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Institutional Assessment of Antitrust
Policy The Latin American Experience**

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The Latin American Experience
Wolters Kluwer

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**Ignacio De Leon:
An Institutional Assessment of Antitrust Policy
The Latin American Experience
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To some, this might come as a total surprise. While you were not watching, and with considerable fanfare the United States (and the European Union) successfully exported (largely) U.S. style antitrust policy and antitrust enforcement to the rest of the world. Practically all nations have - or will shortly have - such a program.

The impetus propelling this initiative harkens back to the early effusiveness displayed by advocates of market principles at the breakup of the Soviet Union. The collapse of the Berlin wall heralding the demise of communism and the principles of state planning it stood for offered a compelling visual, affirming the seeming superiority of market capitalism. This momentous event evolved into what became known as Rule of Law (ROL) or 'good governance' initiatives. The Rule of Law (ROL) thinking turns on the centrality of law in all social concerns. And although it wasn't the first time that law was cast into this role, this present attempt coalesced around the intellectual efforts of Ibrahim Shihata, general counsel at the World Bank and Hernando de Soto, of *The Other Path* fame (De Soto 1989).¹ Into a perfect storm, it combined with Douglass North's work on the centrality of institutions and with the Washington Consensus, Washington's characterization of its vision for the development of reforming and developing economies.

The ROL vision was ambitious and expansive. It held itself forth as holding the key to end of poverty, corruption, gender discrimination, violence, human rights and cast itself as the conceptual foundation for any aspiring democratic, market economy. It advocated heretofore atypical development initiatives that promoted the strengthening of legal systems, transparency,

¹ In the early 1990's, the World Bank's general counsel Dr. Ibrahim Shihata recast the mission of the Bank by expansively interpreting the conditions on the scope of the Bank's activities imposed by its charter. The Bank is limited to economic considerations and specifically excluded from political activities. Shihata artfully bypassed this restriction by linking institution building to economic development. This firmly established the link between institution building, legal development and the Bank's role. See, generally, Barron (December 2005).

accountability, the definition of property rights and the forging of the institutions that would support market economies.

It's not exactly clear how antitrust attached itself to these efforts given its often rancorous history in the United States and the – heretofore - conventional understanding among economists that open markets and the reduction or elimination of entry barriers was tonic required to subdue domestic anticompetitive practices. Still, it appeared ensconced as one of the Washington consensus planks and hardly any institutional reform program today lacks a competition policy component, - as antitrust is known abroad.

Antitrust initiatives were supported financially by the multilateral lending organizations such as the World Bank, the Asian Development Bank, the IADB and others, international cooperation agencies such as the U.S. AID, the OECD and UNCTAD and enjoyed the full complicity of western antitrust agencies, the U.S. and European antitrust bar and antitrust economists.

At its core, the antitrust program viewed itself as a technocratic exercise above the political fray whose sole mission was to “get prices right,” identifying and eliminating the proliferation of market failures instituted in the wake of the wave of privatizations and reforms of the 1990's. In this manner the agency would ensure the optimal allocation of resources, maximizing consumer welfare. Each enforcement agency was to be an impartial, bureaucratically independent entity, capable of challenging via legal means, the array of anticompetitive practices which undeniably abound in developing and reforming economies. It would fear no politician, it would subdue the most obstreperous state and it would never run from political pressure-groups. Dysfunctional courts, the institutionalized corruption, the lack of trained personnel, the unfamiliarity with antitrust practices and jurisprudence were domestic

problems that were to be resolved and remedied by training programs and educational workshops aimed at all stakeholders; the private sector, the local bar, consumer groups and the judiciary. In short order a faithful reproduction of western antitrust would be in place. Even without the benefit of hindsight the naïvete of antitrust exporters – based on a complete disregard for domestic customs, cultural mores and political realities - was astounding.

Problems notwithstanding the programs were deployed. The elbow grease implementing and defining these ideas came from independent antitrust practitioners. Experienced economists and attorneys who dispersed themselves across the world to preach, implement and train locals on the intricacies of antitrust law and practice. Among the most influential and successful at this exercise (and continues to be) is Ignacio De Leon. De Leon is a Venezuelan attorney, former head of the Venezuelan Competition agency, who trained in Economics in the UK and with the Austrians at NYU. De Leon has single-handedly written the competition laws of many countries around the world, including supporting regulations. He has personally trained or assisted the staff of any number of the incipient law enforcement agencies of the world ranging from Kazakstan, through Lebanon and practically all of the Latin American nations. He continues to provide continued professional support and training and remains an active consultant proffering legal representation to clients before agency proceedings and, at times, as an economic expert.

Yet, despite being at ground zero of these initiatives, and benefiting handsomely from the package, in 2001 De Leon penned a critique of these efforts at exporting antitrust, in effect viewing them as misdirected, conceptually misguided and poorly executed attempts to transplant cookie-cutter U.S.-cum-European antitrust programs to Latin America. In fact the subtitle of his 2001 book conveys this flavor: *A Policy in Search of an Identity* (De Leon, 2001).

One would think that a critique of this nature, - proceeding from an experienced hand, one who stood to jeopardize a successful consulting career, a familiar figure on a first name basis with any number of enforcement officials around the world - would get folks to pay attention. But no one really did. De Leon's criticisms and caveats (as well as those of other critics) found no traction at the time and the growth as well as the support for international antitrust programs proceeded apace and even found new vigor.

Part of the reason for the lukewarm reception was self-inflicted and part was consequential. There was a palpable ambiguity in De Leon's thinking (and writings) regarding antitrust. In his 2001 effort he was apprehensive of the likely success of the initiatives due both to antitrust's inability to alter the fundamental anti-market character of Latin Americans and to its inability to distinguish itself from the traditional role of the state in Latin America. It was consequential in the sense - as in all path-dependency arguments - that once you lay blame on some historical artifact, it has you lock, stock and barrel. In this path-dependent world, the analysts and policymakers are left-wondering: what is the point of attempting change if we are fated to continue as we are no matter what we do?

My thesis is that De Leon's first attempt failed to reach the right group of critics. His first book, as well as this second one, - are efforts that should reach beyond the narrow antitrust community. I believe that it would have gotten far more traction from the Rule of Law scholarly community. After all, De Leon's thesis of the inability of the antitrust program to embrace or understand Latin America's broader cultural predispositions and associated behavior is nothing but the antitrust version of Brian Tamanaha's argument that the ROL failures are attributable to their inability to grasp "the connectedness of law principle." (Tamanaha 2009). As De Leon argues, the antitrust program rests upon widely shared attitudes that mistrust of market policies

and a penchant that favor state interventions driven by hard to achieve considerations of equity – what he call “utopian” precepts. In light of this, the embrace of a narrow conventional, neoclassical-flavored antitrust as an indirect means to facilitate economic development is handicapped from the outset.

The times they have a’ changed. Pro-market reforms in the developing world appear to be dead in their tracks (Brenner 2009; Altman 2009).² The Rule of Law programs have faltered. Rule of Law programs have little to show by way of success and vigorous criticism has started to crack at the intellectual edifice, much coming from knowledgeable scholars affiliated with respectable institutions (Carothers 2006). Importantly, domestic support for market reforms in developing and reforming economies, many which never fully took root, has started to be formally and informally rebuffed even before the economic collapse in the United States and the blow it represents to those keen on markets and market initiatives. De Leon has come back with a second bite at the apple - and a greatly expanded commentary at that. This time however, the ambiguity appears to have waned and we see a more reflective critic rather than the proto-cheerleader of 2001. Perhaps this time people are in listening mood.

Regrettably, De Leon limits his criticism to antitrust efforts in Latin America; quite frustrating actually. In my view, the criticism he voices is sufficiently general to apply to all antitrust programs in developing and reforming economies. Yet De Leon circumscribes the generality of views by reaching back - way back - into the roots of Latin American development

² According to Brenner, “the governments of developed countries do not intend to manage these economies indefinitely. However, an opposing intention lies behind similar interventions in the developing world: there the state’s heavy hand in the economy is signaling a strategic rejection of free-market doctrine.” (Brenner 2009). Altman’s voices his apprehension as follows, “The long movement toward market liberalization has stopped, and a new period of state intervention, reregulation, and creeping protectionism has begun. Indeed, globalization itself is reversing. The long-standing wisdom that everyone wins in a single world market has been undermined.” (Altman 2009).

to center his critique around what he calls the ‘anti-market’ tradition characterizing Latin America today. And back he goes, to the time of the Spanish ‘fueros’ to start the process ala Douglass North of identifying the bifurcation point that separated the subsequent path-dependent development of Latin America vis a vis, England and the United States.

De Leon’s tome constitutes at least three ‘books’ rolled up into one addressing many parallel themes at once. The first part is an impressive display of his thorough command of Spanish and Latin American history, firmly linking Latin America’s institutional history to the traditions and customs of Spain.

But although the determinism wrought by colonial origins, customs and mores constitute a pivotal element in New Institutional thinking generally and suggests why De Leon needs to locate the source of the distaste for market policies in Castilian Spain and thereby explain the lackluster performance of antitrust policies, it fails as a general model. We see the same market-skepticism in places with no connection to Spain, like the former Soviet republics, Asian nations and in the African states; in fact, a trait found even in the United States. Jonathan Hughes, the well-known American historian has asked rhetorically regarding American’s penchant for non-market control of industry, “Why have Americans demonstrated such a long-term distaste for the free market?” Responding, pithily, “In every case a long list of answers is available.” (Hughes 1991, 93) We see poorly performing competition policy regimes in Asian and African nations colonized by Great Britain and in the republics of the former Soviet Union – obviously countries with no connection whatsoever to Spain (Rodriguez 2006).

The second “book” within De Leon’s tome is a thorough overview of antitrust theory and practice comparable to any learned antitrust hornbook in the field today. This understanding of the inner-workings of the field is a necessary and unavoidable stepping-stone for any critic of

antitrust – and a perhaps a limitation given the technical demands it imposes on a lay audience: one must know antitrust and how it is conducted to understand its inherent ambiguity and limitations. Still, De Leon makes it accessible to most audiences. As an aside, I note that this portion of the book is highly useful for practitioners even as a stand-alone.

The last ‘book within a book’ is a careful appraisal of antitrust’s institutional setting within each of the Latin American countries, their record and, importantly, the regional prospects of antitrust generally. Sadly, it doesn’t bode well. Here again he shares the pessimism of the ROL critics. In De Leon’s work there is a little bit of everything, a bit for everyone, all fascinatingly assembled with the sole objective of questioning the prospects of antitrust as intended by proponents. There is North’s path dependence theory of institutions used to explain the anti-market predisposition of the Latin American institutional framework, there is allusion to the Austrians centrality on the role of innovation and entrepreneurship to explain the repercussions of its stifling by stodgy antitrust enforcers whose actions are sure to engender “chilling behavior;” enforcement efforts that will inevitably curtail the innovations and associated productivity increases much needed for development in Latin America. There is a variant of Keen’s debasement of the perfect competition model with contributions from the thinking of Joan Robinson and G.B. Richardson to highlight the ‘Nirvana’ or ‘utopian’ aspects of antitrust’s theoretical framework – a point attributable within antitrust to Harold Demsetz (1969). It is a framework which relies on the perfect competition model as its theoretical baseline against which to compare Latin American competitive practices, moreover, it is an approach that displays utter disregard for the prospects of government failure. In reality, as De Leon correctly observes, to avoid the Nirvana fallacy one should contrast prevailing practices with realistic possibilities. There is also the familiar Political Economy rent-seeking model to

explain the inability of an imported, technocratic, novel institution lacking a political base to challenge the real sources of economic and political power. With this model De Leon provides a superb analysis of the ability and wherewithal of domestic interest groups to subvert antitrust efforts.

De Leon conceives of competition as a dynamic process, one where innovations arise to exploit the consequences of economic change that inevitably introduces external economies and imperfections in markets. And he frets that the incipient antitrust agencies of the region are sorely incapable of recognizing this features of competition. And even if they do, they are poorly placed to deal with it given the antitrust best-practices they have been dealt, a view which relies largely on the discarded static, Structure, Conduct, Performance paradigm.

Given the depth and breadth of the critique De Leon's it is difficult to understand his belief in the capacity of education and institutional reorganization to transform the competition agencies into paragons of Austrian market competition. This is what he attempts in the last chapters. In them he offers recommendations aimed at redirecting competition agency efforts towards recognizing the relevance and importance of entrepreneurship and innovation, the elimination of trade barriers, government distortions and barriers to entry. He wants them to target the bewildering number of import duties and non-tariff barriers such as quotas, unnecessary inspection rules and the array of regulations that limit the benefits of specialization promised by a truly unified continent. I cannot share his optimism.

I often receive news recounting the activities of the competition agencies of Latin America. The brand new Salvadoran Competition Commission, for example was trained courtesy of U.S. taxpayers; De Leon in fact, provided them with training and support. In 2008, among its first interventions, the Salvadoran agency upbraided Exxon-Mobil's local distributor

who became a convenient whipping-boy for the unpopular gasoline price spikes of last year. Another recent case involves the Venezuelan Competition Agency – trained and supported by U.S. taxpayers, and again, one where De Leon was not only active - he was the Superintendent. Early this year ProCompetencia, as the Venezuelan agency is known, drew a bead, yet again, on an American company and one with a large footprint (American Express), intending a public spanking to the glee of chavistas. These agencies have become utterly politicized entities of the state ranging far astray of what they were set up to do. Are they likely to compose themselves into De Leon's vision? I find it highly unlikely. But De Leon was there amidst the belly. Bureaucracies once created live forever. And if there is some hope at reorganization De Leon has to be part of the solution.

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