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SYMPOSIUM ARTICLES

SHAPING COMPETITION POLICY IN THE AMERICAS: SCOPE FOR TRANSATLANTIC COOPERATION?

Shanker A. Singham[*]

I. INTRODUCTION

As more and more countries embrace a free market economy and start to adopt and enforce laws that regulate those markets, it is becoming increasingly relevant to ask how those laws are to be implemented and enforced. For example, all of the countries in Central and Eastern Europe adopted the provisions of European competition law encapsulated in Articles 85 and 86 of the Treaty Establishing the European Community.[1] Largely this was done in order to assist them in their bids to join the European Union itself. In Latin America, some countries have adopted European-style concepts in their antitrust laws (for example Venezuela), and others (like Brazil or Mexico) have adopted laws that more closely resemble the Sherman Act of the United States.[2] It is not at all clear, however, that the wholesale adoption by emerging economies of the provisions of one or another of these two systems would be in the interests of the countries, short-term or long-term.[3] Cer-

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1. Treaty Establishing the European Community, arts. 85-86, Feb. 7, 1992, [1992] 1 C.M.L.R. 573, 626 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. (C 224) (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Br. Brit. T.S. No. 1 (Cmd. 5179-II [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. (L 169) (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

2. Sherman Antitrust Act, 15 U.S.C. §§ 1-3 (1994).

3. *See* Spencer Weber Waller, *Neo-Realism and the International Harmoniza-*

tainly, careful analysis must be conducted in assessing which antitrust policy must be used to inform the enforcement decisions of the individual country's antitrust authorities.

This paper will consider similarities and differences between European competition law and U.S. antitrust law on the one hand, and attempt to draw some conclusions about the different factors which underlie antitrust or competition policy on the other. It will focus on those areas of difference between EU and U.S. systems, and how policy differences may be used to aid the implementation and enforcement of antitrust laws in Latin America. It will also highlight examples of countries that have long had antitrust laws, but are only now beginning to enforce them. Also, it will analyze how they are being enforced, and what can be done to enable antitrust laws to be enforced in a manner that is ultimately beneficial to the particular country concerned and sufficiently predictable and certain for the business community.

The paper will survey the current competition regimes in some countries in Latin America and seek to identify those areas where a hybrid policy, drawing on concepts of European and U.S. antitrust law and policy, might be more appropriate, given the countries' own domestic economic priorities. Focusing on specific markets, the paper will also survey and propose how an antitrust policy suitable for emerging economies might be developed, and, to the extent possible, develop core concepts which might be used to inform such antitrust policies.

The economic liberalization in Latin America has meant that there is increasing evidence of more reliance on antitrust enforcement in Latin America. The liberalization of Latin American economies may lead to a firmer view of such anticompetitive practices as price fixing and division of markets. There will be a number of areas where highly concentrated markets remain, and it is important for these to be properly regulated. The growth in international joint ventures will lead to a greater emphasis on governmental supervision of mergers and acquisitions. In addition, it is important that antitrust enforcement not stifle the flow of foreign investment into the countries of the region. Consideration of what actually constitutes the market will become relevant. It will become increas-

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tion of Law: Lessons from Antitrust, 42 U. KAN. L. REV. 557, 564-65, 582 (1994).

ingly important to consider the global, or at least sub-regional welfare effects in performing market analysis. The countries of Central and South America are considering which competition system to favor, the European or the U.S. system, both in its implementation, and in its philosophical basis. An opportunity lies for the transatlantic relationship to be used to lock in substantial reforms in the economies of the Latin American countries, and to put in place competition regimes that make sense for their own internal economic growth and social policies.

II. PHILOSOPHICAL BASIS FOR ANTITRUST

A. *Introduction*

In order to understand the basis of competition law, it is instructive to look at the U.S. and European systems by comparing and contrasting their underlying goals.

Since the U.S. system is largely predicated on minimizing welfare losses to consumers, it is deemed to be most important to prevent anticompetitive practices such as price fixing and cartelization. The Sherman Act states, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal . . . .
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .[4]

The Clayton Act[5] gives private rights of action to individuals who are adversely affected by behavior which is prohibited by the antitrust legislation.[6]

EU competition law is governed by Articles 85 and 86 of

4. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).
5. Clayton Act, 15 U.S.C. § 18 (1994).
6. *See id.* § 18(i)(1).

the Treaty Establishing the European Community.[7] Article 85(1) states that:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[8]

Article 85(2) states that such agreements shall be automatically void. Article 85(3) allows exceptions in certain cases, either by specific application to the European Commission, or by a system of negative clearance designed to facilitate business transactions.

Article 86 provides that:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

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7. *See* EC Treaty, *supra* note 1.
8. *Id.* art. 85(1).

Such abuse may, in particular, consist in:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[9]

These two articles have direct effect, and therefore may be relied on by any private individual in his national court. However, this ability has not been fully exploited, and national courts have shown a marked reluctance to involve themselves in actions based on Article 85, which has primarily been relied on as a defensive weapon, at least in UK courts.

There are a number of substantive and procedural differences that are regularly exposed in the analysis of the differing decisions on the increasing number of transatlantic mergers. This will be analyzed in detail later, but some preliminary points are worth noting now. Analysis of the case law and the manner in which the Sherman Act and Articles 85 and 86 have been interpreted illustrate that U.S. law now precludes any attempt to gain a monopoly position. European law does not. European law merely precludes the abuse of that position once attained. While the Europeans do not view a monopoly as anything inherently bad per se, the United States appears to view the attempt to become a monopolist as behavior which should be penalized because it is thought that monopolists always behave with monopoly power and seek to extract monopoly rents from consumers.

Early U.S. cases suggest that the purpose of the Clayton

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9. *Id.* art. 86.

Act (the U.S. anti-merger law) was to punish monopolies in their incipiency, especially where there was a history of concentration.[10] The apotheosis of this trend was reached in *United States v. Von's Grocery*, which clearly articulated the role of merger law to build up the small business sector.[11] Many decisions were heavily motivated by the desire to protect smaller firms from the actions of their larger rivals. With the ascendancy of the Chicago School economists, this trend was reversed and the U.S. position now would be not to look on monopolies as something inherently bad, but to assess the merger's effect on competition in the market and its effect on price to consumers. When reviewing U.S. case law, it is very important to know which economic school was in the ascendancy when the decision was handed down.

The Europeans are more concerned with the actual anticompetitive conduct of firms with a dominant position in the market. The reason for this difference is historical. One of the main reasons for the formation of the European Union was to create a market large enough to compete against their U.S. rivals. In addition, European competition law was formulated to ensure that the barriers to trade within Europe, which had been eliminated by the formation of the European Community itself, could not be erected by businesses cartelizing the region. Hence, market integration is a very important goal of European competition law. There was also a concern that as larger operations began to be formed, small business would lose out, and this concern was addressed by laws that were more designed to level the playing field than to address the specific interests of consumers.

So what should the philosophical basis for a competition policy for the Latin American region be as we go forward into the twenty first century and advance towards closer hemispheric integration? What should be the guiding star for such a policy—should it be the allocative-efficiency model of which the primary proponent is the Chicago School? Or should a hemispheric competition policy be guided by some other light, particularly in the developing and semi-industrialized economies of Latin America?

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10. *See, e.g.*, United States v. Continental Can Co., 378 U.S. 441, 461 (1964); Brown Shoe v. United States, 370 U.S. 294, 317, 346 (1962).

11. United States v. Von's Grocery, 384 U.S. 270, 276-77 (1966).

B. *The Allocative Efficiency Model*

In order to assess what sort of market model should be striven for in the hemispheric region, it will behoove us to consider the different models in greater detail. Economically, any market externality will adversely affect the operation of an entirely free market. This view was best articulated by the Chicago School economists who sought to apply the antitrust laws in such a way as to preserve this free market. The economic model, favored by the Chicago School, relies entirely on an "efficiency" vision. According to that vision, if the net welfare gain for all participants in the market outweighs the net welfare loss, then the market is competitive. It matters not from where the welfare gain flows or from where the loss arises. In this way, any public policy concerns not related to the efficiency of the market are minimized.[12] Efficiency concerns in the Chicago School antitrust model are, far and away, the most significant concerns. This market analysis is very simple: as more and more externalities are introduced, it becomes increasingly difficult to look at a particular practice and say whether it is efficient or inefficient. The Chicago School sets its highest store on the effect of the particular behavior as far as consumers are concerned, with its ultimate goal being the pursuit of economic efficiency, based on a neo-classical price theory model. Net efficiency gains, within this model, arise from a combination of allocative efficiency and productive efficiency. Under the Chicago School, high market concentrations may not lead to the anticompetitive problems that liberal economists feared. The Chicago School analysis is less focused on the dangers of monopoly, and therefore much less concerned with protecting small competitors against larger rivals. The Chicago model favors exploiting economies of scale, and minimizes the "natural" barriers to market entry as a contributing factor to potential anticompetitive behavior. It is generally considered that at certain concentrations in the market, firms would have to tacitly price fix—according to the Cournot economic model. The Chicago economists have moved away from this model, finding nothing wrong, per se, with a highly concentrated market.

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12. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 215, 223, 231 (1985).

However, in Latin America, owing to the history of nationalization, state-owned or private monopolies abound. Even in nonstate-owned industries, the free functioning of the market has been severely disrupted by governmental price fixing and the presence of extremely high levels of concentration. The elimination of price controls in many of these countries is a relatively recent phenomenon. In addition, the reliance on now discredited import-substitution economic theories has led to a large number of highly inefficient businesses. In light of this, an antitrust policy aimed at encouraging efficiencies and attacking monopolies could have some utility. Also, as a result of the above, in many sectors, barriers to entry are very high. Given the need for foreign investment in these economies, a coherent antitrust policy must deal with these very high barriers to entry.

There is, however, one significant problem in the Chicago School's purely economic analysis that must be taken up here, especially as it relates to the application of antitrust laws to developing economies. The Chicago School assumes that net welfare can be measured in constant dollars. In other words, regardless of where the welfare gain takes place, its effect must be the same. For example, the "transfer of one dollar from a consumer to a monopolist has no welfare implications" according to the Chicago School.[13] Clearly, there are major social implications of this, and one can easily envisage a series of facts where the loss of one dollar by a consumer is considered of greater effect than the gain of one dollar by a monopolist. In essence, our hypothesis starts from the basis that the utility of a fixed sum differs, depending on the person to whom it is given, or from whom it is taken.

The Chicago School economic policy maker would say that any dollar given to anyone must have the same value as a dollar given to anyone else. It is possible to measure this utility objectively by analyzing the difference that the transfer of wealth makes to the person's behavior. For example, a poor person's behavior may be markedly altered by a specific amount, whereas a rich person's behavior may not be affected at all by the same increase in wealth. In such a way, it is possible to actually produce empirical data to look at net welfare

13. *Id.* at 235.

gains and losses, bearing in mind their overall utility and their different relative values, and bearing in mind the different ways they impact on different market participants.

When analyzing a market, one can look at the classical definition, as coined by Pareto: a situation was optimal if no change from that situation could make someone better off without making someone worse off.[14] This was deemed unrealistic because its conditions could rarely be fulfilled, and therefore, an alternative way of looking at efficiency emerged, the so-called potential Pareto efficiency whereby a change was regarded as efficient if the gains experienced by those who gained outweighed the losses experienced by those who lost.

There are, nevertheless, practical problems in using such a simple model. In a real world market economy, as is vividly demonstrated in today's financial markets, every change imposed on one market affects dozens of other markets as well. It is justified to say that allocative efficiency concepts must include everything to which people assign a value. This could include those items that traditionally have been perceived to be non-economic goals, such as increasing opportunities for small businesses or a public policy objective of the diffusion of power generally. The reason these have not formed the bedrock of the economic analysis of, say, the Chicago School, is that Chicago School economists look primarily at what consumers want when they actually make purchasing decisions—and consumers look for the best product at the lowest price regardless of who the producer actually is, or what its behavior has been, either as a monopolist, or as a polluter, or indeed in any other way.

One could argue, however, that the boycott cases are examples of where the simple Chicago School analysis does not hold water. These are cases where the simple vision of supply and demand—a manufacturer selling the best products at the lowest cost—breaks down. A boycott occurs when the market is controlled by consumers to the extent that they can operate collectively to rid the market of a particular market participant, or change the behavior of that market participant, and

14. Pareto optimality is a standard economic concept that was developed by Vilfredo Pareto in 1909. *See* VILFREDO PARETO, MANUEL D'ECONOMIE POLITIQUE (1909); THOMAS J. MICELI, ECONOMICS OF THE LAW 4-6 (1997).

this has very little to do with supply and demand.[15] In these cases, other factors are at play beyond simple price theory. There are market externalities which explain what market participants actually want. These market participants have set a value on non-price factors which exceeds that value which they assign to price. It is not sufficient that the supplier provides low-price products—they must behave in a certain way or risk a boycott.

When considering how a free market should operate, we must also consider whether allocative efficiency should be the only guiding star. How much of a place should other socio-economic goals have, such as the attraction of foreign investment or the building up of a particular industry sector?

There are some special features of the regional markets of countries in Latin America that need to be considered here. These countries vary widely from countries that can be genuinely characterized as developing to semi-industrialized, and even a potential member of the OECD in Chile. There are clearly major implications for antitrust policy in bringing such disparate economies together, to say nothing of the micro-economies of some of the Caribbean. Indeed, at a national level, there is the problem of introducing antitrust policy to economies in transition. It shows that it is particularly necessary for us to consider the full implications of adopting the constant-dollar hypothesis of the Chicago School. For example, the Dominican Republic has already gone on record as stating that the development of the small and micro-enterprise sector is critical to its sustained economic growth.[16] But what will happen to these businesses if they are immediately and unguardedly exposed to massive foreign competition? This is a dangerous area, as it could be misinterpreted as a suggestion of managed trade. It therefore needs to be very carefully handled. In addition, in many countries, a substantial part of the economy consists of parallel or black markets, an issue that could be addressed in an antitrust policy. With this in mind, there are two different factors that must be considered here. The first is how best to implement antitrust policy in the individual countries. The second is to consider how over-arching

15. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

16. Interview with Jaime David Fernandez, Vice President, Dominican Republic, in Miami, Fla. (July 1996).

principles of antitrust might be best grounded in the national economies of the region.

III. THE DOMESTIC CONTEXT

The preferred market model must take into account the developmental stages of certain emerging economies. It must take into account the economic objectives of the different nations involved. There are certain Chicago School assumptions which must be revisited, with special emphasis on the countries of Latin America and the Caribbean. It is clear that barriers to entry in such a market can be and are significant factors. Foreign investors do face tariffs and other barriers, including entrenched domestic rivals, difficulties in accessing all parts of the market, and unclear governmental regulations. We also need to survey the industry sectors most affected to assess the effects of concentration in those industry markets. At what stage might oligopoly pricing occur? If it is likely to occur at low levels of market concentration, then oligopoly becomes a big problem, and a market where economies of scale are very important must be resisted. Otherwise the region as a whole will become anticompetitive, with consequent damage to its citizens.

What is anecdotally true is that the Chicago School hypothesis for what constitutes an efficient market may be particularly misleading where there is a mix of highly industrialized countries and less developed countries. The Chicago School analysis makes certain assumptions:

> (a) Natural barriers to entry are more imagined than real. Capital flows are now so efficient that investment will flow into any market automatically where the rate of return justifies it;
>
> (b) A monopoly is generally self-correcting. This is because a monopolist's profits generally attract new entry into the monopolist's market;
>
> (c) Economies of scale are very important to efficiency. Most industries operate most economically only at very high levels of concentration;[17] and

17. *See* John S. McGee, *Efficiency and Economics of Size, in* INDUSTRIAL CON-

> (d) Business firms are profit maximizers, as opposed to revenue maximizers or even simply pursuers of profit. In any event, if one firm is a profit maximizer, then that will result in all firms being drawn inexorably towards that goal, since those firms will make profits at the cost of other firms.

In the Latin American region as a whole, assumptions (a) through (c) may not hold so true. Significant barriers to entry have historically existed in Latin America, and these must still be dealt with. We must deal with these problems in a careful way, lest we produce a competition policy that has more to do with politics than with the creation of an efficient market. Once again, we advance carefully, bearing in mind the dangers of slipping down the precipice on one side towards managed trade, and on the other towards embracing the Chicago School vision of a free market too early in a country's transition.

Broadly speaking, there could be a number of approaches to ensure that predictable and certain antitrust principles are grounded in national economies:

> (a) Each Latin American country could move toward a system of laws based on the same provisions. An agreed text of competition law (a so-called "Global Competition Code") could be part of the textual basis of the Free Trade Area of the Americas (FTAA). Such a project has been undertaken by academics at the Max Planck Institute;[18]

> (b) A body of agreed-upon principles, which member states would have to implement into their national law on the basis of subsidiarily, and by delegated authority from a hemispheric antitrust body (which could be a coordinating forum of existing national antitrust bodies) for the region; and

> (c) Rules governing priority for prosecution and dealing with which country's law should govern a particular

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CENTRATION: THE NEW LEARNING 55 (Harvey J. Goldschmid et al. eds., 1974).

18. *See* International Antitrust Code Working Group, Draft International Code as a GATT-MTO Plurilateral Trade Agreement, July 10, 1993, *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.).

> anticompetitive behavior pattern. This has been agreed before by the EU-U.S. competition authorities (EU-U.S. agreement—overruled by *France v. European Commission*).[19] The so-called positive comity doctrine is now beginning to be relied on.[20]

The first approach is unlikely, simply because there are too many competing interests, to say nothing of the loss of sovereignty issue. Competition policy is, however, starting to be regarded as a fitting subject for trade discussions. A competition group at the WTO level was set up at the Singapore GATT Trade Ministerial. It is headed by Frederic Jenny, the Vice President of the French Conseil de la Concurrence, Paris. A competition working group forms part of the Free Trade Area of the Americas negotiations.[21] Note also that back in 1948, at the genesis of the GATT, competition provisions were included in the draft Havana Charter.[22] However, it is still felt that a WTO Competition Code may be a long way off.

The third option does nothing to address the actual substantive problems in competition policy. It might be used in some sort of tangential way to deal with extraterritoriality problems, but in reality would do no more than this. It would certainly do nothing to assist the Latin American countries in setting up meaningful competition regimes that they actually had the resources to enforce, and therefore would be only a palliative remedy at best.

I submit that the second option alone can simultaneously address the issues while not being so ambitious that it would fall by the national sovereignty's sword. Though we must be conscious of the rise of protectionism in the hemispheric region, as witnessed by the failure of the fast-track vote in the

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19. *See generally* Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, COM(96)479 final at 1(2), 4.4 [hereinafter Commission Report].

20. *See* Alexander Schaub, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law and Policy (Oct. 16-17, 1997) (discussing the European investigation into U.S. complaints about cartelization in European airline ticket reservation systems).

21. The competition group is chaired by Peru's Vice-Minister for Trade.

22. *See* U.S. Dept. of State, Havana Charter for an International Trade Organization, Pub. No. 3206, Commercial Policy Series No. 114 (1948).

U.S. Congress,[23] there is a significant requirement in such a set-up: in order to have such a system there must be some supranational body or agency to administer the system, and more importantly, to ensure that the guiding principles as set out in the form of a Free Trade Agreement are properly adopted by the different member states.

A look back at history is instructive here. The Havana Charter merely obliges members to take appropriate measures to ensure that private commercial enterprises do not restrain trade. In the event of complaints, the ITO would be the body authorized to investigate and demand information and then recommend remedial action by its member governments. The member states' remedial measures were to be monitored by the ITO. The Havana Charter contains strong competition language in its Code. For example, Chapter Two of the Charter states that member nations must work to eliminate sub-standard conditions of labor. Chapter Four relates to commercial policy, requiring a ban on quantitative import and export restrictions, and mandating consultation between members in the area of subsidies. Furthermore, Chapter Four also places state trading institutions in the same boat as private trading organizations, while calling for the removal of hidden barriers to trade, such as the use of "vexatious formalities" and rules of origin. Chapter Five deals with "restrictive business practices." Members agree to prevent such practices on the part of monopolies and cartels which have harmful effects on the expansion of production and trade. The practices listed include price-fixing, exclusion from markets, allocating customers, fixing production quotas, and suppressing technology. It is expressly envisaged that complaints about anticompetitive practices will be dealt with by the administrative structure of the ITO. The Latin American interest will be intimately connected with the growth of privatization in the market. This will result in the increased importance of anti-monopoly laws to deal with the problems of state enterprises. There is a particularly strong

23. The bill, S. 9627, 105th Cong. (1997), entitled the "Export Expansion and Reciprocal Trade Agreements Act of 1997" was pulled from the floor of the House of Representatives for lack of support among House Democrats, who accepted labor union arguments that giving the President authority to negotiate trade agreements would lead to the export of U.S. jobs. Ironically, lack of fast track may well have the effect of exporting U.S. jobs while shifting the balance of U.S. jobs from skilled to unskilled workers.

mandate for the type of regional institution of which the European Commission Competition Directorate is the prime example. So let us now consider how the European Union uses its own internal institutions to enforce competition law.

IV. ENFORCEMENT OF COMPETITION LAW IN EUROPE

The European competition laws take precedence over the member states' competition laws, although many member states already have their own laws, and are in the process of implementing the provisions of the European Commission Treaty into national law. These will apply if the business transaction is within a member state and does not affect trade between members of the European Union. The European Commission has extensive investigatory powers under Regulation 17.[24] These apply, notwithstanding the provisions of national law. In addition, the European Commission generally has the power to issue directives, which mandate member state governments to enact law along the basis of the directive. In the UK, an attempt to redraft the Competition Act so that it would be in compliance with European Commission principles fell victim to election politics.[25] By comparison with this institution, a Hemispheric Antitrust Institute (the Institute) could have broad powers akin to the European Commission to investigate, and request that member states enforce their competition and antitrust laws. Information going to the Institute could therefore be kept confidential from the different member state nations, and prevent the current confidentiality problems whereby the United States and European Union are unwilling (or in the U.S. case unable for constitutional reasons), to reveal information to other enforcement authorities.

There is another reason why a hemispheric institution would be useful. This concerns the problem already alluded to in terms of labor and the environment. The European Union and United States may fear the rise of low-priced imports, coming in on the back of little labor regulation and environmental protections. Manufacturers here are already lobbying

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24. *See* Council Regulation 17/62, art. 14, 1962 J.O. (204), 1959-62 O.J. SPEC. ED. 87 [hereinafter Council Regulation 17/62].

25. *See* James Blitz & David Wighton, *Cabinet Shelves Two Bills Dealing With Business Law*, FIN. TIMES, Oct. 21, 1996, at 1.

national governments to reestablish barriers to low-priced goods by invoking anti-dumping and other trade legislation. Of course, the real way of dealing with this issue is to ensure that adequate environmental and labor standards prevail in the world, rather than seeking to address the problem by increasing protectionism. I argue that in order to address this very real problem it is necessary to have a single defining vision of what the aims of competition law should be in the hemisphere, and without that there will simply be a combination of special interest issues which will continue to collide. By articulating this vision I consider that the aim of the market must be only this: to maximize total global welfare, regardless of the gains which accrue specifically to nations. As increasingly national markets no longer hold up as valid antitrust markets, and regional and global markets apply, some thought has to be given about how well-placed national authorities are to enforce antitrust laws. Different national laws, provided that efficiency is the ultimate goal, will not necessarily give rise to increased costs. A hemispheric institution is perfectly placed to stand above disputes between nations as increasingly market access issues are fought in the competition arena. If the real problem is dispute resolution, then there should be a body that stands above the concerns of individual national interests at least insofar as these disputes are between nations. The prospect of the WTO becoming such a forum is remote. In the meantime, there should be an alternative.

One of the central problems in the antitrust enforcement area is that "most nations do not prohibit firms from taking anticompetitive actions which harm 'only' foreigners."[26] Such conduct undoubtedly interferes with global markets and reduces total social welfare. It is a problem that must be addressed. The problem, however, is that conduct in one jurisdiction may be so remote from the site of harm, that choice of law issues may be raised when attempting to determine the law that applies to the dispute. The problem is exacerbated if the cartel behavior is in some way government-sponsored, as may occur in developing economies if these markets are exposed to foreign competition too quickly. Therefore, meaningful competi-

26. Eleanor Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 19 (1995).

tion principles should address the Act of State doctrine, and prevent the formation of export cartels, and the like. Traditionally, the Act of State doctrine has fallen into the constitutional/political realm, and therefore has not been dealt with by trade or competition law. Eleanor Fox[27] has discussed the lessons that can be learned from the EU's approach to this problem. In the European Union, all trade law has been reconceptualized, Fox argues, as a distortion of competition problem. And in Europe, it is the economic interests of the EU, as a community of trading nations in whose public good all these problems must be resolved. Hence, the Europeans rightly bring anti-dumping, subsidies, countervailing duties and antitrust policy all within the same broad heading.

V. ANTI-DUMPING

There is a powerful argument that anti-dumping laws have no place in the world trading order. Certainly the Europeans would want the dumping problem addressed. Within Europe, charging dumping duties is illegal. But in the North American Free Trade Act (NAFTA), anti-dumping laws remain, and the United States is adamant that the subject is simply not on the table for discussion. If product is coming into the U.S. market, U.S. predatory pricing laws, or some other cost-based alternative, could be used to stop the practice if the product is truly coming in below marginal cost. Otherwise there should be no reason to protect domestic industry from more competitive rivals, provided critically that those products do not have artificially low costs as a result of violation of agreed-upon labor rights or environmental provisions. To sound a note of caution, however, in the current mood of protectionism, the use of trade remedies may soon increase in the United States, rather than decrease as they were once expected to do.[28]

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27. *See id.* at 29.

28. Many examples of the rhetoric of protectionism may be found in the fast track debate which led ultimately to the recall of the bill from the House, prior to a vote being taken.

VI. SUBSIDIES

Subsidies are inefficient. They tamper with markets, and disturb the key relationship between price to consumers and marginal cost of manufacture. They can lead to the building up of inefficient industries. As a result, resources are not efficiently allocated. Once again, the European Commission model is instructive. State aids are within the competence of the Competition Directorate. Under the EU system, state aids must be reported and justified, or eliminated.[29]

VII. GLOBAL WELFARE

It is clear from the foregoing that there must be some institution capable of assessing what conduct is in the global interest or, at the very least, in the regional interest, leaving aside the individual concerns of nations. The great debate on extraterritoriality, and the controversy about who should prosecute, and when are indicators that this is an idea whose time has arrived. In addition, markets are very closely interconnected due to the increased integration of trade and capital. Once again, the European Union provides powerful lessons, if not a road map for closer hemispheric integration. The European Commission Treaty prevents restraints on the freedom of movement, capital and persons. Now, competition law and free movement are inseparably connected.

VIII. BRAZIL: RECENT DECISIONS OF THE BRAZILIAN COMPETITION AUTHORITY (CADE)

Prior to analyzing key differences between EU and U.S. law, and how they might be used to inform other countries' national laws, it is worth seeing what Brazil's competition authority has done with some recent decisions. The recent decisions of CADE, which I will discuss, are the acquisition by Colgate/Palmolive of a Brazilian tooth products manufacturer, Kolynos, and the two recent decisions in the brewing sector, featuring Miller Brewing and Anheuser-Busch.

In the Colgate/Kolynos case, Colgate-Palmolive sought to acquire Kolynos, the largest producer of toothpaste in Brazil. The acquisition would have given Colgate control of about 75%

29. *See* EEC Treaty, *supra* note 1, arts. 92-94; Fox, *supra* note 26, at 26.

of the Brazilian toothpaste market. CADE's decision was to allow the acquisition only if Colgate did not use the KOLYNOS brand name for four years, or granted a 20 year license to another company. CADE found that there were four product markets in the oral health care industry, and that the acquisition would have anticompetitive effects in only one, the toothpaste market. However Colgate argued that the oral care market was the entire market. There was very little emphasis on the supply-side analysis, i.e., if a price change occurred for one product, at what level would manufacturers of 'other products' switch manufacturing to manufacture the other product. There was also an assumption that the relevant market was the national market, notwithstanding the acceptance that MERCOSUR might be the actual geographic market.

In the brewing decisions, the major U.S. brewing companies had both negotiated exclusive distribution agreements with two of Brazil's brewers. Prior to the agreements, the market was a virtual duopoly between two Brazilian breweries, Brahma and Antarctica, although the market share of CocaCola-backed Kaiser was increasing. CADE ordered that the exclusive agreements of 20 years should be cut back to 24 months from the date of CADE's decisions' publication. This time period was based on the assumption that without such an agreement the U.S. brewer would build a brewing plant, and that was the approximate length of time that a plant would take to build. Once again, CADE relied on the potential competition theory that a joint venture of this type was anticompetitive because it foreclosed the market to a potential competitor, the U.S. brewer.

A number of themes are beginning to emerge out of these, and other recent cases. One is the way markets are defined, which is so critical to merger analysis. The other is the reliance on the potential competition theory. This will be very important, since it is a concept which might have a chilling effect on foreign investment in Brazil, if not very carefully applied. In particular, the CADE decision minimized the importance of market entry barriers in the application of potential competition theory and other opportunities which are available in other markets.

The current U.S. interpretation of the potential competition theory assumes that if the outsider is prevented from acquiring or joint venturing with the insider, it will still enter

the market de novo to establish a toe-hold. The theory itself has been criticized. Judge Posner has said that it is impossible to develop criteria for determining the application of the theory to specific mergers.[30] Principally, there are two theories, perceived potential competition, and the doctrine of actual potential competition. The first has not been validated, while the second has largely fallen into disuse. The theory emanated from the Celler-Kefavaer Amendments to the Clayton Act, and as such was really directed towards the unpopularity of large conglomerate mergers. CADE's decision in the brewing cases draws more on the actual potential competition doctrine, and is concerned with the possibility of independent entry by Miller Brewing and Anheuser-Busch into the Brazilian beer market. In any event, if the doctrine is to be applied, a number of things must be shown:

> (a) You must establish that the market is concentrated;
>
> (b) You must show the existence of other potential competitors;
>
> (c) There must be a reasonable probability that the potential competitor will enter the market independently; and
>
> (d) You must demonstrate that the potential competitor's entry would have significant pro-competitive benefits.[31]

Evidence needs to be gathered on all of these points. To use potential competition theories without satisfying the above will be a dangerous thing to do, particularly for an economy like Brazil's, which is in need of injections of foreign investment as it joins the global economy. If you are resting your theory on perceived potential competition, there must be proof that the acquiror had the capability and incentive to render it a perceived potential entrant, and must be one of only a few firms with such characteristics.

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30. *See* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 113-25 (1978).

31. *See* Mercantile Texas Corp. v. Board of Governors of Fed. Reserve, 638 F.2d 1255 (5th Cir. 1981).

In order to answer the third factor in the affirmative, market entry barriers must not be so high as to deter entry. More importantly, you must be satisfied that when faced with the inability to enter the market in the manner of its choosing, the 'potential competitor' will actually continue to pursue opportunities in *that* market and will not simply turn to other easier markets. The acquiring firm must be shown to have the capability and incentive to enter the market independently. Questions like what would be the expected profits for independent entry need to be addressed in the analysis. Without assessing whether this was or was not the case in the CADE decision, there is little evidence put forth either way.

There also needs to be analysis of who the other potential competitors actually were. If there were numerous other potential competitors, then elimination of one would have a negligible effect on competition. But potential competition can only be applied in cases where an acquisition might be deemed anticompetitive if it results in the elimination of "the prospect of independent entry by a firm whose pre-merger presence on the fringe of the market was perceived by . . . current market participants."[32] The question in the brewing cases should have therefore been whether the U.S. brewers' 1% market share in Brazil pre-merger had this disciplining effect on the duopoly of Brahma and Antarctica.

IX. U.S. JURISPRUDENCE ON POTENTIAL COMPETITION THEORY

The Supreme Court of the United States has twice reserved judgement on whether the theory is valid at all.[33] Very few courts validated the theory, and case law is rare. Indeed it has been condemned by the FTC as a "rather peculiar theory of competitive injury."[34] Many commentators have criticized the theory on the basis that it was designed to attack conglomerate mergers.[35] Rather, what should be focused on is the prevention of mergers which would result in harm to consumers from

32. Mark D. Whitener, *Potential Competition Theory—Forgotten But Not Gone*, 5 ANTITRUST 17, 18 (1991).

33. *See* United States v. Marine Bancorporation, 418 U.S. 602, 625 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973).

34. B.A.T. Industries, 104 F.T.C. 852, 919 (1984).

35. *See* Richard Hoerner, *Innovation Markets: New Wine in Old Bottles?*, 64 ANTITRUST L.J. 49, 50-55 (1995).

the exercise of market power. As far as the actual potential competition theory is concerned, it is clear that different circuits in U.S federal courts have different standards. For example, the Fourth Circuit requires "clear proof" that the acquiring firm would in fact have entered the market, the Second Circuit's standard is merely that the acquiror "would likely" have entered the relevant market, and the Fifth Circuit says the plaintiff must show a "reasonable probability" of entry.[36] What is clear is that a detailed examination of the firm's capabilities, interest, and incentive to enter the market must be considered.[37]

There had been some resurgence of the theory during Commissioner Steiger's term at the FTC, and there are a couple of 1990 FTC Consent Orders relaxing the previous standard of "clear proof" that was required in order to show that an alleged actual potential entrant would have entered independently. But even here, there were some narrow parameters put around the application of the theory. The prospective entrant had to be willing and able to imminently enter the market which is not now performing competitively. The FTC has also used the potential competition theory in the vertical area, but only where there was a claim that the acquisition eliminated potential competition by making assets unavailable that might attract others to enter a market upstream from the markets actually involved in the acquisition.[38]

Currently, potential competition theory is really reserved for cases where the potential competitor is engaged in research and development work, which might lead to a potentially competitive product and that "innovation" is prevented by the merger, i.e., it relates to the prevention of R&D and technological advancement.[39]

Also, the pro-competitive effect of independent entry needs to be illustrated. The mere addition of one competitor in the market will not be sufficient, neither will the mere entry of a large firm in a concentrated market.

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36. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, Ch. IIIC (4th ed. 1997).

37. *Id.* at 347.

38. *See* File No. 901-0010, proposed consent order, 55 Fed. Reg. 37,759 (1990), *Final Order Accepted*, 55 Fed. Reg. 51,963 (1990).

39. *See* Wright Medical Technology, Inc., 60 Fed. Reg. 460 (1995); Boston Scientific, 60 Fed. Reg. 12,948 (1995); Hoechst AG, 60 Fed. Reg. 49,609 (1995).

X. KEY DIFFERENCES BETWEEN EU AND U.S. COMPETITION ANTITRUST LAW

The evolution of U.S. antitrust law has arisen out of a deep-rooted distrust of political and economic power.[40] Subsequently in the 1960s and 1970s, U.S. antitrust laws were used to help small businesses. Gradually, however, as the U.S. economy changed, efficiency became the most important thing to consider in the administration of U.S. antitrust laws. The economic efficiency vision of the Chicago School became the most important view. Since cartels were inefficient, enforcement against the cartels became almost the only enforcement relied on during the Reagan years. Mergers were rarely challenged.

In Europe, competition law developed for very different reasons. Jean Monnet's vision of a unified Europe was founded on two basic theses. The first was that greater unity was a moral imperative after the ravages of two wars. The second was an economic imperative. The businesses of the crippled European economies needed to be able to better compete with their rivals in the United States and elsewhere. In order to be competitive on efficiencies of scale and so forth, the Europeans needed to be able to encourage transnational mergers. However, once the region was unified, it became necessary to ensure that businesses themselves did not cartelize the region, even though European competition law focused on giving assistance to small and medium-sized enterprises.

Hence, European law contains the Article 86 provisions on abuse of a dominant position. Dominance is much easier to prove than monopoly under Section 2 of the Sherman Act. As such, dominant firms are precluded from excessive pricing, and so forth. Examples of Article 86 actions abound, whereas Section 2 of the Sherman Act actions are comparatively rare. Similarly, merger law, specifically in the form of a merger regulation, in the European Commission developed much later, since one of the goals of the European Commission in the first place was to encourage such merger activity. A merger regulation has only been in place for seven years. Under the European merger law, the Europeans are concerned not only with price increases, but also with the merger's potential

40. *See* Eleanor Fox, *Antitrust, Trade and the Twenty-First Century—Rounding the Circle*, 48 REC. NYC BAR ASS'N 535, 539 (1993).

exclusionary effects on smaller competitors, and proof of output reduction is not the only guide.

European competition law is much broader than its U.S. counterpart. Free movement is an integral part of EU competition law. European competition policy extends to the areas of anti-dumping and state aids. Most recently this has been enforced by European Competition Commissioner Karel van Miert, in the area of aid to small businesses.

What the Europeans have that the United States does not, is a unified vision of antitrust, trade and investment rules, and trade regulation all subsumed within the competition area. It is worth noting that the European Commission and the United States have agreed to cooperate in the application of their competition laws, though the agreement was first voided on a technicality and then reapplied. A report produced by the European Commission on the application of this agreement was published on October 8, 1996.[41] The report reveals that the agreement itself provides that cases which concern the important interests of the other party be notified to them. Exchange of information on general matters is mandated. Both parties' competition authorities must cooperate and be coordinated. Each party must take into account the interests of the other when it takes measures to enforce its competition rules. Either party may take appropriate measures in respect of anticompetitive behavior that takes place on its territory, but whose effect is felt in the territory of the other party.

Most of the notifications that have taken effect to this point have been in the mergers area. The European Commission, once it notifies the United States, must notify the member states whose interests are affected. Timing is obviously key. The Microsoft case is an example of how coordinated action can be taken at the same time. An attempt has been made for case handlers on each side of the Atlantic to assess each other's view of the competitive effects of the transaction in their market. Clearly, market analysis is an area where there is a substantial amount of duplicative effort which is wasted and should be avoided. However, the inability of the European Commission and the United States to exchange confidential information is still a major stumbling block, especially if the

41. Commission Report, *supra* note 19.

two authorities adopt different definitions of the market. Kimberly-Clark/Scott Paper[42] shows that even if the product market is identical, a different geographical market can lead to different results and requirements for divestiture. The United States and European Commission cooperated in the Glaxo/Wellcome joint venture,[43] where there were a number of quite distinct product markets. This case demonstrated the different approaches that the FTC and the European Commission take. The European Commission required that the merged company license one of the two anti-migraine treatments and so retain a competitor, while the FTC required full divestiture of Wellcome's R & D for this particular anti-migraine treatment. Regarding geographical market analysis, the European Commission and the U.S. authorities tend to focus on effects in their own markets exclusively. There are, however, some examples where the European Commission already recognizes a global market: in *Lockheed Martin/Loral*,[44] the European Commission accepted that the satellite market was a global one. Nevertheless, U.S. authorities took the view that the United States was the relevant market because of, among other things, differences in price, quality, and/or technology between U.S. and non-U.S. manufacturers.

In certain cases, if the parties consent, U.S. and European Commission authorities may discuss information. There is a process by which the European Commission may respond to requests for information.[45] In addition, there are areas where the authorities have cooperated to help each other to locate information which is of public record, but may not necessarily be information to which the authority unassisted would have been directed. For example, in the Lockheed Martin/Loral merger, the FTC drew the European Commission's attention to information filed with the SEC, which was public, but which the European Commission would not necessarily have looked for

42. European Commission, XXVIth Report on Competition Policy, § III.10 (1996).

43. European Commission Decision Declaring a Concentration to be Compatible with the Common Market, Case No. IV/M.555, Glaxo Wellcome Plc, 1995 O.J. (C 65) 3.

44. European Commission Decision Declaring a Concentration to be Compatible with the Common Market, Case No. IV/M.697, Lockheed Martin/Loral Corp., 1996 O.J. (C 314) 9.

45. *See* Council Regulation No. 17/62, *supra* note 24, art. 11.

without such notification. Cooperation is also important when clarifying a point of foreign law which is relevant to the agreement or to the efficacy of a remedy. Waivers can also be useful in allowing the different agencies to discuss remedies in specific cases, and to exchange documents disclosing anticompetitive behavior.

The positive comity provisions have now been invoked,[46] though it is too early to tell how effective the positive comity doctrine will be in its application. Also, there have been many examples of either of the authorities delaying their own action, pending the action of the others, and keeping in close contact with that action. The European Commission has gone on record as saying that it would welcome European businesses' response to whether and how best it should seek to use the positive comity provisions to push U.S. authorities to investigate examples of where anticompetitive behavior in the United States threatens the ability of Europeans to compete. Although the European Commission report focuses on cooperation in the merger area, greater possibilities for cooperation may present themselves in non-merger cases, such as international price cartels. In these areas, the restrictions on the exchange of confidential information have been felt at their keenest. This is particularly so in the investigation of cartels. If elimination of cartels is to remain the priority of competition policy generally, there needs to be a way around the impasse on the restrictions on exchange of confidential information. It is here that the role of a body standing above national might begin to make some sense.

It will be a significant element of antitrust policy to determine whether certain behavior should be classified as per se illegal, whether a rule of reason should be universally applied, or whether antitrust policy should be informed by concepts of dominance (more prevalent in the European system). Concepts of dominance are thought to encourage small competitors to compete against their larger rivals, as opposed to a pure allocative efficiency analysis which promotes efficiencies and focuses on behavior which lowers price for consumers. In countries, particularly in the Caribbean, where small businesses are a vital part of the economy, it may be necessary to apply

46. *See* Commission Report, *supra* note 19.

dominance concepts, in order to ensure that small economies might more easily make the transition to a free market.

XI. PROCEDURAL DIFFERENCES

Procedural differences between EU and U.S. law are the most immediately obvious area of difference. Generally, in the analysis of vertical restraints, U.S. law applies a rule of reason analysis as described above. However, under EU law, one would have to ascertain whether the restrictions contravene Article 85(1), and if they do, to seek a block exemption or an individual exemption from the European Commission.[47] This procedure has proved successful in promoting a certain and predictable business climate. The European Commission does issue comfort letters, and this procedure has been followed in Venezuela, for example. However, the comfort letter procedure (which is non-binding) has been criticized.

Private enforcement is still comparatively rare in Europe. In the United States, most enforcement is done at the private party level, largely because, unlike in Europe, juries decide damages, and in the area of antitrust, treble damages apply.

Joint ventures are classified differently. If a venture is classified as a consolidation in Europe (rather than a collaboration), then it is analyzed under the Merger Control Rules, and if it falls below the reporting thresholds, it will certainly not be challenged. In the United States, joint ventures are regarded as creatures in between full mergers and separate entities, to which a rule of reason analysis will be generally applied.

XII. ANALYSIS OF LATIN AMERICAN COMPETITION LAW[48]

Until the beginning of this decade, competition policy in Latin America had taken a back seat. Competition laws were enacted prior to this, to be sure, but in environments where

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47. *See* Commission Regulation 1983/83 of June 30, 1983, 1983 O.J. (L 173) 1; Commission Regulation 1984/83 of June 22, 1983, 1983 O.J. (L 173) 5; Commission Regulation 417/85 of Feb. 22, 1985, 1985 O.J. (L 53) 1; Commission Regulation 418/85 of Feb. 22, 1985, 1985 O.J. (L 53) 5; Commission Regulation 4087/88 of Dec. 28, 1988, 1988 O.J. (L 359) 46.

48. LUIS TINEO, COMPETITION POLICY & LAW IN LATIN AMERICA: FROM DISTRIBUTIVE REGULATIONS TO MARKET EFFICIENCY (Monterey Inst., Ctr. for Trade & Com. Dipl., Working Paper No. 4, 1997) (on file with *Brooklyn Journal of International Law*).

government intervention in markets was the norm these laws had little effect. However recently, Latin American countries have started to enact more modern competition laws. Many of the Latin American countries have enacted legislation addressing the competition issue. Argentina enacted such a law in 1980, Brazil in 1994, Colombia amended its law in 1992, Chile in 1979, Costa Rica in 1994, Mexico in 1992, Panama in 1996, Peru in 1991, and Venezuela in 1991. A number of other countries are currently discussing legislation. Regionally, only NAFTA includes competition provisions although there is some discussion of this within MERCOSUR and CARICOM. The view of the Organization of American States (OAS) is that laws in the region target the promotion of freedom in industry and commerce, equitable participation of small and medium sized enterprises, and the decentralization of economic power. Emphasis should be placed on preventing monopolistic behavior, and abuse of dominant position, much more like the European system. A number of Latin American laws are very closely modeled on the European system. Many countries have carved out certain exclusions. Mexico, by way of example, does not apply its competition laws to the petroleum, natural gas sectors or to export cooperatives. Chilean competition law excludes mining and petroleum. In Costa Rica, insurance activities, alcohol distillation, fuels, activities carried out by the concessionary regime and telephone, telecommunications, electric energy and water services are excluded from competition. In Colombia, household public services, and the financial and insurance sectors are excluded. However, of course, the United States also has such exemptions, both by statute and by the application of the state action doctrine.

There are a number of commonalities among all Latin American laws. For example, certain matters are prohibited and these include:

(a) Price-fixing;

(b) Restriction of market access for new competitors by making the sunk costs of potential competitors more onerous;

(c) Bid-rigging or coordination in presentation of bids at public procurement auctions;

(d) Restraint of output agreements by quota imposition;

(e) Market and consumer division agreements; and

(f) Predatory practices adopted by a dominant company to force out or prevent entry of competitors by selling at prices below production cost.

Certain vertical agreements are also generally illegal:

(a) Price discrimination agreements;

(b) Resale price maintenance;

(c) Territorial restraint agreements by which a supplier confines a distributor to market a product in a certain territory;

(d) Exclusive agreements under which a distributor obtains the right to sell and market a product under the condition of not trading the other product;

(e) Tying arrangements; and

(f) Refusal to do business based on a supplier's stronger negotiation position.

The U.S.-style per se rule of reason classification has not generally been used in the design of laws by countries in the region except in the cases of Mexico, Panama, and Costa Rica. In Brazil, all potentially anticompetitive behavior is analyzed by a rule of reason. In Argentina and Brazil, in order for a behavior to be anticompetitive, there must be a demonstrable threat to a nation's economic interests. In Venezuela, horizontal agreements are per se unlawful, and a rule of reason analysis is applied to vertical agreements. This looks like the U.S. law, but Venezuelan law is based also on European dominance concepts. In their enforcement, all countries rely on U.S. jurisprudence.

In Latin American competition law, with the exception of

Mexico or Costa Rica, it is abuse of a dominant position, not the attempt to monopolize, which is to be penalized. This is something of a double-edged sword. The reason is that although European law seeks to find out what is actually being done by the monopolist and U.S. law penalizes attempts to become a monopolist, it is in practice a lot easier to demonstrate that someone has a dominant position, than that they are in fact a monopolist under the U.S. antitrust laws. Generally, in Latin America, the abuse of a dominant position is predicated on the following factors:

> (a) Degree of concentration of the market, existence of barriers to entry, and dynamics of competition in the relevant market; and
>
> (b) Abuse of that position through the performance of additional anticompetitive acts.

In order to ease analysis, Colombia, Chile, and Venezuela actually specify the type of conduct that constitutes abuse of dominant position. This includes things like price discrimination, restriction of output and distribution, refusal to deal for the purchase or performance of services, discriminatory practices to impose unequal conditions for performance of services, and tying agreements.

Economic concentrations are universally disapproved of, because this establishes the platform for abuse of a dominant position. However, doing the necessary analysis to establish how an increased level of concentration can affect competition is no easy task. This analysis requires a tremendous amount of economic and legal analysis associated with considerable manpower. Broadly, the guidelines used by these countries include:

> (a) Relevant market defined by product and geographic content;
>
> (b) Pre-and-post-operation concentration levels, measured by sales volume, and the value of assets, and the value of the transaction;
>
> (c) Level of competition among participants in terms of number of competitors, production capacity, and product demand;

(d) Barriers to entry of competitors; and

(e) History of competition and rivalry between participants in the sector or activity.

In Brazil, Colombia, and Venezuela, this evaluation allows us to take into consideration the increases in efficiency which the new operation might produce. The analysis includes the possibility that the merger took place purely to strengthen certain companies, and not necessarily to boost efficiency. Brazil, Chile, Jamaica, and Venezuela follow a model whereby certain exceptions are authorized for practices that help enhance economic efficiency with respect both to market participants and consumers. This mirrors the European approach. These exceptions have been specifically applied to:

(a) Export agreements;

(b) Agreements on research & development;

(c) Exclusive distribution and purchase agreements;

(d) Agreements which help to improve output, quality and marketing of goods or services; and

(e) Exclusive agreements, as in the case of exemptions and territorial representations.

Mexican, Brazilian, and Venezuelan laws also have de minimis exceptions.

Many of the countries' competition laws are connected with the deregulation of the economy. Determination of the limits of state intervention are very important in developing country markets, particularly those whose industries have been shielded from competition for so long and have levels of inefficiency built up over a period of years, if not decades. Hence, in many countries the laws allow the competition agencies to issue orders or regulations to amend or rescind existing legislation when such legislation generates barriers to the entry of participants. The wave of privatization must be closely

monitored to ensure that the potential for the build up of private economic concentrations is controlled. Agencies in Mexico, Brazil, and Venezuela have the power to evaluate the effect that a privatization might have on competition.

XIII. ANTITRUST ENFORCEMENT IN LATIN AMERICA

A. *Introduction*

Enforcement is perhaps the area where there is the greatest problem in antitrust policy in Latin America. Although the agencies have the power to conduct investigations, and may issue recommendations to firms prior to actually taking specific action, there is little positive evidence that this is happening. Significantly, breaches of these laws are still thought to be in the public domain, and private actions, as in the United States are not generally countenanced. Private parties may, nevertheless, request that the agencies take action in most jurisdictions. Once a decision comes down, private parties may, in certain jurisdictions (for example, Mexico), sue for damages, thus leaving some sanction under private law. Essentially, the agencies can nullify the transaction, impose fines, and impose individual liability for damages.

Fines can be substantial. Violators can suffer fines of up to 20% of annual sales in Mexico, Costa Rica, and Venezuela. Argentina can impose fines of up to 20% of the profit obtained. In Argentina, Chile, and Jamaica, criminal sanctions can be imposed for transgressing the prohibitions. In all Latin American countries, there is the possibility of judicial review from the agencies' decision. This takes place through the court system once the appeal process, if there is one, has been exhausted.

B. *Role of the Antitrust Authority*

As the protectionist backlash is felt throughout Latin America, one significant role which the antitrust authorities in the region could play is as an advocate for free trade with the national government, on the one hand, and act as a counterweight to protectionism on the other.[49] One of the most signif-

49. Malcolm Coate et al., *Antitrust in Latin America: Regulating Government and Business*, 24 U. MIAMI INTER-AM. L. REV. 37 (1992).

icant elements of the job of competition or antitrust authorities is the release of opinions and statements about how the authority intends to enforce antitrust law in specific areas (either by industry sector, or by type of anticompetitive behavior). One challenge for the Latin American authorities is the civil law tradition in which they are rooted. Under that tradition, it is only the underlying statute that has legal significance. The importance attached to statements of policy and so forth that inures in the United States and European systems needs to be ingrained so that an antitrust body of law develops in the countries of the region. The civil law tradition is no automatic bar to this.[50]

But, as things stand, the countries differ greatly in their stated purposes for competition law. For example, Bolivia's Constitution merely states that the economic structure must be such that it is in harmony with principles of social justice with a view to ensuring that all residents enjoy a humane standard of living. The Sectoral Regulation Laws in Bolivia are designed to ensure efficiency in the monitored sectors, which are telecommunications, electric, energy, transportation, and water. In Brazil, there are no per se offenses. All prohibited conduct is determined by a rule of reason. In Brazil, natural monopolies arising out of greater economic efficiency are not illegal. Indeed, actors may get individual exemptions from the competition laws provided their actions have as their objective, cumulatively or alternatively, increasing productivity, or improving the quality of goods or services.

XIV. INDIVIDUAL COUNTRY ANTITRUST REGIMES

This paper, having made some general conclusions, will now analyze competition laws in specific groupings of countries. These groupings mirror those chosen by the OAS in its study of comparative Latin American competition laws.

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50. Although all but one of the European countries (the U.K.) have civil law systems, and the European Court of Justice has historically used a European style rendering of its judgments, no one would dispute the fact that there is a body of European antitrust law, or that European Commission statements carry great weight in subsequent legal analysis.

A. *Chile, Dominican Republic, and Guatemala*

In many Latin American countries, much of the antitrust law is to be found in National Constitutions or in the criminal law. Chilean law focuses on the prevention of monopolies and monopolistic practices. Dominican law is somewhat two-faced, stating that consumers must be protected and that the Government must retain the ability to exercise certain economic and strategic activities. In Chile, Article 6 of the law provides that monopolistic market position means not only a monopoly, but also applies to firms with dominant positions, whether the firms are monopolies or not. State monopolies are still permitted in law in the Dominican Republic (DR). In Chile, there are a number of Commissions and enforcement organizations, but it is unclear how effective this complicated structure is proving although it is certainly true that a number of decisions have been handed down by the relevant authorities. In Chile there is no predetermined legal setting for procedures before the Commissions. Although the authorities can impose major penalties, such as prison sentences, only a fine of up to U.S. $540,000 can be imposed. In addition, prison sentences only apply if the conduct relates to essential services. In the DR, penalties are minimal and are unlikely to have any significant different effect.

B. *Jamaica, Mexico, and Panama*

Although there are antitrust statutes in all of these countries, each has very different objectives. Jamaica is included, though not part of Latin America, as a country which is part of the FTAA process. In Jamaica, the competition law is fairly advanced, even if enforcement is negligible. It includes the usual exceptions for research and development, and promotion of technical or economic progress, provided that enterprises are not afforded the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Mexican law is the most developed of the three, thanks to NAFTA.[51] Price fixing, output restriction, market division and bid-rigging are held to be per se anticompetitive practices. The Mexican law is also the law most like U.S. antitrust law and

51. Mexico's economic competition law, the Federal Act of Economic Competition, 34 I.L.M. 1045 (1992), was enacted in response to Ch. 15 of NAFTA.

even encapsulates the Chicago School's vision of efficiency within the statute itself.[52]

Panama adopts a system of absolute and relative monopolistic practices, which essentially portrays those practices that in the U.S./Mexico model would be per se illegal as absolute monopoly practices and those that a rule of reason would apply to are classified as relative monopolistic practices. In Panama, there are provisions to protect consumers, and unfair trade practices, contained in Panama's anti-dumping legislation.

As regards economic concentrations, Jamaica analyzes these on the basis of dominance and not monopoly. However, simply being dominant does not constitute a breach. Abuse of dominant position must be found. This looks more like European competition law. In all cases there is an antitrust commission to investigate and bring actions in respect of anticompetitive behavior.

Sanctions for anticompetitive conduct do not really act as disincentives. Fines are limited, except in the case of Jamaica, where fines of one million dollars may be imposed on corporations. It is still a far cry from the U.S./EU position where fines of up to 10% of worldwide income can be imposed.

Enforcement in Mexico after NAFTA will be interesting to monitor. The Mexican FCC is beginning to enforce competition laws, and the constitutionality of the competition law has been upheld.

C. *Peru and Venezuela*

In Peru and Venezuela, there are competition laws which most closely resemble European competition laws. Venezuela, as a member of the Andean Pact, must comply with the Andean Pact's legislation on anything which restricts free trade in the region. Exceptions exist in the agricultural sector in Venezuela.

Venezuelan law closely tracks EU competition law, including the abuse of dominant position doctrine, and specific exceptions for exclusive distribution and franchise agreements.

There is machinery for control of economic concentrations

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52. *See* Joshua A. Newberg, *Mexico's New Economic Competition Law: Toward The Development of a Mexican Law of Antitrust*, 31 COLUM. J. TRANSNAT'L L. 587, 593 (1994).

only in the electricity sector in Peru. In Venezuela there is a general prohibition, especially if concentrations arise from the exercise of a single activity. Venezuelan law on concentrations is quite developed, but enforcement is not very developed. In Peru, there are a number of Commissions and tribunals charged with the enforcement of antitrust, and this may give rise to confusion. There are also sectoral bodies for competition regulation, e.g., in the public telecommunications area. Private actions are still rare in Peru and Venezuela.

In regard to sanctions, in Venezuela, major fines including up to 10% gross sales are envisaged, while repeat offenders can be fined up to 40% of gross sales.

Generally, competition laws have universal scope, except that Costa Rica, Jamaica, Mexico, the United States and Venezuela have established certain exceptions to the application of certain laws for certain sectors and economic activities. Examples include agriculture, professional sports, labor organizations, and export activities. There is a control regime in place in Peru for the electricity sector. Brazil, Canada, Colombia, Jamaica, Mexico, and Venezuela additionally provide regulations for the control or prior notification of economic concentration in order to assess the degree of concentration and its consequences on competition. With the exception of Costa Rica, all countries recognize the rights of affected parties to initiate actions for damages or injuries before the ordinary courts. However, it is unlikely that private actions will be used to enforce the antitrust laws in anything remotely similar to the way they are used in the United States.

XV. DEFINING THEMES IN LATIN AMERICAN ANTITRUST LAWS[53]

In all countries, price fixing is prohibited. In Colombia, only horizontal agreements are prohibited. However, in certain countries, a per se prohibition does not apply. For example, in Jamaica horizontal price fixing is only prohibited if it has as an effect the substantial lessening of competition. Similarly bid-rigging is widely prohibited. There is some distinction

53. *See* OAS, Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere (1997) (analyzing the Argentine law in English).

drawn in the case of output reduction—the majority of countries have a per se prohibition (e.g. Mexico and Panama), however Jamaica allows such activity if it is "in the public interest." Market division is also prohibited by most countries, except again in the case of Jamaica, where it is only prohibited if its substantial effect is to lessen competition. Mexico follows most closely the U.S. position in what I would call these "Category A" offenses of price fixing, output restriction, bid-rigging and market division. They are all per se illegal. This is an effective demonstration of the effect of NAFTA. In Latin America, price fixing should be the first target for enforcement authorities.

Tying agreements are prohibited in all of the countries on a rule of reason-type analysis, or according to the doctrine of relativity (Mexico, Costa Rica). In the Dominican Republic (DR), it is prohibited only where the buyer is a consumer. Refusals to deal fall afoul of most nations' competition laws. However in Argentina, a mere commercial reason will make a refusal to deal stand up to competitive analysis. A number of countries make no provisions regarding refusals to deal, for example Bolivia, Chile, the DR, and Mexico. Otherwise, a rule of reason type of analysis is generally applied. For "Category B" offenses, for example, predatory pricing, price discrimination and resale price maintenance, I see some discrepancies between national approaches. In some cases, predatory pricing can only be affected by a dominant party (Colombia), in other cases, it is necessary to show an anticompetitive purpose (Panama). On the other hand, in Costa Rica, any act or agreement resulting in production at less than normal value is deemed to be a partial monopolistic practice, which is illegal, if the party has market power. Price discrimination is generally prohibited, except that in Brazil, as for all anticompetitive practices, you must show anticompetitive effect, and apply a rule of reason analysis. In Bolivia, you must show the intent to harm competition. In Colombia, you need to have a dominant position, in order to come within the bounds of this practice. A form of per se rule applies to concerted practices in this area. In Peru, if some competitors are disadvantaged, then price discrimination is completely prohibited. In Venezuela, there is a difference between horizontal and vertical practices—horizontal practices are almost always per se illegal. Vertical agreements are prohibited if conducted by an entity with dominant position.

Since, in Latin America, state or private monopolies are a very real problem, antitrust enforcement authorities should also focus on taking action against single firms that obtain or enhance monopoly power. Note also that in analyzing predatory behavior, special attention will have to be paid to misuse of government processes. In the area of predation there is a substantial difference between U.S. and European law, since the Europeans apply an abuse of dominant position doctrine, in which it is easier to find evidence than evidence required for a U.S. attempt to monopolize charge. The European system is more likely to protect competitors than it is to ensure market competition. In Latin America in particular, there will be a need to focus on genuinely exclusionary tactics.[54]

Resale Price Maintenance (RPM) is uniformly condemned. However, in most countries, a quasi rule of reason is applied. For example, in Mexico you must show that the purpose or effect is to drive others out of the market. In Colombia, there is no distinction drawn between horizontal and vertical price fixing. They are both per se illegal. In no other country in Latin America is RPM per se illegal. Either a rule of reason, or the doctrine of relativity, which is common to both Mexico and Costa Rica, applies. The doctrine of relativity states that before a practice can be found to be anticompetitive, you must show that there is market power, and that the practice relates to goods or services in that particular market.

Having considered differences between EU and U.S. laws, and surveyed emerging antitrust laws in Latin America, it is worthwhile seeing how best some of the antitrust wisdom from the EU and United States might be applied in the Latin American contact.

The remaining purely vertical restraints, I classify as "Category C" restraints. These include, for example, territorial restraints, exclusive distribution agreements and the like. In certain countries, exclusive distribution agreements are prohibited, but only to the extent they are intended or have an anticompetitive effect. However only Mexico, Panama, Brazil, Canada, Chile, and Costa Rica have laws which govern this.

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54. *See* Fox, *supra* note 40, at 586.

XVI. TRANSATLANTIC DIFFERENCES IN THE VERTICAL AREA

One major difference between U.S. and European law has been illustrated in their approach to vertical arrangements. This difference was highlighted in the Boeing/McDonnell-Douglas merger review, which led to completely different results when analyzed by the European authorities and the U.S. authorities, who were analyzing the same market (the worldwide market for large commercial aircraft).

In the United States, vertical restraints are analyzed in two categories, those that can lead to collusion, and those that can lead to exclusion. However, U.S. antitrust recognizes that vertical restraints may lead to real efficiencies by eliminating the free-rider. Vertical restraints in the EU are analyzed differently, bearing in mind the overriding goal of ensuring closer economic integration within the European Union. The U.S. authorities will generally be more lax than European authorities about allowing territorial restrictions to stand.

In vertical merger cases, efficiency claims (as a defense in a merger case) carry much more weight in the United States, than currently in the European Union. I will now consider specific exemptions of the difference in approach by EU and U.S. officials in certain key vertical relationships.

A. Exclusive Dealing Agreements

Exclusive dealing arrangements are another area of difference between EU and U.S. systems. The key difference is at what level of market foreclosure will the antitrust authority find an exclusive dealing agreement invalid. European law is generally more suspicious of exclusive dealing contracts, and a lower level of foreclosure would be needed before the European authorities found these invalid. This is clearly illustrated in the different approaches to the exclusive supply agreements between Boeing and various airlines which was analyzed in the Boeing/McDonnell-Douglas merger.

The Europeans found that Boeing had a dominant position in the market and abused that dominance by entering into exclusive supply contracts with a number of airlines. The dominance of the seller is the main factor. Dominant position in a U.S. analysis would be only one of many factors in an overall rule of reason analysis. The analysis is found in *Tampa Elec-*

tric v. Nashville Coal.[55] First, the court defined the product and geographic markets and then sought to determine whether the contract foreclosed competition in a substantial share of that market. A contract would only be declared invalid if opportunities for other traders to enter into or remain in that market were significantly limited. But any anticompetitive effects such as the strength of the parties, the percentage of commerce involved, and the present and future effects of foreclosure on effective competition in the market are weighed against any efficiency arising from the exclusive arrangement. It may well be that there is a safe harbor for exclusive dealing contracts which foreclose even up to 20%-30% of the market.[56] By contrast, under European law, it is only really the *Delimitis v. Henniger Bräu* case[57] that has adopted a foreclosure analysis where the Court held that exclusive purchasing agreements do not restrict competition unless they make a significant contribution to the foreclosure of competitors from the market. Nevertheless, pre-existing case law suggested that a European court would simply condemn exclusive dealing arrangements, if the seller had a dominant position.[58] Cases after *Delimitis* suggest that even when the exclusive contract amounted to 10% of the market, a violation could still be found.[59]

In the *Boeing* case, the European Community and United States analyzed Boeing's exclusive supply contracts differently. How exclusive contracts are analyzed in Latin America will be very important in assisting countries in the region with one of their stated objectives, that of increasing foreign trade and investments. In industry sectors where entry barriers are high, exclusive contracts are an important tool to be able to compete. It may be that applying a European-style approach would have a chilling effect on such trade and investment flows.

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55. Tampa Elec. v. Nashville Coal, 365 U.S. 320, 327-35 (1961).

56. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 17 (1984).

57. *See* Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. 935, I-944-45.

58. *See, e.g.*, Case 85/76, Hoffmann-La Roche v. Commission, 1979 E.C.R. 461.

59. *See* Commission Decision Relating to a Proceeding Pursuant to Article 85 of the EEC Treaty against Langese-Iglo GmbH, No. IV/34.072, 1993 O.J. (L 183) 19, 22.

B. Vertical Mergers[60]

The treatment of vertical mergers will also be very important in any developing economy where foreign investment is encouraged. There is likely to be significant integration between manufacturers seeking to integrate their distribution networks, or between two manufacturers where there is likely to be technology transfer.

The United States has analyzed vertical integration by looking closely at the impact of any resulting foreclosure on competition. The *1984 Merger Guidelines*[61] describe several theories of possible competitive harm from a vertical merger. One is the effect on potential competitors—if the industry has a high degree of vertical integration, and a limited independent supply of product in the upstream market, a downstream competitor might feel compelled to enter the upstream market as well. A vertical merger might also facilitate collusion by knowledge of downstream prices by upstream rivals and vice versa.

In Europe, market integration is the overriding goal. This strongly impacts the analysis of vertical arrangements.[62] In Europe, merger control is governed by the 1989 regulation 4064/89 - the Merger Regulation. Here the European Union is particularly concerned by firms that integrate manufacture and distribution, and can exert power over their suppliers.

The approach to collusion differs as between the United States and European Union in merger analysis. Historically, the United States used the Herfindahl Hirschmann Index (HHI) as an indication of coordinated effects, whereas the European Union considered only dominance. Currently a unilateral effects analysis is beginning to be employed in the United States. The European starting point is to look at the market

60. *See* Robert Pitofsky, Chairman, U.S. Federal Trade European Commission, Vertical Restraints and Vertical Aspects of Mergers—A U.S. Perspective, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law and Policy (Oct. 16-17, 1997).

61. *See* Department of Justice, Antitrust Division, 1984 Merger Guidelines, 49 Fed. Reg. 26, 823 (1984), *reprinted in* 2 Trade Reg. Rep. (CCH) No. 655, 4490-4495 (1994).

62. *See* Juan Briones Alonso, Head of the Merger Task Force, European Commission, Vertical Aspects of Mergers, Joint Ventures, and Strategic Alliances, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law and Policy (Oct. 16-17, 1997).

share controlled by leading suppliers. What is true is that the European Commission is unlikely to authorize a merger which results in or reinforces a position on the basis of efficiencies.

In the United States, merger analysis is moving towards a more dynamic analysis of the markets. Mergers that benefit from efficiencies are beginning to be recognized, particularly in the vertical area. In the case of distribution efficiencies, the presence of another brand properly distributed in the market might well lead to a more efficient market, with the potential for an increase in interbrand competition and lower prices to consumers. A static merger model, based only on existing market shares, results in a snapshot of competition in a particular industry.[63] Importantly, international competitiveness and the drive towards technological superiority are being expressly recognized in merger analysis, and innovation benefits arising from such analysis for technology transfer is so important to economies in transition that such concepts should be encouraged and utilized by those countries' antitrust agencies. Increases in efficiency likewise should be considered.

Currently, analysis focuses at least in part, on the possibility that the merged firm would alter its behavior unilaterally following the acquisition by elevating price and suppressing output. Specifically applying to vertical integration, the FTC and Department of Justice (DOJ) recognize foreclosure as a potential competitive harm of vertical mergers, either input foreclosure (denying access of essential inputs to downstream rivals) and downstream foreclosure (denying downstream outlets for production, thus raising upstream rivals' costs).

What should the approach be for Latin America? In many (if not all of the countries of the region) the presence of monopolies is significant. Since these monopolies are often inefficient, antitrust law must do something about them. In addition, the law must facilitate inflows of foreign trade and investment that often take the form, in emerging markets, of vertical integration. In order to balance these different goals, we need a flexible approach to vertical integration that allows efficiencies to have a greater role in analyzing whether mergers should or should not be authorized. Particularly in vertical integration,

63. Thomas N. Dahdouh & James F. Mongoven, *The Shape of Things to Come: Innovation Market Analysis in Merger Cases*, 64 ANTITRUST L.J. 405, 406 (1996).

weight should be given to efficiencies in distribution as this will increase interbrand competition and lead to lower prices for consumers.

A specific merger regulation is advised in Latin America (bearing in mind the civil law tradition of the countries to which I refer) that could encapsulate (in such a way as not to become inflexible) some of the concepts referred to above. Note that an overly hasty attempt to break up the monopolies (by applying European dominance concepts) might lead to some short-term damage to the national economies of the countries involved. It is interesting that at this time, there is a trend in the United States to examine vertical mergers more closely (in line with European law).

C. *Strategic Alliances*

Strategic alliances and joint ventures are areas where antitrust treatment will be very important. These tools are particularly important for multi-nationals, and others accessing new markets. They are also critical to ensuring the transfer of technology to developing countries.

It is the foreclosure effects of such joint ventures which have led to a number of decisions, notably by CADE,[64] which might have a negative chilling effect on foreign investors. An analysis of EU and U.S. laws in this area might prove instructive. In addition, many joint ventures should be encouraged by the countries in the region, because (as stated above) of the possibility of technology transfer.

The European approach focuses on potential foreclosure effects to other competitors (see for example, *Atlas*[65] and *Phoenix/Global*,[66] where conditions were imposed to guard against the dangers of vertical foreclosure). Of course vertical integration effects as a result of merger or joint venture/strategic alliance vary greatly depending on the sector.[67]

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64. *See* the Miller/Brahma [Ato de Concentração No. 58/95] and Anheuser-Busch/Antarctica decisions [Ato de Concentração No. 83/96].

65. Commission Decision Relating to a Proceeding Under Article 85 of the EC Treaty and Article 53 of the EEA Agreement - Atlas, No. IV/35.337, 1996 O.J. (L 239) 23.

66. Commission Decision Relating to a Proceeding Under Article 85 of the EC Treaty and Article 53 of the EEA Agreement - Phoenix/Global One/Case No. IV/35.617, 1996 O.J. (L 239) 57.

67. *See generally* Michael J. Reynolds, Mergers and Joint Ventures: The Verti-

In the UK, by way of example, greater emphasis has been placed on vertical integration in the drinks sector.[68] The U.S. approach to the potential competitor theory of which CADE appears to have grown fond is instructive.

Another important aspect to vertical integration is the possibility that companies "might camouflage inefficient performance in one aspect of their business."[69] In many of the industries in the emerging economies of Latin America, there is a great need to make businesses more efficient, and also ensure that inefficiencies cannot be hidden.

If the goal is market integration, it is clear that a greater emphasis will be placed on vertical relationships. In the context of competition rules in CARICOM or MERCOSUR (discussed later), a greater emphasis or analysis of vertical relationships is to be expected, as opposed to national rules, since market integration will be a goal. However, there is some recent evidence suggesting that vertical restraints do not affect the goal of market integration as greatly as was once thought. It may even be that the benefit of better ensuring inter-brand competition as a result of allowing vertical restraints outweighs any negative effect on the market integration goal.[70]

D. Mergers—Analysis of Efficiencies

Merger analysis, I argue, should take into account a range of efficiencies as possibly pro-competitive. This way we can also assess the effect of changing market conditions, particularly appropriate for a free trade area, such as the FTAA, which encompasses emerging economies. Merger analysis should take into account relevant geographic markets, including foreign supply responses, with regard to actual barriers to entry. We must also consider the effect of the merger on competition in innovation. This will be particularly significant in the telecommunications and high-tech sectors, such as biotechnology and

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cal Dimension, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law and Policy (Oct. 16-17, 1997).

68. *Id.*

69. This was specifically recognized in the Carlsberg-Tetley decision in the U.K. 1997 Cmnd. 3662, at § 2.87.

70. *See* Mario Siragusa, Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law and Policy (Oct. 16-17, 1997).

semi-conductors. We must encourage innovation and ensure that the prize of being first is continuous improvement and innovation. Especially in these sectors there is an advantage in combining complimentary technologies leading to a growth in joint ventures and an increased role in the use of licensing.

Joint venture activity is particularly critical in accessing emerging markets, such as those in Latin America. Pro-competitive efficiencies are taken into account when a rule of reason analysis is applied to conduct in violation of the Sherman Act. Although U.S. Supreme Court authority on mergers has not evolved in the way that its analysis of Sections 1 and 2 of the Sherman Act has, guidelines such as the Horizontal Merger Guidelines (1984) have been applied. The 1992 Merger Guidelines state that "the primary benefit of mergers to the economy is their efficiency-enhancing potential," and implied that in the majority of cases firms could achieve available efficiencies without department interference. The question that must be resolved is whether the efficiencies must themselves relate specifically to this transaction (otherwise it would be arguable that the increased efficiency was not the reason for the merger).

Efficiencies probably pose no greater burden than other types of evidentiary issues. However, there is some evidence suggesting that it is difficult for businesses to measure likely efficiencies accrued pre-merger, and project post-merger, because of the difficulty of producing price and cost information.

One matter that is particularly relevant is the analysis of distressed industries' claims in merger analysis. Failing companies in the United States looking to merge have long argued that they should be exempt from Section 7 of the Clayton Act which prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly. Under the 1992 *Horizontal Merger Guideline*,[71] the failing firm defense will be accepted where:

> (a) Allegedly failing firm would be unable to meet its financial obligations in the near future;

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71. Department of Justice, Antitrust Division & Federal Trade Commission, Horizontal Merger Guidelines (1992), 57 Fed. Reg. 41,552001 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) 13, 104 (1992).

> (b) It would not be able to reorganize successfully under Ch. 11 of the Bankruptcy Act;
>
> (c) It has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would key its tangible and intangible assets in the relevant market, and pose a lesser danger to competition than does the proposed merger; and
>
> (d) Absent the acquisition, the assets of the failing firm would exit the relevant market.

It is widely belived that it is unwise to carve out specific exemptions for distressed industries, and that a competitive effects analysis is the correct approach.

The DOJ is beginning now to turn to a unilateral effects analysis, rather than the old HHI, in its merger analysis. Power and the exact definition of the market is becoming arguably less important. But what is becoming more significant is the precise projected effect on price of the merger. But obtaining this type of price information is very difficult and probably unsuitable for countries currently struggling to set up administrative bodies to deal with antitrust problems. Certainly, a coordinated effects analysis would be easier to apply. The unilateral effects analysis is particularly relevant for those "gatekeeper" industries, like utilities, where behavior can have a significant effect on price. In Latin America, this could become very significant, as foreign investors seek to invest in key utilities in the electricity and telecommunications sectors, as a result of the wave of privatizations.

The approach to mergers in the countries differs markedly. The spectrum ranges from one extreme in the case of Brazil where any dominance is illegal, to those countries which encourage efficiency producing mergers (Colombia, Jamaica). All prohibit mergers where the merger would restrict free competition. However Bolivia is somewhat regressive in that its prohibition applies where the economic independence of the state is threatened.

XVII. SANCTIONS

The approach of the different countries to sanctions for anticompetitive activity also differs widely. Measurement is very different - in the case of Colombia, Costa Rica, and Mexico, reference is made to the minimum wage. Others decide by reference to company profits, for example, Venezuela (10-20% sales), or stated fine (Peru - fine capped to 10% of income or Argentina, fine of up to 20% of profit unlawfully obtained). Not every country carries penal provisions for breaches of the law (no penal sanctions at all in Brazil).

Two points need to be made to conclude this analysis. First, most of the Latin American laws do not coherently break the subject down into categories of offenses as I have. Second, there is still some divergence between the ways the different countries seek to promote free competition. In many cases, special sectoral exceptions are established and this may make a coherent application of competition policy more difficult. In most countries, the antitrust laws are constituted by a somewhat ad hoc mixture of the Constitution, the criminal law and civil sanctions. Rarely, except in the case of Mexico, is there any coherent underpinning, or philosophical framework in which the law is set.

XVIII. SUBSIDIES, ANTI-DUMPING AND COUNTERVAILING DUTIES[72]

This area is worthy of mention, since these topics fall within the general competition area found within European antitrust concepts and the jealously-guarded U.S. dumping law. It is illegal for member states of the European Union to levy dumping duties against other member states. However, Community authorities may order protective relief against dumped imports from countries outside the Union.[73] Under EU law, a product is deemed to be dumped if its export price into the Community is less than its normal value.[74] If no normal price can be readily determined, the European Union will

72. OAS Trade Unit Report to the FTAA Working Group on Subsidies, Anti-Dumping and Countervailing Duties (1997).

73. Council Regulation 2177/84/ECSC of July 27, 1984, 1984 O.J. (L 201) 1.

74. Commission Decision 2177/84/ECSC of July 27, 1984, 1984 O.J. (L 201) 17, 20.

look at a constructed price based on the cost of production, plus a reasonable margin of profit. If this is established and an economic injury to the Community is shown, then a definitive anti-dumping duty will be imposed. Rather than imposing duties, the European Commission has the right to take undertakings after an investigation.[75] However, the EEC, as it then was, became concerned that foreign producers could circumvent the anti-dumping rules by importing some product into the European Union cheaply, and finishing it off in the European Union, so as to avoid the imposition of anti-dumping duties. The European Commission therefore imposed certain rules on these types of operations:

> (a) The assembly and production must be carried out by a related or associated party;
>
> (b) The assembly or production must have been started or substantially increased after the opening of an anti-dumping investigation. The problem with this is that the decision to augment production requires lead time, and may be instigated prior to an anti-dumping investigation; and
>
> (c) The value of the parts or materials used and originating in the country of exportation of the product subject to the anti-dumping duty must exceed the value of all other parts or materials used by at least 50%. The condition requiring at least 60% origination in a certain country is effectively a Rule of Origin. Only if this content is made out can an anti-dumping duty be levied.

There is clearly a problem in which type of legitimate operations will be reached by this type of anti-Circumvention law.

The United States has a well-developed body of law in area, as well as the general unfair trade practices area. The first area that should be considered is the operation of Section 337 of the Tariff Act of 1930.[76] Section 337 has been used to

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75. Gerwin van Gerven, *New Anti-Circumvention Rules In EEC Anti-Dumping Law*, 22 INT'L LAW. 809, 815 (1988).

76. 19 U.S.C. § 1337 (1988).

protect U.S. holders of intellectual property rights against foreign infringements. Trading partners of the United States complain that Section 337 is unnecessary under the GATT. Section 337 violates GATT law because foreigners have inferior rights to U.S. individuals under it and therefore violates GATT's requirements for national treatment. Article XX(d) provides an exception from the national treatment provisions, if they are necessary to comply with national laws or regulations concerning the protection of intellectual property or to prevent deceptive practices. This has been upheld for Section 337 in *GATT panel on Spring Assemblies,*[77] for example, the exclusion order issued in that case by the United States was held to be the only way of dealing with the problem of foreign infringers.

XIX. DEFINING PRINCIPLES TO BE INCLUDED IN A REGIONAL POLICY

The analysis of competition policy highlighted above, illustrates that there is a need to develop a more coherent approach to competition policy, to underpin the individual antitrust laws, and how they are enforced by the countries in the Latin American and Caribbean region. There is scope for an overreaching hemispheric antitrust policy (with or without institutional support), which breaks down those behaviors which are anticompetitive as we have attempted to do, and applies a different approach to each one. Only then will the overall policy work efficiently, without creating problems, and will make sense to foreign businesses that are doing business in the region. In addition, it will be important in countries where competition policy is rarely enforced, that some scope is given to the enforcement of competition law through private rights of action. This would be a very powerful tool to secure the implementation of competition policy into standard business practices. Also, a clear decision needs to be taken whether a purely allocative efficiency model should be adopted, which would only really prohibit certain horizontal behavior, or whether an approach closer to a more liberal school should be adopted, which would be more critical of vertical restraints. We

77. United States—Imports of Certain Automotive Spring Assemblies, May 26, 1983, GATT B.I.S.D. (30th Supp.) at 107, 126 (1984).

need to also consider whether it is even important to draw a distinction between horizontal and vertical conduct. The benefits of a per se, and rule of reason approach need to be considered. Abusive practices must be curtailed certainly, but the real problem lies with dominant entities abusing their positions, not with those emerging businesses seeking to grow.

As a starting point, the Max Plank Institute's Antitrust Code contains useful guidance in this area, as does Eleanor Fox's article setting out the need for substantive principles which nations could agree and which could then be delegated down to member states for inclusion in their own national laws.[78]

The following principles are proposed:

> (a) An anti-cartel rule, including provisions to prevent denial of market access by artificial means;
>
> (b) A definite power vested in a region-wide institution to issue directives so that member states have to incorporate consensus principles in their national laws;
>
> (c) A definite agreement by member states that the guiding principle of the region's law is to encourage the net increase in total social welfare in the region, and not in each individual member state;
>
> (d) Provisions, which should mirror those of the European Union on the freedom of movement of personnel, capital and goods within the region. This should also include the freedom of establishment, particularly in the services sector;
>
> (e) An agreement, which no doubt will involve substantial Latin and European pressure on the United States that anti-dumping rules be brought more closely into line with price predation rules, so that low-price competition is actually encouraged;
>
> (f) There must be provisions which enable a member

78. *See* Blitz & Wighton, *supra* note 25.

state whose internal domestic market is harmed by anticompetitive conduct outside its borders to seek to enforce the national law of the injuring member state, whether the injury arises from private or from a public (e.g government sponsored wrong). The only way to ensure that such a right is effective is by having a region-wide institution to assist in enforcing it. Useful examples include the NAFTA binational review panel which oversees complaints about anti-dumping and countervailing duty matters, and in effect decides whether a particular member state is actually in contravention of its own laws. Another example would be the EU competition directorate. As a final measure the complaining nation should be able to bring a cause of action in its own national courts. There is no way that the United States and Europeans will cede this to each other, let alone anywhere else, so there would have to be a strong, not just an extant, hemispheric institution overseeing this process. In order to build a case, a substantial amount of information of a legal and economic nature needs to be marshalled and a hemispheric-wide institution is the ideal support to the national processes;

(g) There is a role for a coordinating body for the region which could release guidelines and policy statements to provide a discipline on the different countries in the region to implement into their own laws, in much the same way as the European Commission. This could significantly assist the overall drive towards harmonization;

(h) Cooperation between member state antitrust authorities will be very important. The best way of enforcing cooperation is by using the hemispheric body to enforce cooperation and to be the vehicle through which the more developed countries can provide technical assistance to the less developed countries;

(i) State aids must be dealt with particularly in Latin American markets. The EU internal market model, whereby state aids must be reported and justified, is a good model for the hemispheric region;

(j) There should be agreed-upon rules regarding non-discrimination in government procurement rules; and

(k) Although, not entirely within the realm of the competition laws, national treatment of foreign investments is important to removal of distortions in the market.

XX. REGIONAL INITIATIVES[79]

A. *Introduction*

It is worth considering, at this point, what steps are being taken at a regional level. In MERCOSUR, a December 1996 Protocol[80] was signed by member countries, which gives guidelines towards a common competition policy. No supranational bodies are envisaged, only a mechanism to guide national enforcement. The Protocol must be approved by national Congresses before it becomes law. The list of anticompetitive practices covers price-fixing to price discrimination and exclusive dealing, without any real discussion of the relevant analysis. The rule of reason analysis is applied to all anticompetitive practices. Rather like the European Union, if a case has a "Mercosur Dimension" the Committee for the Defense of Competition will have jurisdiction over it. The Protocol also provides for the harmonization of domestic competition laws. However, one has to be very careful when one applies blanket analysis to price discrimination. When there are many inefficient industries, there is a greater risk that applying rigid price discrimination rules will penalize efficiency.

Despite some positive signs coming from the Protocol—for example, it looks like it will contain a workable method for dealing with export cartels—the problem with the Protocol is that it does nothing about enforcement policies, and the heart of antitrust is in the enforcement policies and the application of what are essentially (and intentionally) ambiguous laws. Agreeing to harmonize and draft joint standards is not helpful

79. *See* José Tavares de Araujo, Jr. & Luis Tineo, *The Harmonization of Competition Policies Among Mercosur Countries*, 24 BROOK. J. INT'L L. 443 (1998).

80. Protocolo de Defesa da Concorrência no Mercosul, Decision 18/96, Dec. 17, 1996, *reprinted in* 19 BOLETIM DE INTEGRAÇÃO LATINO-AMERICANA 73 (1996).

unless something is done about the substance of the decision-making process itself. Nevertheless, indications in the Protocol that a properly staffed agency will publish industry reports and regular policy statements are to be lauded.

B. Andean Pact Developments

Colombia, Peru and Venezuela are the countries which have antitrust statutes intended to be modeled after Articles 85 and 86 of the Treaty Establishing the European Community. In the Andean Pact, there is no regional competition policy. The erratic nature of the decisions demonstrate that there is still a continued need for hemispheric direction, drawing on the experience of other countries. The real problem in the Andean countries is the lack of real independence of the authorities.

XXI. CONCLUSION

The key question as to how countries in Latin America will enforce their competition laws is not so much what the letter of the law is, but what are the policies which inform enforcement of those laws. The way to proceed must be to draw upon the concepts of European and U.S. law, without simply adopting wholesale one or the other (with all that entails), while always bearing in mind the economic objectives of the nations that are striving to develop free and efficient markets after decades of inefficiency and state interference. A regional body that could issue policy directives and draw on greater resources than those available to individual regulatory authorities is worthy of further investigation. Properly carried out, such a body could be critical to greater harmonization of antitrust enforcement in the region, providing greater certainty and predictability to businesses. It could also help ensure that the economic reforms necessary to develop free markets are not turned back while simultaneously checking the rising tide of protectionism in countries which have to manage the effects of globalization, even if this is not to their short-term advantage.

In Brazil in particular, we have seen the dangers of applying concepts drawn from other jurisdictions. Multinationals seeking to invest in Brazil, or global mergers with Brazilian dimensions, must now consider how best to steer their transactions through an increasingly active competition authority. As

that authority draws on the jurisprudence of the more developed competition systems in the United States and Europe, an understanding of how to use U.S. and European concepts will become increasingly important for those companies to realize their goals. For the CADE itself, its reliance on U.S. and European wisdom is to be lauded, and critics should not be too harsh about the results. Nevertheless, there is a danger in applying these concepts without a deep understanding of how they came into being, their context, and how they have stood the test of time. It is hoped that as Brazil becomes a full member of the global economy, this knowledge will shape CADE decision making, and that CADE will focus some energy on issuing statements that give businesses a better idea of how the decision-making process works to assist in creating a more stable and predictable business environment.

COMPARATIVE MATRIX I.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Objective	Proper functioning of the market: Article 1 precludes acts or behavior restricting competition, distorting competition and abusing a dominant position, causing damage to the general economic interest.	Promotion of free competition and free enterprise: 1. Preclusion of practices aimed at restricting, limiting or prejudicing competition, 2. Dominating the relevant market, 3. Arbitrarily increasing profits, or 4. Abusing a dominant market position.	Humane standard of living, stimulation of national and foreign investment, and the regulation, control, implementation of efficiency in the public interest of certain sectors, such as telecoms, energy, transportation and water. Focus on cartels and abusive practices.	Maintain/encourage competition in Canada: promote efficiency, protection of SMEs, and provide consumers with competitive prices/choices.	Improvement of national efficiency, ensure freedom of choice for consumers, ensure free participation within the market, and ensure variety of prices, qualities, goods and services.	Protection of the rights and legitimate interests of consumers, monitoring and promotion of competition and free enterprise. Prevention and prohibition of monopolies, monopolistic practices, and other restraints on efficient market operation. Elimination of unnecessary regulations affecting business.	Maintenance of the best interests of consumer, and maintenance of efficiency to protect the community.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
General Application	Article 1 contains a statement of intention (above), and Article 41 particularizes the offenses.	Prohibitions always apply subject to the rule of reason and require proof of anti-competitive effect. Moreover, the legislation does not discriminate between horizontal and vertical practices.	Legislation focuses on cartels (Article 16 Sectoral Regulation System Law) and abusive practices (Article 17 Sectoral Regulation System Law).	Broad division of law in criminal and civil proceedings: criminal applies for the more serious infraction, largely consisting of horizontal practices, and civil for the less serious, largely consisting of vertical practices.	The prohibitions are divided into agreements between businesses made in a parallel manner (horizontal), acts by those carrying on an economic activity (horizontal or vertical), and abuse of a dominant position. The pervading principle is that the infracting party must have market power in the particular market, Article 13.	Law prohibits total monopolistic practices (Article 11), partial monopolistic practices (Article 12), concentrations and unfair trade practices which restrain competition, access of competitor to markets or removal of competitors (Article 10).	Law focuses on any distortion of free competition and abuse of a dominant position, Article 3 Decree.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Price Fixing	Concert practices are prohibited, Article 41(a) of the Amendments to 1994 Constitution.	Prohibited, Pos. 1, 11, 24 of the government list of prohibited conduct if harmful to competition, entailing market domination, arbitrary increase in profits, or abusive exercise of dominant position: Pos.1: setting or adopting prices and conditions on the sale of goods or delivery of services, in agreement with one's competition, in any form. Pos.11: Imposing on distributors, retailers, and representatives in the trade in goods and services prices for resale, discounts, payment conditions, minimum or maximum amounts, profit margin, or any other marketing relating to transactions with third persons. Pos.24: Imposing excessive prices, or increasing the price of a good or service without good cause.	Prohibition of agreement, etc. whose intent or effect is to discriminate, Article 16(1)(a), Article 17(2)(a). The direct or indirect fixing of sale or purchase prices or other unfair trading practices.	Criminal prohibition for influencing or attempting to influence another party's price, § 61(1) FCA. Prohibition of dominant party manipulating price to drive competitor out of market, engaging in a policy of selling products in any area of Canada at prices lower than exacted elsewhere in the country, where the effect is to lessen competition substantially or eliminate a competitor, Article 50(1)(c) Decree.	Horizontal and vertical agreements whose purpose or effect is to determine discriminatory sale or marketing conditions for third parties are prohibited, Article 47(2) Decree.	Prohibition of horizontal or vertical agreement or act, Article 11 Law.	Horizontal or vertical determination of price, Article 2 Decree.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Restriction of market access	A party is prohibited from obstructing a competitor from entering market, Article 41(f).	Prohibited, Pos. 4, 6. Pos. 4: Limiting or impeding the access of new firms to the market. Pos.6: Impeding the access of competitors to sources of inputs, raw materials, equipment, or technology, as well as distribution channels.		Criminal prohibition where engagement in policy is designed to substantially lessen competition or eliminate a competitor, § 50(1)(c) FCA.	Prohibition against horizontal agreement resulting in any discriminatory condition with a third party, Article 47.	Prohibition of collusion among agents with this intention or effect, Article 12 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition Art. 2(f).
Bid-rigging		Prohibited, Pos. 8: Pre-arranging prices or shifting advantages in public or administrative contests.		Criminal prohibition against horizontal agreement, § 47 FCA.	Prohibition against horizontal agreements, Article 47.	Prohibition of horizontal or vertical act or agreement coordinating application or abstention, Article 11 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Restraint of output/ imposition of quotas	Concert parties are prohibited from limiting or controlling technical development, investment, marketing, or production, Article 41(b). Concert parties are prohibited from establishing minimum quantities, discounts, etc., Article 41(c).	Prohibited, Pos. 5, 10, 11, 20, 21, 22. Pos. 5: Creating difficulties to the chartering, operation, or development of a competing company or supplier, purchaser or financier of goods or services. Pos. 10: regulating markets of goods and services, entering into agreements to limit or control technological research and development. Pos. 11: Imposing on distributors, retailers, and representatives in the trade in goods and services prices for resale, discounts, payment conditions, minimum or maximum amounts, or profit margins. Pos. 20: Interrupting or significantly reducing production, without good cause, Pos. 21, 22: Ceasing activities or withholding production without just cause.	Prohibited, Article 16(b), Article 17(b).	Prohibition against horizontal agreements assigning production of supply quotas, Article 47.	Prohibition of horizontal or vertical act or agreement limiting quantity or frequency, Article 11 Law.	Acts of agreements imposing limitations, Article 2 Decree.	Acts tending to impede competition, especially quotas, distribution, reductions or stagnation of them, Art. 2(a).

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Market/ consumer division	Parties are prohibited from agreements or concert practice from dividing among competitors' markets, zones, sources, and clients, Article 41(e).	Prohibited, Pos. 3. Pos. 3: Dividing up markets.	Prohibited, Article 16(b).		Horizontal agreements dividing markets between producers or dealers are prohibited, Article 47 Decree.	Prohibition of horizontal or vertical agreement or act dividing markets, clients, time or space, Article 11 Law.	Acts or agreements imposing market zones, Article 2(c) Decree.
Predatory pricing	Concert parties are prohibited from establishing minimum quantities, discounts, etc., Article 41(c).	Prohibited, Pos 18. Pos. 18: Selling merchandise below cost without justification.		Criminal prohibition where effect is designed to lessen or eliminate competition, § 50(1)(c) FCA.	Prohibition of dominant party intending to reduce or eliminate competition, Article 50, Decree.	Prohibition of acts or agreements resulting in production at below normal value, Article 12 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).
Price discrimination		Prohibited, Pos. 12. Pos. 12: discrimination among purchasers of goods or services by differential price setting.	Prohibition of acts or agreements whose intent or effect is to discriminate, Article 17(c) (Includes all conditions, not just pricing).	Criminal prohibition against imposing any discriminatory condition, § 50(1)(a) FCA.	Prohibition against horizontal agreement imposing any discriminatory conditions whose purpose or effect is to discriminate on third party, Article 47 Decree. Prohibition of dominant position placing contracting party in a disadvantageous position compared to others, Article 50, Decree.		General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Resale price maintenance		Prohibited, Pos. 11. Pos. 11: Imposing on distributors, retailers, and representatives in the trade in goods and services prices for resale, discounts, payment conditions, minimum or maximum amounts, or profit margins.		Criminal prohibition against inducing or attempting to induce a supplier to stop selling to a person because of that person's policy of selling for a low price, § 61(6) FCA.	Vertical and horizonal setting of prices is prohibited, Article 47 Decree.	Prohibition of vertical arrangement setting prices or other condition, Article 12 Law.	Prohibition of imposition of prices on third parties, Article 2 Decree.
Territorial restraints				Civil prohibition against vertical market restriction, § 77 FCA.		Prohibition of establishing exclusive distribution agreement in terms of subject, area or time, Article 12 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).
Exclusive distributorship/ dealership		Prohibits exclusive dissemination of advertising within mass media, Pos. 7. Generally, regulation of markets in goods and services is prohibited, Pos. 10.		Civil prohibition against exclusive dealing if a condition of supply applies for specific products and competition is to be substantially lessened, § 77 FCA. Civil prohibition against vertical market restriction, § 77 FCA.		Prohibition of establishing exclusive distribution agreement in terms of subject, area or time, Article 12 Law.	Prohibition of exclusive distributorship from several producers, Article 2 Decree.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Tying agreements	A party is prohibited where collateral contract is not related to the object of the primary, Article 41(d).	Prohibited, Pos.1,23. Pos.1: Setting or adopting prices and conditions on the sale of goods or delivery of services, in agreement with one's competition, in any form. Pos.23: Conditioning sales of one good (service) on the purchase of another.	Prohibited, Article 17(d).	Civil prohibition against vertical tying where supplier is major or practice widespread, and competition is likely to be substantially lessened, § 77 FCA.	Prohibition of any contract, etc. whose purpose or effect is to condition contract on a collateral contract, Article 47(7) Decree. Dominant parties are specifically prohibited, Article 50, Decree.	Prohibition of tying where collateral agreement involves refusal to deal, Article 12 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).
Refusal to deal	A member of a concert practice is prohibited from refusing a specific order without commercial reason, Article 41(g).	Prohibited, Pos.13. Pos.13: Refusing to sell goods or deliver services under payment conditions that are normal in terms of commercial customs.		Civil prohibition on vertical practice if party can show substantial effect and readiness to trade on usual conditions, § 75 FCA.	Prohibition of any contract whose purpose of effect is to refrain from producing, or affecting production levels, Article 47(8), Decree.	Prohibition of sale or contingent agreement not to sell to a third party, Article 12 Law.	General Clause: Every measure tending to eliminate, restrict or hamper free competition, Art. 2(f).

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Economic Concentrations		Prohibition of acts limiting/harming free competition or result in dominance of relevant markets.	Prohibition against accumulation of private economic power to the extent that it endangers the economic independence of the state. No form of monopoly is recognized. Prohibition of mergers establishing, encouraging or consolidating a dominant position in a given market (only player, or player without substantial competition), Article 18.	Mergers lessening or likely to lessen competition substantially, § 92 FCA. Applies to any merger in Canada regardless of nationality of ownership. Civil prohibition against abuse of a dominant position causing substantial lessening of competition, §§ 78-79 FCA.	Prohibition of abuse of a dominant position. Prohibition of action resulting in undue restraint of free competition. Mergers may not be contested where parties prove significant efficiency improvements resulting in cost savings and non-reduction of supply in the market.	[No specification]	No specific legislation. Relies on broad scope of above provisions.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Sanctions	Termination/liquidation, fine of between 500,000 pesos to 1.5 billion pesos (which can be increased to 20% above the profit unlawfully obtained). Prison sentences of between 1 and 6 years, personal liability of between 1,500,000 pesos and 3 billion (US) dollars (which can be increased up to twice the profit unlawfully obtained). Disqualification from trading for between 3 and 10 years. No distinction between offenses.	[Unquantified] fine, publication of synopsis of decision, prohibition on contracting with public bodies for 5 years, non-concession of dividing up taxes, canceling tax incentives/public subsidies, liquidation, partial cessation, transfer of corporate control, entry into the national Register for Consumer Defense, decision is admissible evidence. There are no specific criminal sanctions for infractions of the competition law.		Director of Investigation and Research may order dissolution, cessation, prohibition, or continuation subject to certain conditions, undertakings to counter the anti-competitive effect. Alternatively, the Director may refer to the AG (criminal cases) or Competition Tribunal (non-criminal) [No other criminal or civil sanctions are listed].	Cessation of behavior, fines of up to 2,000 times the monthly minimum wage for restrictive business practice infractions, fines of up to 300 times the current monthly minimum wage on board members/directors/legal representatives/financial auditors, Decree.	Total or partial breakup of illegal arrangements, fine of up to 65 times the current minimum monthly wage for giving false testimony in addition to any other fine; fine of up to 50 times the current minimum monthly wage for failing to submit information, fine of up to 680 times the minimum monthly wage for engaging in an Article 11 infraction; fine of up to 480 times the minimum monthly wage for engaging in an Article 12 infraction; payment of up to 75 times the minimum monthly wage for acting on behalf of an infracting company. The last three fines may be increased to 10% of annual sales in particularly serious cases.	Nullify any act, cancel the license of any corporation, order any corporation's dissolution, banning any persons involved from holding any labor or professional office for up to five years, fines of up to 10,000 tax Units (about US $540,000, order criminal proceedings whose sanctions include between 61 days and 5 years prison (cumulative if act includes essential articles)). Where infraction generally involved essential articles (food, clothing, etc.) the severity of any sanction is increased by one degree.

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Subsidies	[Not discussed in source]	Pos. 19: Contract where objective or potential effect is to prejudice competition, arbitrarily increase profits or abuse a dominant position by importing any goods below cost in the exporting country which is not a signatory to the GATT subsidy codes, is prohibited.	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]
Anti-dumping	[Not discussed in source]	Pos.19: Contract where objective or potential effect is to prejudice competition, arbitrarily increase profits or abuse a dominant position by importing any goods below cost in the exporting country which is not a signatory to the GATT anti-dumping codes is prohibited.	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]
Countervailing duties	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]

Table 1	Argentina	Brazil	Bolivia	Canada	Colombia	Costa Rica	Chile
Additional prohibitions	Imposition of products, Article 41(h).	Obstructive behavior during otherwise normal contractual relations, per Pos. 14.	Carrying out other similar anti-competitive practices, per 1.c).	Criminal prohibition against granting to purchaser an allowance for advertising or display purposes that is not offered on proportionate terms to competing purchasers, § 51 FCA.	Limiting technical development.	Any deliberate act that results in the withdrawal of competitors from the market, or bars access thereto, Article 12 Law.	General prohibition against any measures designed to eliminate, restrict or hamper free competition, Article 2 Decree.
	Destruction, as part of a concerted action, of products, means to produce, or transport, Article 41(I).	Destruction/retention of products, per Pos. 15, 16, 17, 21, 22.			Infringement of advertising standards as contemplated by the consumer protection statute, Act 1.	Any general act that results in withdrawal of competitors from the market or bars access thereto, Article 12 Law.	Prohibitions against restrictions on workforce union rights, Article 2 Decree.
					Retaliatory policies, Act 3.		
References/ applicable legal framework	•Law No. 22,262 of 1980 for the Defense of Competition (DOC). •Decree No. 2,284 of 1991 on Deregulation of Domestic Commerce in Goods and Service (Decree). •Amendment to 1994 Constitution, Arts. 42, 43.	•Law No. 8,884 of June 11, 1994. •Constitution of Brazil, promulgated in 1988. Article 170, 173, 174. •Complementary Legislation Law No. 8,137, No. 9,021, No. 7,347, Gov. Order No 186 of the Ministry of Justice.	•Sectoral regulation System Law (SRSL). •Investment Law. •Political Constitution Arts. 134, 142, 233.	•Federal Competition Act RSC c. C-34, came into force on June 19, 1986 ("FCA").	•Constitution of 1991. •Decree 1302 of 1964, Regulating Law 155/59. •Decree No. 2153/92. •Law 155/59. •Decision 285 of the European Commission of the Cartagena Agreement on Distortion in Competition.	•Law No. 7472 on promotion of Competition and Effective Consumer Defense of December 20, 1994. •Political Constitution of the Republic, Art 46. •General Law No. 6227. •Executive Decree.	•Decree No. 511, September 17, 1980 establishing the Rules for Defense of Free Competition (Decree). •Constitution Art. 19 (21 and 22).

COMPARATIVE MATRIX II.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Objective	Protect free enterprise, trade and industry. Prohibit monopolies of private companies. Additionally protect consumers through price controls on certain basic articles and services.	Maintenance and encouragement of competition to provide consumers with competitive pricing and product choices.	Protection of the competitive process by prevention and elimination of monopolies, anti-competitive practices and other restraints on the efficient operation of markets for goods and services.	Protect and secure free economic competition, eradicate monopolistic practices and other constraints on the efficiency of markets for goods and services, and safeguard the greater interest of consumers.	Elimination of monopolistic practices, controls and restraints on competition, so that free competition can flourish to the greatest benefit of consumers and users.	Promote and protect free competition and the efficiency that benefits the producers and the consumers, and prohibit monopolistic and oligopolistic practices which limit the enjoyment of economic freedom.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
General Application	Sparse legislation, chiefly concerned with the bare necessities.	Effect on competition is determined by reference to all the factors affecting competition in the market.	Distinction between per se infractions (Article 9 FLEC) broadly including horizontal practices, and relative infractions (Article 10 FLEC) for vertical practices. Latter additionally requires proof of substantial market power in a particular market, Article 11 FLEC.	Legislation focuses on monopolies, consumer protection and unfair trade practices. The monopoly legislation is subdivided into absolute monopolistic (Article 11 Law prohibits per se) and relative monopolistic practices (Article 14 Law prohibits upon proof of prejudice to consumers), broadly relating to horizontal and vertical practices.	Legislation is divided into abuse of a dominant position (Article 5 Decree) and anti-competitive practices (Article 6 Decree). No general distinction between horizontal and vertical practices: legislation is equally applicable.	Broad statement of intent (Arts. 6-9) are given specificity by Article 10 which broadly focuses on horizontal practices, Article 11 on economic concentrations, Article 13 on abuse of dominant positions. The vertical practices are caught by the general clauses.
Price Fixing	Setting of artificial prices is prohibited by Articles 419-420 Criminal Code, and arrangements and conspiracies to set false prices for basic necessities are prohibited, Law No.13/63.	Prohibition of agreements having as their purpose the substantial lessening of competition, § 17(2)(a), § 19(1)(d) FCA 1993.	Prohibited per se, Article 9 FLEC	Prohibited per se between competing agents, Article 11 Law. Prohibited among non-competing agents if consumer prejudice is shown, Article 14 Law.	Prohibition on collusion between competitors, Article 6 Decree.	Horizontal agreements, etc. prohibited, Article 10. Vertical agreements are similarly prohibited, Article 12.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Restriction of market access		Horizontal restriction of competitors into market is prohibited if done by a dominant enterprise abusing its position, § 20(1)(a)-(c) FCA 1993.		Prohibited if due to exclusive distribution, price fixing, *tying, third party* exclusion or customer discrimination, Article 14 Law. Any predatory action causing exit or preventing entry of a *competitor* to exit or preventing a competitor from entering a market, when action cannot be reasonably expected to generate earnings.		Prohibited, Article 6.
Bid rigging		Prohibition of agreements whose primary purpose is to substantially lessen competition, § 17(2)(d) FCA. Prohibition of *any two parties to* coordinate bids or abstinence § 36(1)(a)-(b) FCA.	Prohibited per se, Article 9 FLEC.	Prohibited per se between competing agents, Article 11 Law.	Prohibited in public bids, etc., Article 6 Decree.	

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Restraint of output/ imposition of quotas		Limiting production (2)(b) FCA. Prohibition of agreement to lessen production unless in the public interest, § 35(1)(b) FCA. Prohibition of abuse of dominant position by limiting production to prejudice of consumers, § 20(1)(e) FCA.	Prohibited per se, Article 9 FLEC.	Prohibited per se between competing agents, Article 11 Law.	Application of quotas is prohibited, Article 6 Decree.	Prohibition of horizontal agreements, unilateral decisions limiting production, or technological development, Article 10. Vertical agreements if unjust and by a dominant entity, Article 13.
Market/ consumer division		Prohibition of agreements whose primary purpose is to substantially lessen competition by sharing markets of sources, § 17(2)(c) FCA.	Prohibited per se, Article 9 FLEC.	Prohibited between competing agents, Article 11 Law.	Prohibited, Article 6 Decree.	Prohibition of horizontal agreements, unilateral decisions, etc., Article 10.
Predatory pricing				Prohibited if their purpose or effect is to unduly supplant competitors and consumer prejudice is shown, Article 14 Law.		

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Price discrimination		Prohibition of agreements where the primary purpose is to substantially lessen competition by applying discriminatory conditions to equivalent transactions, § 17(2)(e) FCA.	Legality of any discriminatory term is governed by doctrine of relativity.		Prohibition of any discriminatory conditions imposed by dominant position, Articles 5, 6 Decree.	Prohibition of horizontal agreements and unilateral decisions discriminating in terms of any condition disadvantaging others, Article 10. Vertical agreements are similarly prohibited if by a dominant entity, Article 13.
Resale price maintenance		Prohibition on the vertical imposition of unfair purchase or selling prices, § 20(1d) FCA. Prohibition of agreements establishing minimum prices upon resale in Jamaica, § 25(1)FCA. Prohibition of agreement to influence upward or discourage reduction of prices to third party, § 34(1a) FCA.	Prohibits vertical imposition of any conditions where the purpose or effect is to drive economic agents out of the market or to establish exclusive advantage, Article 10(II) FLEC.	Prohibited if unduly supplants, or prevents competitor from entering market and consumer, Article 14 Law.		

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Territorial restraints				General clause: Prohibited if their purpose or effect is to unduly supplant competitors and consumer prejudice is shown, Article 14 Law.		
Exclusive distributorship/ dealership			Legality is governed by doctrine of relativity. Other factors include duration and extent. Article 10 FLEC.	General clause: Prohibited if their purpose or effect is to unduly supplant competitors and consumer prejudice is shown, Article 14 Law.		
Tying agreements	Prohibited especially where buyer is a consumer, Constitution, Criminal, and Law Code No. 13.	Prohibition of agreements where primary purpose is to substantially lessen competition by tying a collateral with no connection according to normal commercial usage to the primary, § 17(2)(f) FCA.	Legality is governed by doctrine of relativity, Article 10 FLEC.	General clause: Prohibited if their purpose or effect is to unduly supplant competitor and consumer prejudice is shown, Article 14 Law.	Generally prohibited, Article 5, 6 Decree.	Prohibition of horizontal agreements, unilateral decisions etc., Article 10. Vertical agreements are similarly prohibited if some competitors are disadvantaged by a dominant entity, Article 13.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Refusal to deal		Prohibition of refusal to supply or otherwise discriminate, especially prohibited if induced by the low pricing policy of the other side. §§ 34(1)(b)-(c) FCA.	Prohibition of unilateral refusal to deal where purpose or effect is or could be to drive economic agents out of the market, Article 10(V) FLEC.	General clause: Prohibited if their purpose or effect is to unduly supplant competitors and consumer prejudice is shown, Article 14 Law.	Prohibited if it distorts free competition or constitutes abuse of a dominant position, Article 6(g) Decree.	Prohibited, Article 7. Vertical agreements prohibited if unjustified and if by a dominant entity, Article 13.
Economic Concentrations		Infraction occurs upon abuse of dominant position in the market. Enterprise does not abuse its dominant position if behavior is exclusively directed towards improving production/distribution and consumers are allowed fair share of benefits. Nor is the enterprise abusing its dominant position by enforcing its intellectual property rights, § 20 FCA.	Mergers are prohibited if their purpose is to diminish, harm or impede competition with respect to identical or substantially similar goods and services, Article 16 FLEC.	Mergers are prohibited to the extent that they diminish, restrict, harm, or unreasonably impede free economic competition in equivalent or substantially equivalent markets. Art. 5.	Dominant bodies in the electricity sector are prohibited from partnerships or mergers with others in the same field, Supreme Decree No. 27-95-ITINCI, 95.	Prohibited, especially if arising out of a single activity, if restrictive of free competition, or if results in dominance of entity in the market, Article 11. Abuse of dominance position is generally prohibited, Article 13.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Sanctions	Prison for between 15 days and 3 months and fine from 10 to 100 pesos, prison from 1 month to 2 years and fines of between 25 and 500 pesos, and where infraction involves fraud the penalties are doubled. Correctional prison terms of between 2 days and 6 years and/or fines of between 25 and 10,000 pesos, and confiscation of articles with respect to hoarding, adulteration, false weights and measures or tying (Law No. 13).	Obstruction of investigation is punishable with fine and/or prison, §§ 42-45 FCA. Maximum fine for an individual is $1 million, and for persons other than an individual is $5 million.	Article 9 infractions result in the acts being void and the agents subject to criminal liability. Suspension, modification or cessation of the practice. Divestiture of concentration. Maximum fine of 7,500 times the minimum wage per month applicable in the Federal District Court for fraudulent testimony. Fine of up to 375,000 times the minimum wage per month applicable in the Federal District Court for inherently restrictive practice. Fine of up to 225,000 time the minimum wage applicable in the Federal District Court for infractions of the doctrine of relativity. Repeat offenses attract double penalties.	Article 11 infraction attracts a fine between 25,000 balboas and 100,000 balboas. Article 14 infraction attracts a fine between 5,000 balboas and 50,000 balboas. Consumer protection infraction attracts a fine of between 100 balboas and 10,000 balboas. Any other infractions attract fines of between 50 balboas and 5,000 balboas.	Fine of up to 1,000 UITs provided it does not exceed 10% gross sales/income. In very serious cases, the fine may be increased beyond 1,000 UITs but may never exceed the 10% cap. Where the entity does not engage in economic, industrial or commercial activity, or has begun trading after the beginning of the previous year, the fine shall not exceed 1,000 UITs.	Authors and accomplices of infractions are personally liable, Article 45. Fines of between 10% and 20% of infractor's sales, rising to 40% for repeat offenders, Article 49. Independent fines of up to 1 million Bolivars for obstruction of investigation. Injured parties may claim damages on indemnity basis, Article 55.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Subsidies	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	Prohibited if cause or threaten to cause significant harm to national production, Article 71 Law.	[Not discussed in source]	[Not discussed in source]
Anti-dumping	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	Prohibited, Article 75.	[Not discussed in source]	[Not discussed in source]
Countervailing duties	[Not discussed in source]	[Not discussed in source]	[Not discussed in source]	Prohibited on research, objectively disadvantaged regions of the regional development framework and adaption of facilities to comply with new environmental requirements.	[Not discussed in source]	[Not discussed in source]

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
Additional prohibitions	Setting of artificial prices, spreading of false rumors, and collusion among business executives, Criminal Code, Articles 419-420. Use of subterfuge to price tamper, use of false weights and measures. Hoarding of basic necessities for speculative purposes.	General prohibition of agreements where purpose is the substantial lessening, or likely lessening of competition in a market, § 17 FCA. Undue restrictions on transporting, producing, manufacturing, storing or dealing, § 35 FCA. General prohibitions against lessening, restraining or injuring competition, § 35(1)(c)-(d) FCA, making misrepresentations to the public, § 37(1)(a)-(d) FCA. Various conspiracies to retaliate for breaches of price provision.	Conspiracy or action to persuade a party to action a certain manner by doctrine of relativity, Article 10 FLEC. General prohibition, subject to the doctrine of relativity, against any act which unduly diminishes, harms or impedes competition, Article 10 FLEC.	General prohibition against any action, contract or practice which restricts free economic competition and free competition in production, etc., of goods and services Article 5 Law. Similarly, any action which unduly harms or impedes free market competition is prohibited, Article 14 Law. Monopolies per se are prohibited, Article 11 Law. Consumer protection provision prohibiting practices likely to confuse the public, Article 48 Law.	General prohibition against abuse of dominant position, limitation, restraint, or distortion of free competition in a manner which injures the common economic interest. Agreement on quality not relating to recognized standards adversely affecting the consumer, prohibited, Article 6 Decree. Collusion on limits or controls on production, technical development or investment, Article 6 Decree.	General prohibition of conduct, practices, conventions, contracts or decisions that impede, restrict, falsify or limit free competition, Article 5 PPEFC. The development of commercial policies which tend to eliminate competitors through unfair methods of competition, especially if by false advertising directed at impeding free competition, promotion of products based on false declarations with regard to competitors' products and bribery in commerce, Article 17. Agreements into directly or indirectly by unions which impede competition are prohibited, Article 9.

Table 2	Dominican Republic	Jamaica	Mexico	Panama	Peru	Venezuela
References/ applicable legal framework.	•Constitution of August 14, 1994, Art. 8.12. •Criminal Code Article 419 and 410. •Law No. 13/63, Articles 12 and 13. •Law No. 770/34.	•Fair Competition Act 1993 (FCA).	•Constitution 1917, Art. 28. •Federal Law on Economic Competition 1992 (FLEC).	•Law 29, 1996 (Law).	•Constitution of 1993, Arts. 58, 60, 61. •Decision 285 of the board of the Cartagena Agreement. •Legislative Decree *No. 668 on Measures* to Guarantee Free International and Domestic Trade. •Decree Law No. 25,868 on the organization and functions of INDECOPI. •Decreto Legislativo No. 788 modificatorio del Decreto Legislativo 701. •Legislative Decree No. 701 Against Monopolistic Practices, Controls and Restraints on Free Competition, 1991 (Decree).	•Constitution, Art. 96 •Law for Promotion of the Exercise of Free Competition. Federal Register No. 34880, 1992 (PPEFC). •*Regulation No. 1* concerning the System of Exceptions. Fed. Reg. No. 35,202, 1993. •Resolution No. 036-95 on the blanket Exemption for Agreements on Exclusive Supplies and Purchases. Fed. Reg. No. 35,801, 1995. •Regulation No. 2 concerning the System of Economic Concentratio. Fed. Reg. No 35,963, 1996.

Countries not covered include Uruguay, Ecuador and Paraguay.