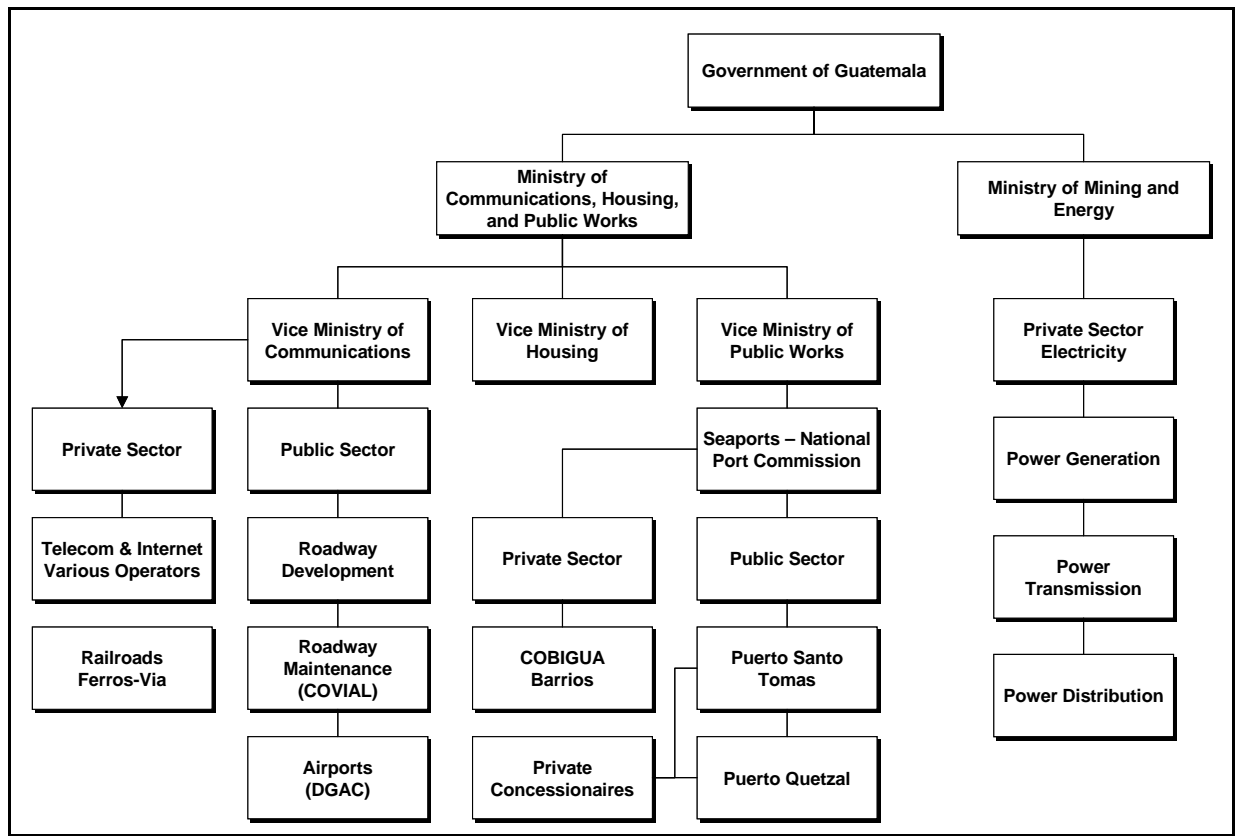
e. Border Crossings

Guatemala's border crossings have seen little to no investment in recent years because the concept of Customs Union incorporates that customs facilities at border crossings within the region will eventually disappear. Consequently, the facilities are falling into disrepair and suffer from bottlenecks due to traffic congestion. Currently, the facilities are not equipped with sufficient truck queuing facilities to accommodate both in-transit and trouble vehicles. Near-term development of sufficient parking facilities located proximate to the border crossings and enforcement of parking regulations would greatly improve overall service characteristics, reducing downtime while providing cost savings to compliant trucking companies. In addition, border crossings suffer from unreliable computerized communications equipment, which form the backbone of cross-border data transfer to and from neighboring countries. Improvement in this area will improve overall reliability and service levels at the border crossings.

B. LEGAL FRAMEWORK

Transportation infrastructure planning, coordination, supervision, implementation, and maintenance are generally the responsibility of the Ministry of Communications, Infrastructure & Housing, a part of the Guatemalan Government. The Ministry consists of three subministries, which include the Vice Minister of Communications, the Vice Minister of Public Works, and the Vice Minister of Housing. Each Vice Ministry is further subdivided through public, private, or public-private entities charged with implementation and operation of the nation's trade infrastructure. The Ministry of Mining & Energy has regulatory authority for electricity generation, transmission, and distribution. Figure 1 provides an organizational chart outlining the institutional relationships.

Figure 1. Guatemala Infrastructure Organizational Chart



The Vice Ministry of Communications has the authority for implementation of roadway improvement projects, right-of-way maintenance, and development and operation of the nation's airports. Roadway development is an inherent responsibility of the Vice Ministry; roadway maintenance is administered through COVIAL, a supporting public institution; and airport development and operations are administered through the *Direcciones General de Aviación Civil* (DGAC), a second supporting public institution.

The Vice Ministry of Communications regulates private sector involvement in telecommunications, Internet, and railroad implementation. For these services, regulatory authority typically involves approving applications to provide these services, with little or no direct Government involvement.

The Vice Ministry of Public Works administers the nation's seaports through public and private port authorities. Public port authorities are semiautonomous agencies responding to a board of directors typically consisting of public and private members. The private sector port authority administering Puerto Barrios enjoys further autonomy. Port authorities are represented at the government level through the National Port Commission.

The Ministry of Mining and Energy regulates electrical power generation, transmission, and distribution through private sector concessions. Electricity operates within an open and free

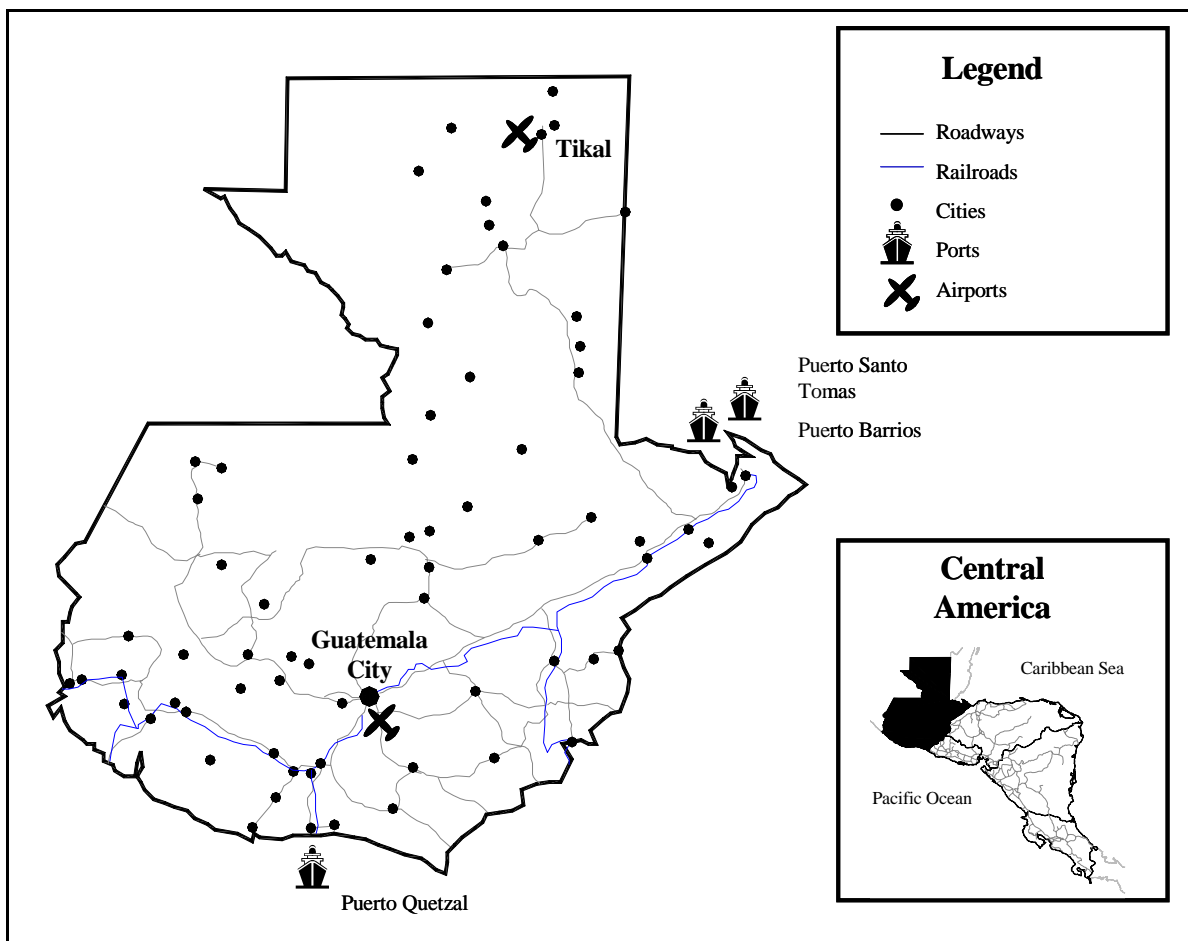
marketplace. Typically, government regulation involves approving applications to offer services, with little direct Government involvement.

Government operating institutions are required to implement infrastructure operations and improvements according to approved annual budgets. This is also true, to a lesser extent, for the port authorities, which enjoy more autonomy in operations but require approval for major investment projects.

C. IMPLEMENTING INSTITUTIONS

The following sections provide an overview of each of Guatemala's major trade infrastructure components. The discussion provides a brief description of major facilities, overall operations, and recommendations for improvement as appropriate. For reference, Figure 2 provides a regional map of Guatemala.

Figure 2. Guatemala Country Map (N.T.S.)



1. Roadway Networks

Guatemala's roadway system provides the backbone for overland transportation of internationally traded goods as well as local transportation. Guatemala's roadway network

primarily consists of two-lane, flexible pavement highways with recent development of high-capacity four-lane corridors located south of Guatemala City. As of June 2004, the nation's network consists of approximately 14,000 kilometers of primary and rural roads.¹²⁴

Approximately 5,000 kilometers are paved; the rest are unpaved. Paved roads are provided along all principal routes between major population centers and municipalities. Primary two-lane, paved roadways are narrow but are designed with shoulder capacity to accommodate 50 to 75 percent of a vehicle's wheelbase. Mountainous roadways have the potential for steep grades and sharp horizontal and vertical curves, limiting sight distances and slowing traffic flow. Estimated levels of service are below B during nonpeak periods on two-lane roads and at B or better on four-lane divided roads during nonpeak periods. The system is considered to provide competitive service levels within the region due to its overall condition; however, it lacks capacity along several principal routes and lacks bypass corridors at major population centers.

Guatemala has taken regional initiatives to improve the region's transportation systems through recent development of a regional transportation improvement plan, entitled the Central American Transportation Study. This initiative was undertaken by SIECA, centralized within Guatemala, working with neighboring countries and considers the five CAFTA countries as a unit with 10,000 kilometers of regional highways identified as key corridors. The focus of this improvement plan includes developing roadways that meet the design criteria of international best practices and providing safe and efficient free flow of traffic throughout the region. Guatemala has implemented initial phases of this plan; however, administration priorities of the recent past have diminished continued execution of the plan.

To facilitate trade, Guatemala's roadway network will require targeted improvements, many of which have been identified through the SIECA study. Key improvements and recommendations include:

- ♦ Widening and alignment improvements along the principal corridor from Guatemala City to the Atlantic Coast. This existing roadway consists of a single two-lane highway traversing mountainous terrain. The roadway is heavily traveled by trucks and privately owned vehicles and is subject to frequent traffic slowdowns. It is recommended that this corridor be upgraded to a four-lane divided highway to reduce traffic congestion, improve safety, and reduce transit times. Improving this facility will add to the attractiveness of the existing Atlantic ports, increasing demand, and will provide a further basis for seaport development along the Atlantic.
- ♦ Developing bypass corridors around major population centers. Guatemala's existing roadway network provides point-to-point services between municipalities and production/consumption zones. Consequently, truck traffic is required to transit local roads en route to its ultimate destination. This circumstance is most pronounced within the city limits of Guatemala City, the nation's predominant population center. Referring to Exhibit 2, it can be seen that the nation's road network centers around Guatemala City as the major destination, with little or no escape routes available. Consequently, all truck traffic must transit Guatemala City, putting serious constraints on efficient transportation. Recently enacted policy prohibits truck traffic from entering the city during peak

¹²⁴ See CIA World Factbook at: <http://www.cia.gov/cia/publications/factbook/geos/gt.html#Trans>.

operating hours (i.e., daytime). This policy forces trucking companies to operate only during nonpeak hours, creating unintended consequences, such as inefficient utilization of freight corridors throughout the day, high peak demands, and traffic congestion at points of origin (seaports).

- ♦ Upgrading and improving bridges and overpasses along principal freight corridors. Many of Guatemala's existing highway bridges are under capacity with regard to existing highway loads. Approximately 1,200 bridges have been identified as requiring load-bearing analyses, according to SIECA. Many of these bridges were designed and constructed before 1958, when loading limits were approximately 25 tons. Today, load limits are typically more than 40 tons. Whereas funding to improve the entire portfolio of Guatemala's bridges would be difficult to acquire, targeted improvements along major freight corridors are highly recommended. Improvements would enable the nation to realize the benefits of high-capacity truckloads, reducing traffic congestion and labor costs.
- ♦ Implementing highway security improvements. Guatemala's highway network suffers from security problems related to freight piracy. Interviews with shippers and carriers indicate frequent losses of high-value goods are anticipated throughout the nation. Consequently, many carriers operate in convoys with armed security guards alongside. This reality affects cost-effectiveness of transportation and increases peak demand frequencies, reducing the overall efficiency of traffic flow. This has a tremendous negative impact on the nation's roadway competitiveness from the standpoints of reliability and costs. Although not necessarily a physical infrastructure improvement requirement, a key component toward improvement involves eliminating slowdown areas and traffic congestion points. Along with societal change, detailed analysis of traffic flow conditions to maintain the speed of transit is recommended to assist in alleviating this problem. Additionally, the nation may consider developing strategically located secure zones alongside major corridors for safe vehicle stoppage.

2. Seaports

Guatemala has five seaport facilities. Three facilities operate as the primary commercial seaports, handling general cargo, containers, and liquid and dry bulk cargoes. Each of these facilities operates as an independent port authority, responding to a board of directors made up of both representatives from Government and private sectors. These organizational structures provide for a certain amount of autonomy in both operations and capital improvement implementation. Each of the Port Authorities is represented at the governmental level through the National Port Commission, providing representation to the Vice Ministry of Public Works, under the Ministry of Communications, Infrastructure, and Housing. Two facilities, Puerto Barrios and Puerto Santo Tomas de Castilla, are located along the Atlantic Coast, while one facility, Puerto Quetzal is located along the Pacific Coast. Port authority responsibilities exclude Customs, Immigration, and Agricultural inspection services.

Puerto Quetzal is administered by Empresa Portuaria Quetzal and operates the facility as a landlord port, providing common user fixed assets and limited maritime services for customers with no current contracts with private sector operators. Most landside services are provided

through private sector concession contracts. As of June 2004, the port operates under 27 concession contracts. The facility was recently certified as exceeding the ISPS codes, and observations indicate that landside security procedures could be considered high.

Cobigua, as a private port authority through a private concession contract, administers Puerto Barrios. The facility has little relationship with the Guatemalan Government and consequently enjoys autonomy to implement improvements and make investments as deemed appropriate. Puerto Barrios is the primary refrigerated container facility providing transfer services for Guatemala's largest fresh fruit producers. The facility is accessed via local collector roads through the town of Barrios. Road access is a key improvement opportunity for Puerto Barrios.

The National Port of Santo Tomas de Castilla is Guatemala's only state-run operating port facility. The facility enjoys similar autonomy with regard to concession agreements and capital planning; however, predominant port operations are currently under state control. The facility is comparatively overstaffed compared with Puerto Barrios and Puerto Quetzal. It is recommended that a detailed organizational study be conducted to streamline labor requirements and corresponding operating costs.

Table 4 provides a breakdown of key infrastructure elements at each of the three major port facilities:

Table 4. Seaport Comparison Matrix

Port Facility			
Component	Puerto Quetzal	Puerto Barrios	Puerto Santo Tomas de Castilla
Location	Pacific Coast	Atlantic Coast	Caribbean Coast
Operation	Landlord port authority private sector operators	Private port authority Private sector terminal operations	Public operating port authority
Main wharf	810 m—marginal 3 additional private terminals	290 m x 11 m finger pier	914 m—marginal
Water depth	11.1 m	8 m	11.2 m
Number of berths	4 + 3 dedicated terminals	3	6
Cargoes handled	<ul style="list-style-type: none"> • Containers • Liquid bulk • Dry bulk • General cargo 	<ul style="list-style-type: none"> • Refrigerated containers • Liquid bulk 	<ul style="list-style-type: none"> • Containers • Liquid bulk • Dry bulk • General cargo
Dedicated wharf equipment	<ul style="list-style-type: none"> • Mobile harbor cranes • Dry bulk evacuators • Conveyance systems 	<ul style="list-style-type: none"> • Containers—none • Liquid bulk—pipelines 	<ul style="list-style-type: none"> • Mobile harbor cranes
Container yard layout	FLT/top pick	FLT/top pick	Straddle carrier
Expansion potential	High	Low	Moderate
Comments	Excellent access, both landside and waterside.	Remnants of original pier destroyed by earthquake impede vessel navigation	Landside access constraints—traffic congestion
Overall assessment	Highly competitive	Competitive	Competitive

To facilitate trade, Guatemala's seaports would benefit from the following key improvements and recommendations:

- ♦ Consider development of a modern, purpose-built container handling facility along the Atlantic Coast. Common to most international port facilities, the existing port terminals of Barrios and Santo Tomas were originally designed as general cargo terminals and subsequently adapted to accommodate containerized cargoes. The facilities consequently suffer from impediments associated with inefficiencies prevalent from this adaptation inhibiting competitiveness from the standpoint of service. The facilities are also reaching the limits of their operational capacity. Going forward, Guatemala would be required to expand the port facilities to accommodate growth in trade. With that said, Guatemala should consider the potential for competitive advantages through development of a container terminal designed for efficiency in container handling and vessel turnaround times. Development of such a facility along the Atlantic Coast would be a highly attractive asset for carriers, providing opportunities for increased service levels and cost savings associated with scale. The existing facilities would remain of value through growth in traditional noncontainerized cargoes.
- ♦ Provide landside access improvements for Atlantic port facilities. The ports of Santo Tomas and Barrios are highly dependent on the serviceability of a single two-lane corridor to Guatemala City. This facility, discussed earlier, has the potential to affect the reliability of service to the ports. Furthermore, the port facilities are located within the city limits of Barrios and suffer from local traffic congestion and impediments affecting efficient inland transportation operations. Development of a dedicated facility elsewhere in the region would alleviate the need for landside improvements; however, in the near term, each of the facilities would benefit greatly from the standpoint of service and cost through landside access improvements.
- ♦ Consider privatization of Puerto Santo Tomas de Castilla to improve service and costs. Puerto Santo Tomas is the nation's only Government-run port facility. Consequently, the facility suffers from the typical inefficiencies seen by Government-run entities. Privatization of the facility operations similar to that of Puerto Quetzal would enable the nation to provide cost-effective services for its customers, improving its competitive position.

3. Airports

Guatemala currently operates two qualified international airports. La Aurora International Airport, located within Guatemala City, is the country's largest international airport, equipped with full passenger and freight facilities, including warehousing and refrigerated storage. Tikal International Airport is Guatemala's second international facility dedicated for tourism traffic. Other airport facilities within Guatemala are utilized primarily for domestic passenger traffic but are being developed as appropriate to accommodate international traffic. All airport facilities are currently owned and operated by the Government. Guatemala's airport infrastructure, although marginally adequate to accommodate today's traffic, will require substantial investment to facilitate both international passengers and air cargo. The nation's airport infrastructure is currently considered less competitive, primarily due to capacity constraints, which affect service characteristics.

To facilitate trade, Guatemala's airport infrastructure will need significant improvements, including assessment of alternatives to continued investment at existing facilities. Key improvements and recommendations include the following:

- ◆ Consideration and development of a new, modern airport facility located outside Guatemala City city limits. La Aurora International Airport, the nation's primary international airport facility, is reaching the limits of its peak operating capacity with little opportunity for expansion outside the limits of its existing footprint. The facility is equipped with a single runway of 2,980 feet, capable of receiving Boeing 747s and C-5 Galaxy aircraft. However, air operations are limited because of the proximity of the taxiway parallel to the runway centerline, often prohibiting simultaneous air and aircraft taxi operations. The main terminal, consisting of eight passenger gates, will require expansion to accommodate any significant increases in peak passenger air traffic. The terminal also will require landside access improvements to facilitate both passenger and freight arrivals and departures. Although significant operational capacity exists during nonpeak periods, the realities of air transportation market demands place airports in a position of little influence to maximize off-peak operating hours. Consequently, airports must respond to the market through development of capacity to accommodate peak demands. Air cargo traffic could utilize airside infrastructure during nonpeak operating hours; however, these services are also subject to time constraints with regard to services. Considering the lack of expansion potential and inability to improve the airside geometry, Guatemala should evaluate the potential for development of a new international airport terminal to enable continued growth in this important trade sector.
- ◆ Development and enforcement of minimum standard operating procedures for domestic aircraft operators. Guatemala's airport facilities provide services to both major international air carriers as well as smaller domestic carriers calling on local airports and aerodromes. Currently, little standardization exists for domestic carriers to operate at General Direction of Civil Aeronautics (DGAC) facilities. Consequently, inconsistent reliability and service levels are prevalent, affecting overall airport operations. It is recommended that minimum service standards be identified and enforced for domestic carriers to improve overall airport operations.
- ◆ Deployment of technology-based communications between airport services, customs, immigration, etc., is another area that is recommended for improvement. Currently, interagency communications systems are antiquated or nonexistent. No plans for technology improvements are currently under way.
- ◆ Consideration of private-sector involvement in airport investment and operations. Each of Guatemala's airport facilities is owned and operated by the Government and subject to annual approvals of operating and investment budgets at the ministry level. This relationship puts substantial fiscal limitations on airport operations and investment in long-term development projects. Considering the potential costs associated with development of a new airport terminal, partnering with the private sector may provide an opportunity to realize its implementation.

4. Railways

Guatemala's railway network encompasses approximately 500 miles of narrow-gauge right-of-way connecting the Atlantic and Pacific Coasts with Mexico and El Salvador. The railway is currently operated under a 50-year concession contract with FerroVias Guatemala, which is restoring the lines to operating condition. The concession also includes rail port facilities and the right to develop alternative uses for the right-of-way for infrastructure improvements such as pipelines and fiber optics. Currently, approximately 200 miles of existing lines are in operation, with a total of 350 miles available depending on market demands.¹²⁵ The railroad currently carries bulk, neobulk, and containers, utilizing a mix of antique locomotive power and road equipment. Although not necessarily serving high-value time-sensitive cargoes, the existing rail service would require significant upgrades to meet a high level of service demands.

To facilitate trade, Guatemala's railroad network would benefit from the following key improvements and recommendations:

- ♦ Recognize the economic benefits of rail service through length of haul and consolidated cargo characteristics. Rail services realize economic value across long distances, typically 500 miles or more. Services across long distances provide a competitive edge over trucking services. Considering the available lengths of haul within Guatemala, it appears that rail service will continue to be at a competitive disadvantage despite efforts to develop its services. To improve competitiveness, regional strategic thinking is required. Guatemala should work with its neighboring countries and the United States in development of a regional intermodal rail strategic plan to realize the full potential benefits afforded to rail services.
- ♦ Deploy standard-gauge infrastructure and equipment. The current rail corridors are designed and constructed as a narrow-gauge system. The available system inhibits fluid connectivity with U.S. and Mexican rail services. Development of a regional standard compliant with international practices would enable deployment of a comprehensive international rail service with potential strategic advantages for the U.S. marketplace. Detailed study is required before full understanding of the potential benefits.

5. Border Crossings

Guatemala provides fixed administration and vehicle inspection facilities at all its international border crossings. These facilities are designed to house customs, immigration, and agriculture officials while providing vehicle and pedestrian travel ways. Historically, frequent vehicle inspections were conducted at each of the border crossings; however, customs procedures have been modified to centralize vehicle inspections at an inland location, easing the individual operational demands on each of the nation's border crossings. In many cases, inspection facilities remain at the border crossings but see little use, typically for Agriculture only.

Guatemala, in cooperation with other Central American nations, has been formulating policy for development of the regional Customs Union. Successful implementation of this endeavor will eliminate the need for formalized border-crossing facilities. Consequently, little or no investment

¹²⁵ See, http://www.rrdc.com/op_guatemala.html, last visited September 15, 2005.

in facilities has been realized in the recent past. This reality has put capacity constraints on the nation's border-crossing facilities. Specifically, insufficient area is provided for vehicle queuing and trouble processing. This results in heavy traffic congestion at the border-crossing approaches, with little or no passageways for free flow.

Although the future intent is to remove formalized border crossings, near-term improvements are required to facilitate trade. The following improvements are recommended in the interim:

- ♦ Enact policy and enforce off-property parking requirements for noncompliant vehicles. The border crossings originally were designed for and intended to allow traffic flows with minimum delays. Operationally, this assumes an applicant's full compliance with all administrative requirements. However, high volumes of trouble vehicles are a common occurrence, seriously impeding traffic flows. At some border crossings, privately held parking facilities are available but go unused because of cost considerations. Parking alongside the roadway is free. Enacting policy against roadside parking and enforcement through levying fines in excess of available off-site parking rates would give applicants the incentive to either arrive fully compliant or utilize appropriate parking facilities. By freeing up throughways, Guatemala would improve the competitiveness of its border crossings from the perspectives of service and reliability.
- ♦ Develop vehicle queuing and trouble parking facilities proximate to existing facilities. At locations where limited public and private parking facilities are available, development of parking facilities is recommended to support the above recommendation.
- ♦ Improve reliability of computerized communications equipment. Guatemala's border-crossing facilities are electronically connected to those of its neighboring countries. This technological advancement is a major plus; however, reports indicate low reliability exists with existing connections. Efforts to improve the reliability of electronic connections at the border crossings would further enhance overall service and reliability.

6. Telecommunications and Internet

Guatemala's telecommunications and Internet services operate within a free and open competitive marketplace. Consequently, the nation benefits from deployment of advanced fixed line and wireless technologies available from leading providers. Services are available throughout the metropolitan areas of the country.

The largest service provider is Telgua, a Mexico-based company selected to operate the former state-owned telecommunications company. Currently, Telgua maintains approximately 80 percent of the nation's fixed lines. Competing service providers have the ability to market to all Guatemalan users but must either supply direct lines to end users or lease bandwidth from Telgua.

Four service providers currently provide wireless services, with a fifth entering the market in the near future. Services include high-quality digital/GSM throughout the country. Offers include bundled packages to include time discounts and Internet connectivity. The services are scalable to meet public demand.

It is important to note that, Guatemalan services typically are based on negotiated rates. On the basis of interviews with service providers, these rate negotiations provide opportunities to maintain competitive rates through bundled packages. Service providers believe implementation of CAFTA's requirements to unbundled packages will have effects on competition.

Recommendations include continued support of the competitive market environment.

D. SUPPORTING INSTITUTIONS

1. Trucking Companies

Private trucking companies operate throughout the country with significant capacity provided at seaport and inland distribution terminals. Trucking companies provide drayage and inland distribution services for all international trade. The quantity and quality of trucking companies available within Guatemala are considered adequate and scalable to facilitate trade.

2. Airlines

La Aurora International Airport is served by most major airlines currently providing service to accommodate more than 1.6 million annual passengers. Major carriers also provide air cargo service. Air service is considered adequate and scalable to facilitate trade; however, air terminal capacity is considered to be an issue during peak operating hours in the near term. Carrier service to other domestic airports is a minor segment of overall air transportation with available capacity to accommodate growth.

3. Ocean Carriers

More than 20 carriers calling on regular intervals serve Guatemala's seaports. Services include containerized cargo, breakbulk, neobulk, and liquid bulk cargoes. Private sector companies provide vessel stevedoring and landside transportation. Sufficient supporting institutions participate in the maritime activities of Guatemala.

4. Railways

Railway service is currently provided for discrete customers serving the fresh fruit and dry bulk industries. Railway service is considered adequate to accommodate these discrete needs; however, significant infrastructure upgrades and corresponding rail service increases would be required to utilize the nation's rail network.

5. Power Distribution

Power distribution from private sector generating plants is provided via three national concessions and two private companies. The networks are segmented according to the east, west, and northern regions of the country. The east and west regions make up most of the distribution network. Although service is provided via two distinct concessions, it has been reported that each concessionaire is under the same parent company, raising the question of monopolistic activities.

6. Telecommunications and Internet Providers

Landline and wireless telecommunications and Internet services are provided through private sector concessions in an open-market, competitive environment. This environment provides users with cost-effective and reliable services from which to choose.

E. SOCIAL DYNAMICS

Guatemala's transportation infrastructure has benefited from successful implementation of public-private ventures. Although areas of the nation's transportation infrastructure are considered quite good, other areas will require expansion and upgrades to facilitate trade. Specifically, a detailed corridor analysis should be conducted to evaluate trade flows from the Caribbean Coast. On the basis of this analysis, consideration for highway upgrades from the Caribbean Coast should be analyzed with respect to implementation of a national rail intermodal system. In addition, seaports located along the Caribbean Coast should be evaluated as a system of facilities, and development of a dedicated purpose-built container facility to facilitate future trade should be considered. The existing facilities should be evaluated for continued use as dedicated cargo facilities as appropriate. Lastly, the nation's airports will require expansion and modernization to further facilitate trade. This includes the potential for development of a new international airport elsewhere within the region of Guatemala City.

ATTACHMENT 1: COMPILATION OF RECOMMENDATIONS

COMPANY LAW

No.	Type	Recommendation	Priority	Duration
1.	Training/Education Campaign	Corporate governance training for business people, lawyers, judges and governmental officials and promotional campaign on corporate governance for the society at large.	Medium	Long term
2.	Legal Reform	Legal reform in Commercial Law to incorporate world class corporate governance principles, protection of minority shareholders and exceptions when the legal personality of companies could be disregarded.	High	Medium term
3.	Legal Reform	Notaries' role should be regulated and they should be made accountable through regulatory mechanisms.	Medium	Long term
4.	Institutional Strengthening/ Strategy Development	Reform of the Commercial Registry to make it totally automated and improve the procedures, along with introduction of strategic planning methodology and management tools.	High	Long term
5.	Analysis/Strategy Development	Diagnostic of the micro and small business situation and identification and removal of obstacles that affect the growth of that kind of business. Incentives to business formalization should be created.	Medium	Long term

CONTRACTS

No.	Type	Recommendation	Priority	Duration
1.	Legal Reform	Legislation is needed to clearly establish the transactions to be notarized, set regulatory standards and create a supervisory body.	Medium	Long term
2.	Judicial Reform	Reform of court system to increase the number of courts and introduce technology, managerial techniques and public automated access to court information to make current procedures more efficient.	High	Medium term

No.	Type	Recommendation	Priority	Duration
3.	Institutional Strengthening/Legal Reform	Arbitration centers should be created and promoted. Use of foreign language and appointment of foreign arbitrators should be allowed to handle international business transaction disputes. Legal changes should be implemented to reduce the use of <i>amparo</i> in arbitration cases.	Medium	Long term
4.	Legal Education	Program on international business transactions, economic analysis of law, foreign legal doctrine and jurisprudence and electronic arrangements for contract lawyers and customized for judges and arbitrators.	High	Long term

REAL PROPERTY

No.	Type	Recommendation	Priority	Duration
1.	Institutional Strengthening	The Real Property Registry needs to be decentralized and automated and managerial techniques and strategic planning need to be introduced as part of personnel training. A cadastre office is necessary and its information should be consistent with that of the Real Property Registry.	High	Long term
2.	Consensus Building	A consensus should be built around the housing deficit problem and a private-public sector cooperative action plan should be undertaken to help solve the problem.	High	Medium term
3.	Judicial Reform	Courts need to be reformed to make procedures more simplified and transparent.	High	Long term
4.	Assessment	Guatemala requires a real property tax assessment and subsequently a real property tax reform.	Medium	Long term
5.	Legal Reform	Legal reform is needed to increase the standards of notaries and real estate brokers.	Medium	Long term
6.	Legal Reform/International Cooperation	Real estate brokers should be allowed to promote their services in the United States only in connection with Guatemalan real estate, so that Guatemalan immigrants could invest their remittances directly in housing in their homeland.	Medium	Long term

COLLATERAL

No.	Type	Recommendation	Priority	Duration
1.	Legal Reform	Adoption and implementation of a modern legal framework on secured transactions is needed (e.g. the Organization of American States Model Law on Secured Transactions) to facilitate access to credit at reasonable interest rates for micro, small and medium-sized business and foreign investors.	High	Long term
2.	Legal Reform	Conduct a comparison of Guatemalan secured transactions legal framework against the Organization of American States (OAS) Model Law requirement to identify gaps and recommend changes in Guatemalan framework to be consistent with the Model Law.	High	Short term
3.	Training	Train judicial and administrative officials in modern systems, procedures, and international standards of secured transactions.	High	Medium term
4.	Public/Private Partnership	Create a public/private cooperative effort in order to facilitate an integrated and transparent system of managing security interests.	High	Long term
5.	Legal/Policy Reform	Assist in drafting regulatory framework, developing organizational structure, and identifying financing options for a regional electronic commercial registry, and formulate a strategy for how it should be implemented in Guatemala.	Medium	Long term
6.	Legal Implementation Reform	Examine current extra-judicial foreclosure procedures and make recommendations to strengthen and develop new implementation processes.	Medium	Long term

COMMERCIAL DISPUTE RESOLUTION

No.	Type	Recommendation	Priority	Duration
1.	Analysis/Strategy Development	Explore and implement reforms to limit reported abuses associated with <i>amparo</i> , the use of which currently allows for almost unfettered frivolous appeals to the Supreme Court.	High	Medium term
2.	Legal Reform	Revive efforts to enact a new code of civil procedure, <i>inter alia</i> to bring about greater use of oral proceedings.	High	Medium term
3.	Institutional Reform	Encourage greater use of alternate dispute mechanisms. This would have the additional effect of promoting competition in ADR services, which would likely have the added benefit of reducing the fees associated with the process.	High	Long term

BANKRUPTCY

No.	Type	Recommendation	Priority	Duration
1.	Analysis/ Training	<p>Pursue modernization of the bankruptcy law and harmonization with that of trading partners in the region and beyond, taking into consideration the World Bank's principles and best practices of insolvency regulation. As part of this, other recommendations should be pursued, including:</p> <ul style="list-style-type: none"> ▪ Conduct a comparison of Guatemalan laws and implementation on insolvency with others in the region and to international standards, and identify areas that need to be modernized and harmonized. Recommend changes in Guatemalan system and build consensus for change around this assessment. ▪ Train legal professionals and judicial and administrative officials in modern systems, procedures, and international standards of insolvency. 	High	Long term
			High	Short term
			High	Long term
2.	Legal/Policy Reform	<p>Seek modernization of the legal framework for electronic commerce (i.e., electronic documents signatures), which is part of the modern international trading system. As part of this, other recommendations should be pursued, including:</p> <ul style="list-style-type: none"> ▪ Identify specific aspects in Guatemalan commercial legal framework that need to be reformed to allow for a modernized framework for electronic commerce and signatures. ▪ Work more closely with private sector associations to improve and broaden advocacy efforts on this issue: build consensus, train Small and Medium Enterprises (SMEs) on benefits, conduct education campaigns on benefits targeting the public and government. 	High	Long term
			High	Short term
			High	Long term

COMPETITION

No.	Type	Recommendation	Priority	Duration
1.	Strategy Development	Pursue a dual strategy of deregulation and introduction of a competition law and a competition agency.	High	Long term

No.	Type	Recommendation	Priority	Duration
2.	Institutional Strengthening	Allocate sufficient resources to the Dirección de Promoción de la Competencia (DPC) of the Ministry of Economy, so that they can properly conduct sectoral or industry studies to examine how lack of competition affects the competitiveness of Guatemala. The DPC can then highlight specific examples of anticompetitive practices that demonstrate the benefits that could be realized with adoption and enforcement of a competition law. Provide resources to the DPC so that it may, together with the private sector and NGOs, promote passage and implementation of a competition law through advocacy and educational efforts with decision-makers.	High	Short term
3.	Institutional Strengthening	Work with the Ministry of Economy and other stakeholders to allow the DPC additional autonomy, in particular as it relates to external communications.	Medium	Long term
4.	Legal Reform	Engage the drafters of the two current versions of the competition law in dialogue, with a view towards building consensus around a single draft. In revising the drafts, consider the Guatemalan experience with different types of institutions, including the Comisión Nacional de Energía, the Superintendencia de Telecomunicaciones, and the Dirección General de Hidrocarburos, and design the competition agency accordingly. The new draft should then be circulated to private sector representatives, consumer organizations, and local and international experts for their comments, and revise as necessary.	High	Short term
5.	Legal Reform/ Implementation	<p>Following Passage of the Competition Law:</p> <ul style="list-style-type: none"> • Develop a policy strategy to make the law operational, including institutional arrangements (e.g., staffing and training). • Develop regional training programs for staff and with universities and bar associations. • Continue advocacy initiatives, including reviews of government policies and regulation affecting competition, and preparing studies on key sectors. • Develop an enforcement strategy that focuses on investigating anticompetitive conduct in sectors that are important to consumers and that address Guatemalan market failures. • Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; engaging in dialogue/workshops with related law enforcement officers, other government regulators, and the business and academic communities. 	High	Long term

INTERNATIONAL TRADE

No.	Type	Recommendation	Priority	Duration
1.	Regional Cooperation Promotion	<p>Encourage regional solutions to problems in the trade facilitation, investment and customs areas. (See also sections on Goods and Services)</p> <ul style="list-style-type: none"> ▪ Technical assistance to provide additional training in various trade and customs areas (including the establishment of a regional customs school). ▪ Promote regional alternative dispute resolution systems and increased exchange of information. 	High High	Long term Medium term
2.	Institutional Reform	<p>Support Customs Service efforts to improve further efficiency, training, integrity, and transparency of staff.</p> <ul style="list-style-type: none"> ▪ Reform current and institute best practices for expediting the clearance process (including improved risk analysis systems and targeting methodology). ▪ Conduct an in-depth analysis on ways to reduce opportunities for corruption, and increase deterrence of smuggling, drug trafficking, and terrorism. Review best practices in other Central American countries and ways to implement in Guatemala. 	High High Medium	Long term Medium term Short term
3.	Institutional Reform	<p>Increase Guatemala's capacity to trade and export by increasing access to affordable credit through modernizing and harmonizing laws with regional and international standards, creating accessible registries of debtors and collateral, and modernizing the legal framework for electronic documents and signatures. (See also section on Collateral.)</p>	High	Long term

FLOWS OF GOODS AND SERVICES

No.	Type	Recommendation	Priority	Duration
1.	Analysis/Strategy Development	<p>Promote regional harmonization of procedures and approaches to problem resolution through the Committee for International Trade Facilitation (CONAFACIL) and the Secretariat for Central American Economic Integration (SIECA).</p>	High	Long term
2.	Analysis/Strategy Development	<p>Simplify import processing by forming a Customs/Border Agency and Trade Task Force to analyze and identify redundancies and recommend streamlined procedures.</p>	High	Medium term
3.	Analysis/Strategy Development	<p>Institute a media promoted anti-corruption campaign to solicit public reporting of official abuse of authority and publicize successes.</p>	Medium	Medium term

No.	Type	Recommendation	Priority	Duration
4.	Analysis/Strategy Development	Develop a regional strategy for implementation of the CAFTA requirements regarding border enforcement of intellectual property rights to include a centralized electronic data base and training in detection and detainment of potentially infringing material.	High	Medium term
5.	Process Re-engineering	Continue priority development of an overall Customs risk management strategy to include document analysis, compliance measurement, and post audit techniques using scientifically based methodologies to conduct physical and documentary inspections.	High	Medium term
6.	Legal/Financial	Create a national procedural manual for Customs processing to supplement current CAUCA and RECAUCA to promote predictability within the international trade environment.	Medium	Short term
7.	Process Re-engineering	Develop commodity specialization and reorganize core process to effectively utilize officer expertise to address complex free trade issues.	High	Long term
8.	Systems/Equipment	Strengthen guidelines for recruitment and performance for Customs officers, and develop a strong training curriculum with a library of training materials and resources.	High	Medium term
9.	Systems/Equipment	Upgrade laboratories and equipment for goods examination and provide on-site training in its use.	High	Medium term

FLOW OF PEOPLE

No.	Type	Recommendation	Priority	Duration
1.	Institutional	Upgrade the professionalism and modernization of the immigration agency. <ul style="list-style-type: none"> ▪ Assist government in implementation of integrity program, including strengthened independent internal affairs. ▪ Develop a comprehensive personnel system that would upgrade candidate qualifications, improve recruitment procedures, establish job-specific performance and evaluation standards. ▪ Provide training in document examination, investigative and interviewing techniques. 	High	Short term
2.	Legal and Regulatory	Harmonize and implement CA immigration visa so that trade-related visitors may enter one country and visit all with appropriate security.	High	Medium term

No.	Type	Recommendation	Priority	Duration
3.	Legal and Regulatory	Amend laws to create streamlined process for highly skilled individuals (engineers, doctors, attorneys, etc.). Simplify the process by implementing one-stop processing center at most appropriate ministry. This process should include, at a minimum, filing of applications and payments through one agency with transparent, predictable process for review and determination.	Medium	Medium term
4.	Legal and Regulatory	Eliminate review requirement for all exiting parties by strengthening risk assessment and enforcement function. It should be mandatory for citizens and visitors to “check in” but departure procedures should be unencumbered and lead to less delay at borders.	Medium	Medium term
5.	Operational	Modernize and upgrade automation for people processing at the border, including passport readers and networked computers so that borders have capacity for the following: <ul style="list-style-type: none"> ▪ electronic exchange of people information among border sites and headquarters ▪ electronic exchange of people information with other CAFTA countries ▪ enhanced risk analysis system and automate risk processes. 	Medium	Long term
6.	Operational	Provide training to increase capacity of Customs officers in the area of: <ul style="list-style-type: none"> ▪ Document fraud detection techniques ▪ Customer service ▪ Risk management. 	Medium	Medium term

FINANCIAL CRIMES

No.	Type	Recommendation	Priority	Duration
1.	Analysis/Strategy Development	Assess the causes and implications of Guatemala’s apparent inability to address corruption in various sectors, including banking and the judiciary. Using this assessment, develop a strategy to work toward eliminating corruption which in turn would limit illegal money flows.	High	Medium term

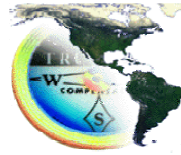
FLOW OF MONEY

No.	Type	Recommendation		
1.	Institutional	<p>Improve access to credit for small and medium-sized exporters and importers. While the basic tools for conducting exchange of payment for trade (i.e., letters of credit), trade and financial institutions must develop strategies to more effectively extend credit to reliable small and medium-sized traders. A robust trading system provides small and medium-sized traders with the ability to finance their export and import activities, yet the current system often requires many smaller traders to self-finance their activities. This reality imposes serious costs on importers and exporters making them less competitive. Strategies to pursue, include such activities as:</p> <ul style="list-style-type: none"> ▪ establishing guarantee funds that offer credit to exporters for fewer guarantees than currently demanded; ▪ developing associations/cooperatives among producers for pooling of resources and risks to acquire lower cost credit; ▪ increasing importers and exporters understanding of existing bank instruments through seminars and training. 	Medium	Long term

INFRASTRUCTURE

No.	Type	Recommendation	Priority	Duration
1.	Analysis/Strategy Development	Identify potential operational cost savings associated with trade infrastructure development. A detailed trade corridor analysis should be conducted to evaluate both the existing operational costs and potential opportunity costs associated with continued traffic flows on existing thoroughfares. While in generally good repair, some major trade corridors are operating near capacity today.	High	Short term
2.	Analysis/Strategy Development	Develop a national multi-modal / intermodal- transportation plan. A detailed national transportation development plan identifying key production / consumption zones, future trip generations by mode, and associated origin-destinations will enable the government to identify key development priorities that reduce transportation costs while improving service level	High	Short term

No.	Type	Recommendation	Priority	Duration
3.	Infrastructure Reorganization	Segregate freight operations to maximize efficiency of international trade facilities. Key international trade facilities, such as seaports, should evaluate their comparative advantages for handling varying kinds of freight and develop dedicated facilities to accommodate as appropriate. Development of a combined long-term strategic master plan, focusing on the nation's seaports as a system, rather than independent facilities will enable the nation to leverage the strengths of its existing facilities while minimizing development costs.	High	Long term
4.	Institutional Development	Identify stakeholder rules, roles, and expectations to improve service quality and reliability at key multi-user gateways – i.e. border crossings. Currently, traffic flow through key gateways is hampered by inadequate definitions of roles, responsibilities, expectations and consequences. Key multi-user transportation facilities should clearly identify stakeholder roles and expectations, and establish rules to eliminate system bottlenecks that currently affect all system users at key locations. At the same time, these facilities should provide buffering facilities and penalties to accommodate non-compliant system users.	Medium	Short term



ATTACHMENT 2: ROUNDTABLE PACKAGE

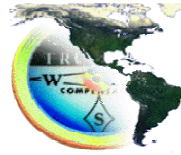
Preparing for CAFTA and Regional Harmonization Trade, Commercial Law and Institutional Development Strategy Roundtable Discussion

June 29, 2004 • 14:00 – 18:00

Holiday Inn Guatemala City • Guatemala City, Guatemala

Agenda

- 1:30 – 2:00 **Registration**
- 2:00 – 2:45 **Opening Remarks**
- Agenda Overview: Mark Belcher, Booz Allen Hamilton
 - Welcome and Overview of Regional Harmonization Efforts, Evelio Alvarado, Asesor, Vicedespacho de Integracion y Comercio, Ministerio de Economia
 - Overview of Economic Policy of GOG related w/ Trade and Business Environment: Richard Aitkenhead, Comisionado Presidencial para el Seguimiento del Plan de Gobierno Económico
 - Overview of Trade and Commercial Law Assessment Activity: Glenn Anders, Mission Director, USAID/Guatemala-Central American Program
 - Strategic Goals and Objectives of the Trade and Commercial Law Assessment Activity: Mark Belcher
- 2:45 – 3:30 **Session I: Presentation of Trade and Commercial Law Assessment Findings**
- Local Expert Perspective: Liz Gordillo, Carrillo y Asociados; Carlos Molina Mencos, Molina Mencos, Pineda y Asociados
 - Summary of Commercial Law Findings: Mariana Silveira, Assessment Team
 - Summary of Trade Findings: Irina Swift, Assessment Team Member
- 3:30 – 3:45 **Coffee Break**
- 3:45 – 5:00 **Session II: Focused Group Discussions**
- Breaking Down Trade Barriers
 - Fostering Healthy Credit Systems
 - Using Public-Private Cooperation to Achieve Goals of National Importance
 - Exploring the Strategic Implications of Greater Openness and Regional Integration
- 5:00 – 5:30 **Breakout discussions presentations**
- 5:30 – 6:00 **Wrap up and Closing**
- MINECO
 - Comisionado para la Inversión y la Competitividad
 - USAID
- 6:00 – 7:00 **Reception**



**Preparing for CAFTA and Regional Harmonization
Trade, Commercial Law and Institutional Development Strategy
Roundtable Discussion**

Breakout Discussion Topics

Breaking Down Trade Barriers

- What are the linkages between trade, security, and competitiveness?
- What are the major challenges to trade across borders? What are the major challenges to doing business in the country? What are the major challenges to regional trade harmonization?
- What are some solutions to reducing or eliminating bottlenecks you have identified?
- What are the impediments to implementing these solutions?

Fostering Healthy Credit Systems

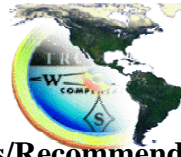
- What are the major challenges to improving the credit system so that it will attract substantially increased levels of commercial finance?
- What are some solutions to overcome these challenges?
- What are the impediments to implementing these solutions?

Using Public-Private Cooperation to Achieve Goals of National Importance

- What are the opportunities for private sector leadership in addressing major issues, e.g. corruption, security, inefficiencies, etc.?
- What mechanisms can be utilized to achieve greater collaboration in these areas?
- What are the impediments to more effective private sector involvement?

Exploring the Strategic Implications of Greater Openness and Regional Integration

- What are the current challenges to SME competitiveness?
- What are the major challenges to small and medium enterprises being able to compete in a post-CAFTA trade environment?
- What strategies and specific actions can be taken to prepare SMEs now?
- What are the legal and capacity issues to overcome?



**Conclusions/Recommendations from:
Preparing for CAFTA and Regional Harmonization
Trade, Commercial Law and Institutional Development Strategy
Roundtable Discussion
Holiday Inn, Guatemala City, Guatemala
June 29, 2004**

GROUP 1 – BREAKING DOWN TRADE BARRIERS


- Harmonization of the legal framework: Guatemala must be prepared to modify its own laws in order to coordinate and work with the other countries of Central America. This should be undertaken at a regional level, but not to the exclusion of the concerns of local businesses.
- Technology and Infrastructure: Roads need to be improved and greater strides need to be taken to ensure physical security of goods moving across country; and a better system needs to be deployed to identify and track goods as they move through the country.
- Business Training: Businesspersons at all levels need to have a better understanding of the law and their rights and obligations. Public officials need to gain a deeper understanding of the needs of international business. In both cases, one way to achieve desired ends is through greater public/private cooperation.

GROUP 2 – FOSTERING HEALTHY CREDIT SYSTEMS

- Guatemala needs to gain better financing that will help Guatemalan businesses to take advantage of CAFTA. Within Guatemala there is a lack of financing opportunities, so the country must work to promote international financing through institutions like EX/IM Bank and OPIC
- Banking officials need improved training in order to compete in the trade environment created by CAFTA.
- Public and private banks need to find better ways to cooperate among their various institutions (including the Banco de Guatemala, the Ministry of Economy, the Ministry of Finance, the U.S. Embassy, American Chamber of Commerce for Guatemala, etc.) to develop a program to cooperate in facilitating access to credit. Legal and regulatory reform is needed in order to ensure economic stability, including greater access to insurance, better controlled interest rates, and reformed bankruptcy and registry systems.

GROUP 3 – UTILIZING THE COOPERATION BETWEEN THE PRIVATE AND PUBLIC SECTORS TO REACH GOALS OF NATIONAL IMPORTANCE

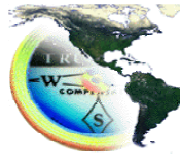
Guatemala has strong communication between the public and private sectors, so the challenge is not to improve that, but use that to ameliorate the deleterious affects of fraud, corruption, barriers to trade caused by a lack of transparency and physical security as well as other challenges. Recommendations in order to achieve this:

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- Fundamentally, a commitment to social development – education, health, training – is needed throughout all levels of society to ensure that society will not tolerate negative behaviors such as corrupt practices or those that threaten security.
 - More specifically, the private sector must take better strides to not only self-regulate but also to ensure that it is understood that it is in businesses' best interest to not engage in negative behaviors and instead to look to the long term. In addition the private sector can help to create opportunities to modernize and improve institutions. Moreover, the private sector should work to ensure greater transparency, both in its own dealings and the government's, in order to create greater accountability.
 - There should be created a permanent structure or means for cooperation between the public and private sectors that will survive across government administrations in order to create institutional continuity. This can also help to create accountability as the private sector does not necessarily change as frequently or dramatically as government administrations.

Group 4 – Exploring the strategic implications of better regional integration and trade liberalization

CAFTA presents a number of opportunities to small and medium enterprises (SMEs). What follows are suggestions to help ensure that SMEs will be best able take advantage of these.

- Nationally, education – from the basic levels to businesses practices – is a priority. In particular, SMEs must have commercial training in order to learn how to compete within Guatemala to be able to eventually reach the level of exporting goods.
- In order to help SMEs succeed, the government must have a clearer export strategy.
- SMEs must have greater access to credit, without which it is difficult to start a business.
- Greater decentralization needs to occur throughout the country. While Guatemala City has had some success with this, the interior of the country lags behind.
- The legal system must be improved to ensure greater certainty of results, so that persons and businesses will be more willing and confident to be a part of the formal economy, and that those not in Guatemala city will not be at a disadvantage.
- Information about CAFTA and what it will mean in practice, how it will relate to SMEs, etc., must be widely disseminate.



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