DePaul Law Review

Volume 44
Issue 4 *Summer 1995: Symposium - Cultural Conceptions of Competition*

Article 6

Mexico's New Institutional Framework for Antitrust Enforcement

Sergio Garcia-Rodriguez

MEXICO'S NEW INSTITUTIONAL FRAMEWORK FOR ANTITRUST ENFORCEMENT

*Sergio Garcia-Rodriguez**

INTRODUCTION

On December 22, 1992, Mexico enacted an unprecedented antitrust law regime — the Federal Law of Economic Competition.[1] Drafted and promoted by Mexico's leading economists and lawyers, the new law established a national policy that focuses exclusively on the promotion of economic efficiency through the competitive process.[2]

Vigorously applied, the new competition policy should eliminate long-standing anticompetitive practices in the Mexican market, such as market-sharing cartels, exclusive dealing contracts, and collusive price-fixing arrangements. Mexico's enforcement of the new Competition Law may also eradicate serious market distortions stemming from decades of state intervention in numerous sectors of the economy.

Mexico became a party to the North American Free Trade Agreement last year.[3] NAFTA is a trilateral agreement among the United States, Canada and Mexico that, among other things, phases out and eventually abolishes trade barriers in North America, creat-

---

* Partner, Heller, Ehrman, White & McAuliffe, San Francisco, California. I wish to gratefully acknowledge the invaluable assistance and suggestions of Albert Moreno, Commissioner Leonel Pereznieto Castro, Professor Kevin R. Johnson, Robert Doughty and Scott Wiener.

1. *Ley Federal de Competencia Economica*, D. O., Dec. 24, 1995. Federal Law of Economic Competition, *Official Gazette of the Federation*, Dec. 24, 1995 (english translation) (hereinafter "LFCE").

2. *Id.* chpt. 1.

3. The Senate approved the North American Free Trade Agreement by a 61-38 margin on November 20, 1993. H.R. 3450, 103d Cong., 1st Sess., 139 Cong. Rec. S16712-13 (1993) (enacted). Previously the House had passed NAFTA in a 234-2 vote. H.R. 3450, 103d Cong., 1st Sess., 139 Cong. Rec. H10,048 (1993) (enacted). NAFTA became law when Canada, the United States and Mexico formally signed the agreement on September 8, 9, and 14, 1993 Mexico City, Ottowa, and Washington D.C.. North American Free Trade Agreement, U.S-Can.-Mex. (herein after NAFTA). North American Free Trade Agreement Implementation Act, 19 U.S.C.A. § 3301 et. seq. (West 1994) [hereinafter NAFTA].

ing a free trade zone of over 360 million consumers.[4] By establishing a free trade relationship with the United States, Mexico hopes to improve its trade position with the United States which has historically been Mexico's largest trading partner. Mexico, in turn, is the United States' third largest trading partner, after Canada and Japan.[5]

Under the North American Free Trade Agreement, Mexico, the United States and Canada are committed to create greater investment opportunities and to facilitate increased trade in North America.[6] Trade and investment are important to each of the NAFTA countries; the trade agreement thus seeks to create a more predictable business climate so as to reduce, or eliminate, much of the risk associated with foreign investment. By establishing a free trade relationship with the United States, Mexico hopes to secure a more favorable commercial position than it has had in the past with the U.S. The United States is Mexico's largest trade partner, accounting for almost 70% of total Mexican trade.[7] Mexico, in turn, is the United States's third largest trade partner, after Canada and Japan.[8] Mexico is expected to benefit substantially more from the trade agreement than either the United States or Canada largely because Mexico's gross domestic product is scarcely 5% that of the U.S., and its economy historically has been relatively closed to foreign investment.[9]

NAFTA's Chapter on Competition Policy commits the United States, Canada, and Mexico to take "appropriate action" to prohibit anticompetitive business practices.[10] Having recently enacted its first comprehensive Competition Law regime, Mexico now appears to have committed itself to insure a competitive environment for NAFTA-based firms operating in Mexico. The substantial increase in trade and cross-border investment in North America is likely to lead to increased interaction and cooperative enforcement among the NAFTA parties' antitrust authorities.

---

4. *Id.*

5. In 1993, U.S. - Mexico trade exceeded U.S. $87 billion, nearly three times larger than the trade between the two countries in 1986. U.S. EMBASSY, MEXICO CITY, THE UNITED STATES AND MEXICO: A GROWING PARTNERSHIP (ed. 1993).

6. NAFTA, *supra* note 3.

7. CAROLITA L. OLIVEROS, *International Distribution Issues: An Overview of Relevant Laws*, C888 ALI-ABA 553, 576 (1994).

8. *Id.*

9. *Id.*

10. NAFTA, *supra* note 3.

This Article presents an assessment of Mexico's new Competition Law regime. Part I sets forth the context in which Mexico's first comprehensive antitrust law was enacted. Part II provides an overview of the LFCE: its scope and purpose, its substantive rules and its enforcement mechanisms. Part III places the LFCE in the context of Mexico's civil law system, and discusses important enforcement and interpretation issues. Part IV explores NAFTA's Competition Law provisions and the need for coordination of competition issues in the NAFTA free trade area.

I. OVERVIEW OF MEXICO'S PRIOR ANTITRUST LAWS

A. Mexico's Decades of Statist Economic Policy

With a 3,000 mile border with the United States, Mexico historically has been subjected to enormous influence — and often direct control — from its powerful neighbor to the north. As a result, during the early decades of this century, Mexico began to take measures to centralize its resources and political power, and to protect its economy from foreign exploitation.[11] Mexico pursued centralization of resources through expropriation and nationalization.[12] The Constitution, drafted during the violent throes of the Mexican Revolution, declared sub-surface minerals to be the state's inalienable property and barred foreign ownership of coastal land.[13] Mexico also expropriated agrarian landholdings, the oil, sugar, steel industries, telecommunications and transportation.[14]

As important, from the end of the Mexican Revolution until the early 1980s, political and economic power came to reside in a single political party, the Partido Revolucionario Institucional ("PRI").[15] The PRI, self-described as the *party of the revolution*, has governed Mexico at the federal, state and local level for over six decades.[16]

---

11. *See* BILATERAL COMM'N ON THE FUTURE OF THE U.S. - MEXICAN RELATIONS, THE CHALLENGE OF INTERDEPENDENCE: MEXICO & THE U.S. (1989) (stating that Mexico's nationalistic economic policies were based on fear of domination by capital from the U.S.).

12. *Id.*

13. MEX. CONST. art. 28.

14. *See* Amy H. Goldin, *Mexican Labor Law from 3 Perspectives: the Constitution, the Trade Unions, and the Maquiladoras: Collective Bargaining in Mexico: Stifled by the Lack of Democracy in trade Unions*, 11 COMP. LAB. L.J. 203, 203 (1990).

15. *Id.*

16. The ruling PRI officially has lost only four gubernatorial elections in almost seven decades. Most recently, the PRI lost the gubernatorial election in one of Mexico's largest states, Jalisco. Tim Goden, *Governing Party in Mexico Suffers Big State Defeat*, N.Y. TIMES, Feb. 14, 1995, at A1, W16. The PRI also lost the mayor's race in the state capital, Guadalajara, Mexico's second

Although a comprehensive analysis of Mexico's unique political history is well beyond the scope of this Article, the country's six and one-half decades of unbroken rule by a single political party has had at least two profound effects on its economic development that bear directly on Mexico's present efforts to open the economy to international competition. First, the PRI's concentration of political power came to depend directly on the government's increasing control of the economy itself.[17] State dominance over key sectors of the economy essentially served the political goals of the PRI by ensuring a vast network of loyalists throughout the Mexican polity. As a result, the Mexican government came to control — by strict regulation and direct ownership — literally thousands of business enterprises throughout the economy.[18]

Second, and in part because the PRI came to power following a bloody revolution which put an end to decades of unbridled foreign domination over the economy, Mexico's economic policies were designed to manage, and restrict, foreign investment in the national economy to make Mexico as self-sufficient as possible. Most importantly, after World War II, Mexico pursued economic growth through a development model of import substitution,[19] a strategy which favors the expansion of the internal market, in contrast to development through "market-driven" primary commodity exports.[20] Under this model, the Mexican government encouraged and protected domestic industry, often through direct subsidies, price supports and the outright exclusion of foreign competition.[21] The "hallmark" of the import substitution policy was to develop national industry to produce what had formerly been imported.[22]

This economic model has been credited for "transforming Mexico from a backward rural economy into one of the industrial giants of

---

largest city. *Id.*

17. *Id.*

18. *See* NORA LUSTIG, MEXICO: THE REMAKING OF AN ECONOMY 17-20 (The Brookings Institution ed., 1992) (discussing the government's increased regulation & intervention in business enterprises).

19. Under an import substitution model, a country pursues protectionist regulations and policies to promote domestic industries in key sectors. The policy aims to substitute national products for foreign manufactured imports. CHARLES P. KINDLEBERGER & PETER H. LINDERT, INTERNATIONAL ECONOMICS 283-89 (8th ed. 1986).

20. JAMES CYPHER, STATE AND CAPITAL IN MEXICO: DEVELOPMENT POLICY SINCE 1940 555-559 (discussing the Import Substitution program and its effects on Mexico's economy). (ed. 1990).

21. *Id.*

22. *See* Sidney Weintraub, *The Promise of U.S.-Mexican Free Trade*, 27 TEX. INT'L L.J. 551 (1992).

the developing world."[23] But as one commentator has observed, Mexicans had to pay a high price for this protectionist economic structure:

> Consumers had to pay a high price for the privilege of buying national. Most Mexican-owned industries were unable to compete in foreign markets without large subsidies. . . . [B]ecause subsidies are a charge on the national budget, their use displaced other public expenditures.[24]

Consistent with Mexico's import substitution model, the government adopted a legal framework expressly designed to stifle foreign investment in protected industries and to direct such investment to sectors where foreign entities posed little or no competitive threat.[25] The Mexican government legislated to exclude foreign participation in key sectors of the economy, *i.e.*, "strategic sectors" (petrochemicals, mining, electricity) and additional non-strategic sectors such as banking, insurance and other financial services.[26] The government also used regulatory vehicles to exclude foreign investment, including discriminatory taxation, and selective use of permits and licenses.[27]

During the early 1970's, President Luis Echeverria enacted three major laws to ensure state control over the economy and to further restrict foreign investment. These regulations, referred to as the Echeverrian Wall, were: the Foreign Investment Law,[28] which limited foreign ownership in many sectors to 49 percent, or less, and barred foreign investment outright in special "strategic" sectors; the Transfer of Technology Law,[29] which restricted foreign control of technology transferred to Mexican firms; and the Law of Industrial Property,[30] which, among other things, discouraged registration and enforcement of foreign-source patents and trademarks.[31]

---

23. MIGUEL D. RAMIREZ, MEXICO'S ECONOMIC CRISIS: ITS ORIGIN AND CONSEQUENCES 41-43 (1984).

24. *See* Weintraub, *supra* note 22, at 559.

25. *Id.* at 562.

26. ECONOMIC ISSUES AND POLITICAL CONFLICT: U.S.- LATIN AMERICAN RELATIONS 20-21 (Jorge I. Dominguez ed., 1982).

27. *Id.*

28. Ley para Promover la Inversión Mexican y Regular la Inversión Extranjera ("Law to Promote Mexican Investment and Regulate Foreign Investment"), D. O., Mar. 9, 1973.

29. Ley sobre el Control y Registro de la Transferencia de Tecnología y el Uso Explotacíon de Patentes y Marcas, D. O., June 11, 1982.

30. Ley de Invenciones y Marcas, D. O., Feb. 10, 1976, at 7.

31. For a critique and analysis of Mexico's intellectual property and transfer of technology laws during this period, see Ewell E. Murphy, *The Echeverrian Wall: Two Perspectives on Foreign Investments and Licensing in Mexico,* 17 TEX. INT'L. L.J. 135, 142-44 (1982).

Despite these and other restrictions, foreign investment continued to flow into Mexico at a steady pace, particularly from the United States.[32] Indeed, Mexico enjoyed sustained economic growth which continued to attract foreign investors until the late 1970's.[33] Meanwhile, funded primarily with United States bank loans and stimulated by Mexico's oil boom during the early 1980's, the Mexican public sector expanded enormously.[34]

B. Dismantling The Statist Economic Model

Notwithstanding Mexico's decades of relatively steady economic growth, by 1982, oil prices fell and Mexico found itself unable to service the massive foreign debt accumulated during the period of largesse.[35] When the bottom fell out of Mexico's economic model, Mexicans entered into a nearly decade-long depression; including a period of unmanageable foreign debt, rampant inflation and widespread capital flight.[36]

Mexico's economic crisis, among other things, revealed the toll taken on the Mexican economy by the decades of political centralization and economic protectionism.[37] Under President Miguel de la Madrid, who took office in 1982, Mexico dramatically changed its economic policies, replacing the old nationalist policies with a free market approach to development and economic growth.[38] Crucially, de la Madrid began to address the most significant structural problem of all — the heavy-handed role of the state in the economy. Departing from the old import substitution model meant that the state and its regulatory foundation had to be dismantled. Consequently, between 1982 and 1990, nearly 900 government-owned en-

---

32. From 1955-1982, Mexico received $113.5 billion in net foreign investment, among the highest in the developing world. *See* WILSON PEREZ NUÑEZ, FOREIGN DIRECT INVESTMENT AND INDUSTRIAL DEVELOPMENT IN MEXICO 15 (Development Centre of the Organisation for Economic Co-operation and Development ed., 1990).

33. LUSTIG, *supra* note 18, at 14-17 (discussing Mexico's "Golden Years of 'Stabilizing Development' ").

34. *See id.* at 20-21 (stating that the oil boom lead to a decrease in government actions in the economic and political arenas, which in turn strengthened public sector growth).

35. *See id.* at 24-26 (stating that an "increased demand for imports in turn aggravated the trade deficit," which Mexico found itself unable to repay because of higher interest rates, devaluation of the peso and inflation).

36. *Id.* at 28-60 (discussing Mexico's attempt at recovery from the depression beginning in 1982 and continuing into the 1990's).

37. *Id.* (discussing the challenges encountered in Mexico's repeated attempts at recovery from the depression).

38. Weintraub, *supra* note 22, at 559.

terprises were divested.[39] President de la Madrid also set in motion a major liberalization of Mexico's trade regime.[40] Mexico's accession to the General Agreement on Tariffs and Trade ("GATT")[41] signaled a decisive break from the staunchly protectionist policies of the past.

President Carlos Salinas de Gortari, elected in 1988, sharply accelerated the profound economic restructuring that his predecessor's had begun. Salinas initiated a series of bold reforms because he believed that Mexico, in the 1990's, had to be "better positioned in the competition for [foreign] capital."[42] Toward this end, Salinas set out to create a more favorable climate for foreign direct investment as a central focus of his National Development Plan (1989-1994).[43] He restructured Mexico's massive foreign debt, continued Mexico's broad privatization plan and decreased inflation through price and wage controls.[44]

The Salinas administration set out to reform, and in some cases abrogate, many of the restrictive laws and regulations enacted during the 1970's and beyond. In 1989, Mexico adopted new foreign investment regulations authorizing 100 percent foreign ownership of Mexican companies.[45] Two years later, Mexico abrogated the former restrictive intellectual property regime by enacting a new and

---

39. In 1983, the Mexican state owned 1,155 enterprises. By March 1991, only 269 remained. *Id.* at 564.

40. *Id.* at 559-60.

41. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT] *reprinted in* GATT, Basic Instruments and Selected Documents (4th Supp. 1969).

42. Jeff Silverstein, *An Interview With Pres. Salinas,* BUS. MEX., Aug. 1992, at 18.

43. Amendments to the Constitution in 1983 expanded the Executive Branch's broad powers to direct economic development. Amendments to the Constitution, approved Feb. 2, 1983, reprinted in Federal Official Gazette, Diario Oficial, Feb. 3, 1983 (amending arts. 16, 25, 27 (§§XIX, XX), 28, 73 (§§XXIX-A, XXIX-E, XXIX-F)). Pursuant to those powers, President Salinas directed a national economic development plan that emphasized the role of private investment as the catalyst for economic growth. Plan Nacional de Desarrollo 1989-1994, Diario Oficial, May 31, 1989. Under Salinas, in 1987, the Mexican government also enacted the Economic Solidarity Pact, imposing wage and price freezes in order to lower inflation. Goldin, *supra* note 14, at 223.

44. LUSTIG, *supra* note 18, at 55-59.

45. Reglamento de la Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera [Foreign Investment Regulations], D. O., May 16, 1989. In 1993, an entirely new foreign investment law regime, Ley de Inversion Extranjera [Foreign Investment Law], D. O., Dec. 27, 1993, was enacted, further liberalizing the rules for foreign investment in Mexico. The new Foreign Investment Law authorizes virtually unlimited foreign investment in many sectors of the economy, thereby codifying NAFTA's provisions regarding "national treatment" for NAFTA investors in the trade area.

comprehensive Industrial Property Law,[46] and an amended and updated copyright law.[47]

However, Salinas and his advisors recognized that domestic reform would not be sufficient to transform Mexico into a major player in international markets.[48] Mexico needed closer economic integration — via a free trade agreement — with the United States to give Mexico a "clear opportunity for attracting additional foreign capital."[49]

At first glance, it may appear incongruous that the Mexican government would so eagerly pursue a free trade accord with the United States, a country from which Mexico historically has sought to remain independent. Of course, as a matter of rudimentary economic theory, domestic economic liberalization goes hand-in-hand with lowering protectionist barriers. At the same time, however, the deeply intertwined nature of political and economic power in Mexico ensured that political realities also underlay the Salinas administration's fervent advocacy of NAFTA.[50] The free trade agreement was critical to the success of Salinas' grand economic reforms upon which, in turn, Salinas and the PRI had effectively staked their political future.

The logic behind Salinas' push for NAFTA consisted of two major elements. First, the economic crises of the early 1980s demanded dramatic action from the central government.[51] Failure to act decisively would have inevitably threatened the PRI's previously unassailable political base. As one commentator put it:

> With a slimmer bureaucracy and fewer political spoils, the PRI realizes that it can preserve a measure of its political monopoly only if the economy prospers and only if jobs and salaries increase. In the judgment of President Salinas and his advisers, this can only happen by increasing its trade and investment with the United States, its major trading partner and source of

---

46. Ley de Fomento, y Protección de la Propiedad Industrial [Law to Foster and Protect Industrial Property], D. O., June 27, 1991.

47. Ley Federal de Derechos de Autor [Copyright Law], D. O., July 17, 1991. NAFTA has its own intellectual property provisions. However, NAFTA does not establish specific offenses and enforcement procedures. Instead, NAFTA relies on each Party to establish and maintain legal regimes to punish those that violate intellectual property laws. *See, e.g.*, NAFTA, *supra* note 3 arts. 1707, 1717 (committing each Party to provide criminal procedures and penalties for trademark counterfeiting and satellite decoding devices).

48. NAFTA, *supra* note 3, arts. 1707, 1717.

49. *Id.*

50. Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POLICY INT'L BUS. 391, 395 (1993).

51. *Id.*

capital.[52]

In other words, after massive privatization of state-owned enterprises, the PRI — in power for over 65 years — had no choice but to seek a closer trade and investment relationship with the United States to maintain political control. Second, approval of NAFTA would help Salinas ensure the permanence of Mexico's domestic shift to free market policies.[53] A trade agreement with the United States would reassure foreign investors who may not have had confidence that Mexico's reforms would survive the Salinas administration. Investors had good reason to worry. The President of Mexico enjoys enormous power to pursue and implement his own policies.[54] The same presidential powers that allowed Salinas to restructure Mexico's economy likewise could enable Mexico's new president to reverse the changes toward a free market economy. In this regard, Salinas needed NAFTA to solidify Mexico's macroeconomic reforms and to ensure that Mexico did not return to the unstable economic conditions that it had experienced in past decades.[55]

C. *Mexico's Decision To Enact A Comprehensive Competition Law*

Both the immediate and long-term viability of Mexico's shift to market liberalization hinge on the government's capacity to prevent — or at least to minimize — anticompetitive economic behavior endemic to the country's economy. Accordingly, competition policy as-

---

52. *Id.*

53. *Id.*

54. The President is the most active legislator in Mexico. Over 90% of the legislative bills presented in Congress originate in the President's office. The President appoints members of the judiciary, influences most of the seats in the Congress, and appoints political allies as well as state governors and municipal presidents. PABLO G. CASANOVA, LA DEMOCRACIA EN MÉXICO (1964). As Octavio Paz pointedly observed twenty years ago: "The President is the man of the law: his power is institutional. Mexican presidents are constitutional dictators . . . . They have the power while they are presidents; and their power is almost absolute . . . ." Octavio Paz, *Return to the Labyrinth of Solitude, in* THE LABYRINTH OF SOLITUDE, 336-37 (Rachel Belash, trans., 1985).

55. While President Ernesto Zedillo has continued the free-market policies of his immediate predecessor, he faces the most serious financial crisis since Mexico's 1982 economic crisis. The peso has lost nearly 70% of its value, Mexico's foreign reserves are nearly depleted and many foreign investors have abandoned Mexico's stock market. In a recent poll, a majority of Mexicans blamed former President Salinas for the financial crisis. *See* Juanita Darling, *Peso Fiasco Sullies Salinas' Claim to Fame; Mexico: The Former President's Vaunted Economic Stabilization is in Tatters. His Political Foes Even Call for Prosecution.*, L.A. TIMES, Jan. 5, 1995, at A4. In another recent poll nearly two-thirds of Mexico City residents expressed a lack of confidence in Zedillo's ability to lead the country out of the present crisis. Paul B. Carroll & Dianne Solis, *Mexico's Zedillo Stumbles in His New Job,* WALL ST. J., Feb. 6, 1995, at A10.

sumed a central place in the reformers' plans. Concern with competition issues and monopolies is not new in Mexico. Indeed, Mexico's 1857 Constitution prohibited monopolies, predating the Sherman Act by almost forty years.[56] In 1934, Mexico enacted its first antitrust statute, called the 1934 Monopoly Law.[57] However, the antimonopoly provisions in the Constitution and federal legislation did little to reduce anticompetitive behavior in the Mexican economy. In the sixty years since the enactment of the 1934 Act, the federal courts decided only eight precedent decisions.[58] Mexico's experience in this regard is no different from that of other Latin American countries that have enacted antitrust legislation.[59] In Mexico's case, sparse antitrust enforcement was due to the absence of any administrative or judicial entity responsible for enforcing the law against anticompetitive market conduct.[60]

What is new in Mexico today is the existence of a comprehensive competition policy that aims to eliminate anti-competitive market practices through specific enforcement mechanisms. As mentioned, Mexico only recently has emerged from several decades of state control over the national economy. By the end of 1991, Mexico had virtually completed profound restructuring of the economy, including the massive sale of state-owned enterprises. The country was moving at an accelerated pace toward open competition and international trade. Mexico joined GATT and began negotiations with the United States for a free trade accord.[61]

However, over several decades, state protectionist policies had insulated Mexican businesses from the constant hum of market-driven competition. Government support of national firms had created oligopolistic, inefficient corporations in Mexico.[62] Further, the government's labyrinthine system of regulatory control had rewarded those firms that had learned how to manipulate governmental commissions and bureaus rather than those that had responded effi-

---

56. COMISION FEDERAL DE COMPETENCIA, Annual Report, 1993-1994, at 1, 34 (hereinafter "Annual Report").

57. *Id.* at 34.

58. *Id.*

59. Juliana L.B. Viegas & Robson G. Barreto, *Brazil's Computer & Software Laws: A Much-Needed Update and Summary*, 24 INTERAM. L. REV. 37, 44 (1992) (discussing effects of recent legal changes to the Brazilian computer sector).

60. Annual Report, *supra* note 56, at 1.

61. GATT *supra* note 3.

62. *See* Rudiger Dornbusch, *The Case for Trade Liberalization in Developing Countries*, 72 J. ECON. PERSP. 69, 69 (1992).

ciently to market-driven forces to cut costs, improve products and provide better service for consumers.[63]

Perhaps the best example of this was found in the banking sector. Former President Salinas privatized Mexico's banks in 1992.[64] All national banks previously had been nationalized by Lopez Portillo (1976-1982) shortly before the end of his presidential term.[65] Despite Salinas' swift privatizations, Mexican banks continued to engage in the anticompetitive practices "that have given them a reputation locally as inefficient, and, often, corrupt."[66] Regulatory authorities have not devoted significant resources to investigate illegal banking practices, due in part, to the government's *quid pro quo* with the newly-privatized banks. Essentially, the government garnered high sales prices from the investors who purchased the banks, while promising the new bank owners mild enforcement of banking regulations.[67] Lack of regulatory oversight has enabled the banks to collude with other financial institutions, to create shell companies, and otherwise to commit fraud against government regulatory authorities.

Mexico's Attorney General's Office has a backlog of several hundred cases involving bank fraud, embezzlement and other financial crimes.[68] Most recently, a Mexican financier with a controlling interest in Banco Union, one of the largest banks in Mexico, was charged with a number of fraudulent business practices, including funneling between $200 million and $700 million to himself through loans extended to shell companies.[69] In short, the banks, like many

---

63. *See* Javier Aguilar Alvarez de Alba, *Caracteristicas Esenciales de la Ley Federal de Competencia Ecomomica,* ESTUDIOS EN TORNO A LA LEY FEDERAL DE COMPETENCIA ECONOMICA, at 13 (Universidad nacional Automoma de Mexico, Instituto de Investigaciones Juridicas ed., 1994) (herein after Estudios); Annual Report, *supra* note 56, at 2.

64. LUSTIG, *supra* note 18, at 56-57 (noting the government's formal announcement in 1990 to privatize the banking system).

65. *Id.* at 25.

66. Tod Robberson, *Mexico's Banking Afflicts Investors; Corruption Said to Be Compounding Risk,* WASH. POST, Apr. 30, 1993, at A35. The anticompetitive practices of the largest banks include the exchange of information regarding interest rates and credit card transaction fees. *Id.*

67. *See* Carlos M. Nalda, *NAFTA, Foreign Investment, and the Mexican Banking System,* 26 Geo. Wash. J. Int'l. L. & Econ. 379, 408-12 (1992) (discussing the privatization of Mexican banks by selling the state-owned banks for divestiture proceeds estimated at $10 billion).

68. *See* Robberson, *supra* note 66, at A35.

69. Craig Torres & Dianne Solis, *Plucking Pieces of Del Monte,* WALL ST. J., Sept. 7, 1994, at A1. Mr. Carlos Cabal controls a banking and fresh-produce empire valued at $2 billion. *Id.* Mexico's Finance Ministry issued arrests warrants against Cabal and several associates. *Id.* At least 10 people have been arrested, making the criminal investigation into Cabal' empire the largest action against a bank in over two decades. *Id.*

other large Mexican enterprises, are still able to exploit the cozy private sector-government relationship that is a product of the many decades of state protection of domestic enterprises.[70]

As such, Mexico of the 1990's has inherited a highly concentrated industrial sector, and a financial sector that has grown accustomed to a secure relationship with regulatory authorities. A single firm controls over 60% of the cement market; five firms share over 70% of the total sales in the construction industry; the former state telecommunications monopoly, Telmex, still controls over 90% of the telephone services market.[71] As prevalent as the high level of concentration in the Mexican economy, so too is opportunistic behavior on the part of private entities. Government policies allowed and often encouraged producing sectors where monopolistic practices were treated as the acceptable way of doing business.[72]

President Salinas and his advisors concluded that Mexico needed a new relationship between the private sector and the government.[73] Mexico's restructured economy required new rules and standards for free market participation. Effective competition in international markets could flourish only if the market distortions of the previous statist system were abolished.[74] Simply removing state enterprises from the economy would not necessarily promote open competition because private monopolies and oligopolies could opportunistically replace the state in its control of the national economy.[75]

---

70. As part of Mexico's effort to comply with NAFTA, new regulations for the operation of foreign banks in Mexico have been enacted. These regulations dramatically increase opportunities for foreign financial institutions. Mexico has amended its Credit Institutions Law and the Financial Groups Law to authorize foreign investment in banks, securities firms, insurance providers, investment management companies, factoring companies, and foreign exchange firms. Consistent with NAFTA's financial services provisions, these regulatory changes are designed to give special preference to NAFTA-based financial institutions. *See, e.g.*, Credit Institution Law, arts. 45-A-45-N (stating that "treaty banks" may establish wholly-owned subsidiary financial institutions in Mexico).

71. *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, 603 (1994) (noting the high level of industrial concentration in Mexico). Not surprisingly, the families that control these firms happen to be the wealthiest families in Mexico. *See* Graham Button, et al., *There's Lots of Opportunity*, FORBES, Jan. 30, 1995, at 46 (listing Mexican billionaires).

72. Annual Report, *supra* note 56, at 5.

73. *Id.*

74. *Id.*

75. The experience in other parts of the world bears this out. Even after a shift from non-market economies, many developing and former Communist nations continued to experience anticompetitive market conduct. Consequently, the countries of Eastern Europe, a number of former Soviet republics and several nations in Latin America and Africa recently have adopted antitrust/competition law regimes. *See* Jonathan D. Glater, *Busting Trusts, South of the Border: Latin*

President Salinas submitted a draft of the LFCE to Congress in the last quarter of 1992 designed to implement an ambitious new regime vital to the development of an efficient and competitive market economy.[76] The draft law aimed to eliminate cartel practices such as price-fixing and market-sharing arrangements by subjecting these, and other, "monopolistic practices" to legal scrutiny and administrative enforcement for the first time.[77] Competition law advocates in Mexico believed that everyone would benefit from an effective competition law regime.[78] Consumers would benefit by gaining access to quality goods and services at the lowest prices, and suppliers of goods and services would benefit from the new emphasis on efficiency and participation in a more competitive market environment.[79] Congress passed the Federal Law of Economic Competition ("LFCE," for the Spanish acronym), Ley Federal de Competencia Economica) on December 22, 1992.[80] The law became effective on June 22, 1993.[81]

II. THE COMPETITION LAW AND THE FEDERAL COMPETITION COMMISSION

A. Purpose And Scope of LFCE

The sole purpose of the LFCE is "to protect the process of competition and free market access through the prevention and elimination of monopolies, monopolistic practices and other restrictions that deter the operation of the market for goods and services."[82] The scope of the law is broad by any measure, sweeping by Mexican standards. The LFCE applies to "all economic agents."[83] It ex-

---

Countries Take Antitrust Lessons from U.S. to Open Markets, WASH. POST, Aug. 21, 1993, at B1.

76. Alvarez de Alba, *supra* note 63, at 11-13.

77. Annual Report, *supra* note 56, at 1.

78. *Id.*

79. *Id.*

80. LFCE, *supra* note 1.

81. Under President Zedillo, Mexico has continued the process of deregulation and privatization. Also, Mexico's implementation of NAFTA has accelerated the pace of economic reforms. As important, the financial crisis in early 1995 will result in substantial new privatizations of state-owned enterprises and further market-freeing reforms. The international emergency aid package to Mexico early this year was conditioned on Mexico's commitment to make further fiscal and monetary reforms, and to privatize remaining state-owned entities. *See* David E. Sanger, *Peso Rescue Sets New Limits on Mexico*, N.Y. TIMES, Feb. 22, 1995, at A1.

82. LFCE, *supra* note 1, art. 2.

83. *Id.* art. 3.

pressly applies not only to private entities, but also to federal, state and municipal governments, divisions, agencies and entities.[84] The application of Mexico's antitrust enforcement scheme to all governmental entities is a major policy component of the law. The LFCE's proponents recognized that the state had been largely responsible for the proliferation of many anticompetitive practices in Mexico:

> The competitive environment is greatly influenced by the direct participation of the State, as a producer and as a consumer, as well as by the regulations, that directly or indirectly affect economic activity. Even though the objective of the latter is to increase efficiency, insofar as the [their] spirit is always procompetitive, occasionally they have unexpected effects, or improper enforcement results in monopoly power. Since the new legislation proposes the adoption of an integral competition policy rather than an anti-trust policy to be applied only to prevent unregulated agents, State activities fall within the jurisdiction of the law.[85] The new law therefore is intended to serve as the basis for a comprehensive, and rigorously enforced, competition policy, not simply a narrowly-focused antitrust law regime.[86]

The LFCE expressly repealed several laws and regulations that enabled the federal government to control specific areas of the economy.[87] Thus, for the first time, Mexico's state enterprises — and the government itself — became subject to the forces of competition.

The drafters of the LFCE carved out narrow exemptions from the law's mandates. As required by the Constitution, the law exempts those governmental activities exercised exclusively in "the strategic sectors."[88] Under Article 28 of the Mexican Constitution, these ac-

---

84. *Id.* This provision incorporates — and augments — the Mexican Constitution's prohibition against the individual states' interference with the transport of foreign or domestic goods through state lines. *See* MEX. CONST. art. 117 (prohibiting individual states from interfering with the passage of domestic goods through their territories).

85. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (hereinafter "OECD"), *Economic and Legal Background for Mexico's New Competition Law (Note by the Secretariat)*, Apr. 30, 1993, at 6. Under United States law, no express limitation on governmental power to restrain trade exists. Indeed, the Commerce Clause gives Congress plenary power to restrain trade as part of its authority to regulate foreign and interstate commerce. U.S. CONST., art. I, § 8. Additionally, state-imposed restraints of trade are immunized from antitrust challenge under the state action doctrine. Parker v. Brown, 317 U.S. 341, 351 (1943) (holding that a valid exercise of a state's legislative authority does not violate the Sherman Act). A state may engage in anticompetitive conduct so long as it has a "clearly articulated" regulatory scheme, and it has exercised "active supervision" and control over the regulatory scheme. *See* Hoover v. Ronwin (1980), 466 U.S. 558, 569 (1984) (discussing the degree of control necessary for the state action doctrine to apply); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (invalidating California's resale price maintenance scheme for wine because of insufficient supervision by the state).

86. Annual Report, *supra* note 56, at 5-6.

87. LFCE, *supra* note 1, art. 3.

88. *Id.* art. 4; MEX. CONST. art. 28.

tivities include oil, basic petrochemicals, radiotelegraphy, satellite communications, hydrocarbons, public electricity service, railroads, postal service, nuclear energy, and currency issuance.[89] In addition, the LFCE exempts worker associations or unions "formed in accordance with relevant legislation."[90] Export associations or cartels are also exempt as long as they do not offer their products for sale or distribution in Mexico and the products are "the principal source of wealth produced in the region . . . ."[91] This language mirrors the export cartel exemption contained in the Mexican Constitution.[92]

B. Role of the Federal Competition Commission

The LFCE creates an autonomous administrative body, the Federal Competition Commission, to investigate and prosecute anticompetitive practices in Mexico.[93] The Commission consists of five Commissioners and a Commission President.[94] The President of Mexico appoints members of the Commission to serve ten-year renewable terms.[95] Members may be removed from office only for "serious reasons duly justified."[96] The Commission's mandate is very broad. Moreover, the Commission's short history to date suggests that it intends to exercise considerable authority in implementing the law, rather than to function as a mere formalistic instrument for effectuating the competition law.[97] In its inaugural Annual Report, published in 1994, the Commission defined its mission in ample terms: "to foster economic efficiency and increase social welfare."[98] As interpreted by the Commission, this charge does not translate into automatic advocacy of unbridled, free market economics; rather, the Commission maintains that "competition is not an end in itself, but a tool to increase social welfare . . . ."[99] These statements, especially when combined with some of the Commission's concrete

89. MEX. CONST., art. 28.
90. LFCE, *supra* note 1, art. 5.
91. *Id.* art. 6.
92. MEX. CONST., art. 28.
93. LFCE, *supra* note 1, art. 23.
94. *Id.* art. 25.
95. *Id.* art. 26.
96. *Id.* art. 27.
97. *See generally* Annual Report, *supra* note 56 (reviewing the Commission's first-year activities).
98. *Id.* at 2.
99. *Id.*

actions,[100] suggest that the Commission will play a vigorous role in forging Mexico's new economic reality.

The Competition Law itself endows the Commission with a formidable array of powers. Specifically, the LFCE empowers the Commission: 1) to investigate competition law offenses, at the request of a private party or on its own initiative; 2) to resolve administrative cases in the area of competition law, impose administrative penalties and refer criminal business practices to the Attorney General; 3) to issue advisory opinions upon request by the Executive Branch regarding the Competition Law implications of draft laws and regulations; 4) to issue legal opinions, on its own initiative, regarding competition and free market access issues; 5) and to participate in the negotiation and execution of international competition policy, treaties and agreements.[101]

The LFCE also grants the Commission unprecedented enforcement tools. The Commission has the authority to enjoin any business practice in violation of the provisions of the LFCE.[102] The Commission may also order the partial or total divestiture of a merger or acquisition in noncompliance.[103] No other administrative entity in Mexico enjoys such broad enforcement powers.

The Commission is also authorized to impose substantial fines for antitrust offenses.[104] Fines are indexed to the minimum wage in the Federal District, and vary with the specific type of antitrust violation.[105] Potential fines under the LFCE are the largest penalties that may be levied under Mexican law.[106]

Given that the LFCE grants the Commission authority over state-run enterprises, the Commission's effectiveness depends to a large

---

100. *See infra* notes 207-57 and accompanying text (discussing some of the commission's actions).

101. LFCE, *supra* note 1, art. 24.

102. *Id.* art. 35. Injunctive, or other equitable, relief generally is not available in Mexico. JAMES E. HERGET & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 40 (1978).

103. LFCE, *supra* note 1, art. 35.

104. *Id.*

105. *Id.*

106. In the case of an "absolute monopolistic practice," the Commission may impose a fine in the amount of 375,000 times the minimum wage (approximately U.S. $1.7 million at the rate of exchange in 1993). *See id.* As a result of the Mexican peso's dramatic plunge early this year, the index for antitrust penalties will undergo adjustment. Although significant by Mexican standards, the fines possibly are less important as an enforcement tool than the injunctive powers available to the Commission. In its first year of operation, for example, the Commission levied less than U.S. $800,000 in fines for *all* antitrust enforcement actions. *See* Annual Report, *supra* note 56, at 19.

extent on its autonomy from control by the central government.[107] The Commissioners' ten-year terms should give them a certain level of autonomy since Mexico's presidential term is six years.[108] Also, the Commission's Internal Regulations establish the Commission as a self-governing agency of the Ministry of Finance and Trade Promotion (SECOFI), with a budget and staff independent of that Ministry.[109] These provisions are intended to guarantee the Commission's financial independence.[110]

C. *Regulation Of Anticompetitive Activities*

The LFCE's substantive provisions begin with a general prohibition of "monopolies" and other practices that "diminish, impair or prevent competition and free access in the production, processing, distribution and marketing of goods or services."[111] The LFCE, however, does not contain an explicit monopolization prohibition similar to Section 2 of the Sherman Antitrust Act in the United States.[112] The law seeks to avoid evaluating firms solely by their size or their dominant position in the market. Rather, the Commission has emphasized that "the new legislation rejects the idea that big firms are by themselves monopolies."[113]

The LFCE focuses on specific categories of market conduct, and classifies numerous market activities as either "absolute" or "relative" monopolistic practices.[114] The Competition Law treats "absolute monopolistic practices" as *per se* illegal, permitting no assessment of either the purpose or effect of the anticompetitive conduct.[115] In contrast, "relative monopolistic practices" are judged by reference to specific economic criteria set forth in the law.[116] The Commission's analysis in deciding both "absolute" and "relative"

---

107. *See* Annual Report, *supra* note 56, at 39 (describing the Commission's autonomic structure).

108. *Id.*

109. *Id.*

110. *Id.*

111. LFCE, *supra* note 1, art. 8.

112. 15 U.S.C. § 2 (1988 & Supp. V 1993).

113. OECD, *supra* note 85, at 5 (noting the LFCE's rejection of rigid rules utilized in the past to prohibit monopolistic behavior).

114. *Id.* at 3.

115. LFCE, *supra* note 1, art. 9; GABRIEL CASTANEDA, ET AL, ANTECEDENTES ECONOMICOS PARA UNA LEY FEDERAL DE COMPETENCIA ECONOMICA, 3-4 (1992); *see also* OECD, *supra* note 85, at 3 (explaining the treatment of absolute monopolistic practices in Mexico).

116. OECD, *supra* note 85, at 4.

cases parallels aspects of United States antitrust law which are highlighted in the discussion below.

1. *Absolute Monopolistic Practices*

The Competition Law declares "absolute monopolistic practices" void without inquiry and subjects firms engaged in such practices to administrative penalties and injunctions.[117] The Competition Law defines these practices as contracts, agreements, arrangements or combinations among competitors whose purpose or effect is: (1) to fix prices or exchange information with the same purpose or effect; (2) to restrict or limit the supply of goods or services; (3) to divide markets, or allocate customers or suppliers among competitors; or (4) to rig bids on contracts.[118] These market practices are punished the most severely: approximately $1.7 million per offense, or for particularly serious violations, up to 10% of the firm's annual sales.[119]

The LFCE's treatment of absolute monopolistic practices effectively mirrors the *per se* rule in United States' antitrust jurisprudence. In essence, the American *per se* rule flatly bars horizontal trade restraints, *i.e.*, arrangements between ostensibly competing firms to manipulate price, supply, or any other aspect of market activity.[120] Thus, as a procedural matter, the respective *per se* rule in Mexico and the United States is identical: when the adjudicatory

---

117. LFCE, *supra* note 1, art. 9.

118. *Id.*

119. *Id.* art. 37.

120. The *per se* doctrine in United States antitrust law holds that certain market arrangements are "so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality . . . ." National Soc'y of Engineers v. United States, 435 U.S. 679, 688-92 (1978) (discussing the two categories of antitrust analysis; *per se* illegal actions and the rule of reason analysis). The *per se* rule has been applied by the United States Supreme Court in a long line of antitrust cases involving horizontal restraints on trade. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 347 (1982) (noting "we have not wavered in our enforcement of the *per se* rule against price fixing"); Albrecht v. Herald Co., 390 U.S. 145, 151 (1968) (following the "long accepted rule in § 1 cases that resale price fixing is a *per se* violation of law"); United States v. Socony Vacuum Oil Co., 310 U.S. 150, 218 (1940) (stating that the court has consistently adhered to the principle that price-fixing agreements are illegal *per se*); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927) (establishing that price fixing is per se illegal). The United States courts have also applied the *per se* rule to vertical restraints such as "tying" arrangements, and resale price maintenance. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984) (noting the vitality of the *per se* rule, but finding no basis for its application to the tying arrangement in question); Beard v. Parkview Hosp., 912 F. 2d 138, 142-43 (6th Cir. 1990) (finding that an alleged tying arrangement between the hospital and radiologist did not violate the Sherman Act under either the *per se* rule or the rule of reason analysis).

body finds the existence of a per se violation (United States)[121] or an absolute monopolistic practice (Mexico),[122] the monopolist has no grounds to defend his or her actions. Those actions are, by law, automatically illegal.[123] However, Mexico's ban on "absolute" monopolistic practices is somewhat substantively narrower than that of the United States. In particular, the LFCE does not include tying arrangements and resale price maintenance as subject to the *per se* rule.[124] Generally, a tying arrangement is an agreement in which one party sells a product to another party on condition that the buyer also purchase additional products from the seller or a third party.[125] Retail price maintenance occurs when the producer and the retailer agree on a fixed price range for goods or services.[126] Both practices are subject to the *per se* rule in the United States.[127]

2. *Relative Monopolistic Practices*

The LFCE defines "relative monopolistic practices" as "those acts, contracts, agreements, cartels or combinations, which purpose or effect is to improperly displace other agents from the market, substantially impede their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals . . . ." under specific circumstances.[128] The law delineates seven market practices that invite scrutiny from the Commission: (1) territorial distribution restrictions; (2) resale price maintenance or other resale conditions; (3) tying or reciprocity sale arrangements; (4) refusals to deal; (5) exclusive dealing; (6) group boycotts; or (7) any act that "unduly impairs or impedes the process of competition and free market production, processing, distribution and marketing of goods

---

121. *See Socony*, 310 U.S. at 218 (prohibiting explanation or justification as a defense to price fixing agreements under a *per se* illegality analysis).

122. *See supra* notes 117-119 and accompanying text (describing absolute monopolistic practices as *per se* illegal).

123. LFCE, *supra* note 1, art. 9.

124. *Id.*

125. *See e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

126. *See e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 US 373, 399-400 (1911).

127. United States courts apply a "quasi" *per se* analysis to tying arrangements and distribution contracts that contain resale price maintenance clauses. *See, e.g.*, Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) (stating that the *per se* rule did not apply to the tying arrangement at issue); *Beard*, 912 F. 2d 138 (holding that the tying arrangement between the hospital and radiologist did not violate the *per se* rule as applied).

128. LFCE, *supra* note 1, art. 10.

or services."[129]

The LFCE's "relative" monopolistic practices include market behavior that, in United States' antitrust law, fall under the general rubric of "vertical restraints." Indeed, the Commission has openly acknowledged that its analysis is similar to the "rule of reason" framework long employed in United States antitrust jurisprudence.[130] Under this analysis, the court "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[131] Echoing this approach, the LFCE requires the Commission to weigh the "purpose" and "effect" of every challenged relative monopolistic practice in reaching its decision.[132]

In Mexico, a firm engaged in a relative monopolistic practice runs afoul of the LFCE when two conditions are met: (1) the firm possesses "substantial power in the relevant market"; and (2) the firm exercises such market power over other economic agents.[133] The Competition Law sets forth specific criteria for defining the "relevant market" and for measuring a firm's market power in that market. Determining the "relevant market" consists of analysis of the following criteria:

(1) the availability of substitute goods;

(2) transportation, distribution and input costs;

(3) the firm's market share and that of its competitors;

(4) the cost and probability of consumers seeking other markets;

(5) tariffs and other restrictions limiting consumer access to alternative sources of supply.[134]

When measuring a firm's market power in the relevant market, the Commission evaluates these criteria:

(1) the firm's share of the relevant market, and whether it can unilaterally fix prices or restrict supply in the relevant market without the competing entities being able to offset, at present or potentially, the firm's leverage in the market;

---

129. *Id.*

130. OECD, *supra* note 85, at 3.

131. Business Electronics v. Sharp Elect., 485 U.S. 717, 724 (1988) (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)). The "rule of reason" analysis was first articulated by the United States Supreme Court in Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

132. LFCE, *supra* note 1, art. 10.

133. *Id.* art. 11.

134. *Id.* art. 12.

(2) the existence of entry barriers;
(3) the existence and market power of competitors;
(4) the access of the firm, and its competitors, to sources of supply;
(5) the firm's recent conduct;
(6) any other criteria established by regulation.[135]

As with the absolute monopolistic practices discussed above, the Mexican analysis of "relative" monopolistic practices bears striking similarities to the United States' vertical restraint analysis.[136]

D. Commission Regulation of Merger And Acquisition Activities

The Competition Law is not only concerned with existing monopolies and monopolistic practices, but also seeks to limit monopolies at their inception. The Law's approach toward mergers and acquisitions is preventive — only mergers and acquisitions that fit within specified size thresholds will be subject to the law.[137] It thus purports to regulate only those mergers that pose a serious threat to competition.

The LFCE establishes two mechanisms for the Commission to monitor and regulate merger activity. First, similar to the antitrust laws in Canada[138] and the United States,[139] the Competition Law requires that parties notify the Commission in advance of entering into mergers or acquisitions which fit within the following notification thresholds: 1) acquisitions valued at United States $55 million

---

135. *Id.* art. 13.

136. *See supra* note 130 and accompanying text (citing vertical restraint decisions by United States courts which have applied the "rule of reason" analysis).

137. *See infra* note 139 and accompanying text (indicating the statutory thresholds for notification to the Commission of anticipated mergers and acquisitions).

138. Competition Act, R.S.C. 1985, C. C-34, S. 92, as amended (1986). In Canada, mergers are a reviewable practice subject to an inquiry of "substantial prevention or lessening of Competition." *Id.* The Act sets forth an exhaustive list of criteria, including the extent of foreign competition, whether the merger involves a failing business, the availability of substitutes, entry barriers, the level of foreign competition remaining after the merger, the removal of an effective competitor from the market and the nature of change and innovation in the market. *Id.* § 93. The transactional thresholds are as follows: the parties to the transaction must have combined assets in Canada or annual gross revenues from sales in 1) from or into Canada over C $400 million; 2) in the case of an acquisition of assets or shares, the value of the Canadian assets controlled through the entity(ies) to which the shares pertain, or the annual gross revenues in or from Canada generated by those assets, must exceed C $35 million. *Id.* §§ 120-22.

139. In the United States, this requirement is found in the Hart-Scott-Rodino notification provisions. Codified at 15 U.S.C. §§ 15(c)-(h) (attorneys), 18(a)-(h) (parties) (1989). Section 18(a) states that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . file notification . . . ." *Id.* § 18(a).

or more; 2) transactions resulting in the accumulation of 35 percent or more of the assets or sales of an entity with assets or sales in excess of United States $55 million; and 3) transactions involving merger partners with joint assets or annual sales over United States $220 million and involving the additional accumulation of assets or capital stock of United States $22 million or more.[140]

Second, the Commission may, on its own initiative, review any merger or acquisition which may "diminish, impair or impede competition and free market access."[141] The Commission considers the following factors while investigating possible unlawful combinations, and regards them as evidence in support of the charge if the merger or acquisition:

> 1. Bestows or may bestow on the merging party, the acquirer, or the economic agent resulting from the concentration, the power to fix prices unilaterally or to substantially restrict the stock or supply [of products] in the relevant market, without the competing economic agents being able, presently or potentially, to offset such power;
>
> 2. Intends or may intend to improperly displace other economic agents or to prevent their access to the relevant market; and
>
> 3. Intends or has the effect of substantially permitting the participants in said act or attempt to engage in monopolistic practices as referred to in Chapter Two hereof.[142]

In determining whether a concentration is unlawful, the Commission applies the same criteria as used to evaluate "relative monopolistic practices."[143] That is, the Commission must consider the "relevant market" and the market power of the entities supplying the relevant market.[144] The Commission also must evaluate the degree of concentration in the relevant market, and any "other criteria or analytical instruments" the Commission may establish by regulation.[145]

A party's merger notification must include the entities' most recent financial statements, data regarding the firms' market share,

---

140. LFCE, *supra* note 1, art. 20; OCED, *supra* note 85, at 5 (noting that under the LFCE, mergers and acquisitions are evaluated not only by their size, but also by the relationship between the operation and the international market). All monetary figures are approximate. Under the LFCE, threshold amounts are indexed to the minimum wage in the Federal District, and the exchange rate, as of January, 1993. LFCE, *supra* note 1, art. 20, §§ 1, 2.

141. LFCE, *supra* note 1, art. 16.

142. *Id.* art. 17.

143. *See Id.* art. 10 (stating the general definition and categories of "relative monopolistic practices").

144. *Id.* art. 18.

145. *Id.* art. 18, § 3.

and other data relevant to evaluation of the proposed transaction.[146] The Commission may request additional information or documents from the parties within 20 days of receipt of the initial notification.[147] The parties must respond within 15 days of the Commission's request for additional information.[148] The Commission has 45 days from receipt of the additional information to issue a decision.[149] If the Commission fails to issue a decision within the statutory period, "it shall be understood that the Commission has no objections whatsoever" to the proposed transaction."[150]

Transactions that have received a favorable Commission ruling may no longer be challenged, except in cases where the Commission rendered the ruling based on false information.[151] Also, transactions that do not require prior notification may not be challenged after one year following their consummation.[152] During its first year, the Commission received fifty-two notifications for merger review.[153]

III. Application and Enforcement Issues

Mexico's Competition Law establishes the framework for an economy driven far more by market forces than it was previously. The LFCE, however, remains quite new. Notwithstanding the far-reaching reforms during the de la Madrid and Salinas administrations,[154] Mexico's economy still features both an active state role and a high level of economic concentration. Therefore, the ease and completeness of the transformation into Mexican economic reality of the liberalizing, pro-competitive vision of the LFCE's drafters will depend upon how effective the Commission is in pursuing the law's mandates.

A. The Commission's Exclusive Jurisdiction

In monitoring and regulating Mexico's new pro-competition regime, the role and authority of the Federal Competition Commis-

146. *Id.* art. 21, § I.
147. *Id.* art. 21, § II.
148. *Id.*
149. *Id.* art. 21, § III.
150. *Id.*
151. *Id.* art. 22, § I.
152. *Id.* art. 22, § II.
153. Annual Report, *supra* note 56, at 7.
154. *See supra* notes 38-55 and accompanying text (discussing the reforms during those administrations).

sion is clearly paramount. Most importantly, the LFCE gives the Commission exclusive antitrust jurisdiction.[155] The LFCE provides that "[e]xcept as specified herein, no judicial or administrative action may be based on this Act."[156] Accordingly, no other federal judicial or administrative entity may issue rulings or otherwise enforce the LFCE. Likewise, the individual states cannot participate in enforcement of the new law.[157]

This centralization of enforcement authority stands as a distinctive feature of the new competition regime. While other aspects of the law are modeled largely after United States antitrust law,[158] Mexico's centralized enforcement departs from the United States model. In the United States, two federal agencies — the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") — have dual enforcement jurisdiction over antitrust matters.[159] The Antitrust Division of the DOJ and the FTC have overlapping jurisdiction over antitrust violations. The Antitrust Division may enforce any of the federal antitrust laws and may bring criminal prosecutions under them.[160] The FTC may only enforce the Clayton Act and may not bring criminal prosecutions, but it has the authority to enjoin practices that may not be violations of the antitrust laws but are nevertheless violations in spirit.[161] The two agencies regularly consult with one another on the initiations of investigations and lawsuits.[162] They typically divide responsiblities based on their relative expertise in given areas and the availability of their staff.[163] Moreover, many states have active antitrust agencies to enforce both federal and state antitrust statutes. Because of the

155. *See* Annual Report, *supra* note 56, at 5 (discussing the Commission's structure and decision-making authority).

156. LFCE, *supra* note 1, art. 38.

157. Under the Mexican Constitution, the regulation of monopolies and, more generally, competition, is exclusively a federal matter. *See* MEX. CONST. art. 28. Consequently, the individual states have never enacted laws regulating competition.

158. *See supra* notes 117-26 (discussing the absolute monomopolistic practices), 128-36 (discussing relative monopolistic practices).

159. *See* 15 U.S.C. § 4 (1995) (authorizing United States Attorneys to bring civil suits in federal courts to prevent and restrain antitrust violations); *id.* § 45 (authorizing the Federal Trade Commission to bring proceedings to enforce antitrust laws, subject to judicial review by the United States Courts of Appeal).

160. *See* Section of Antitrust Law, AMERICAN BAR ASSOCIATION, *Antitrust Law Development (Third)* 547 (1992).

161. *Id.*

162. *Id.*

163. *Id.*

nature of American federalism, in which the states play important roles in law enforcement, state antitrust enforcement has proved to be complementary to federal enforcement in at least two ways. First, state antitrust laws may be broader than federal laws, thus allowing for more aggressive prosecutions. Second, since states may enforce federal antitrust laws, there is a greater volume of antitrust enforcement of federal law. These state enforcement agencies often choose not to defer to the DOJ and the FTC for enforcement actions.[164] Mexico instead decided to centralize all antitrust enforcement in a single agency.

B. Initiation of Investigatory And Enforcement Activities

Investigations of potentially illegal monopolistic activities and enforcement actions commence in one of two ways. The Commission can initiate its own actions, or, alternatively, some actions may be commenced by the filing of individual complaints with the Commission.[165]

1. The Commission's "Ex Officio" Investigations Of Monopolistic Practices

The Commission has broad authority to initiate administrative proceedings on its own — "ex officio" investigations — to examine anticompetitive market practices in virtually any economic sector.[166] As described below, during the 1993-1994 period, the Commission initiated sixteen investigations in important sectors of the Mexican economy.[167]

---

164. In the United States, each individual state government has the authority to enforce its own antitrust laws. *See* California v. ARC America Corp., 490 U.S. 93, 100-03 (1989) (holding that the rule limiting federal antitrust recoveries to direct purchasers does not prevent the states, as indirect purchasers, from recovering damages flowing from their own antitrust law violations). State antitrust legislation generally is not preempted by the Sherman Act. *Id.* at 101. State attorneys general also have the authority to bring enforcement actions under the federal antitrust laws as *parens patriae* on behalf of the citizens or consumers in their states. *See* H-S-R, Title III, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394 (1976), codified at 15 U.S.C. §§ 15c (a)-(d) (1988) (prescribing the manner in which State attorneys general may bring civil actions for damages to enforce federal antitrust laws).

165. LFCE, *supra* note 1, arts. 30, 32.

166. *Id.* art. 15.

167. *See infra* notes 201-57 and accompanying text (summarizing a number of Commission investigations of certain markets in the Mexican economy).

2. *Private Party Litigation*

The LFCE also establishes a limited private cause of action for challenging alleged anticompetitive business practices.[168] In the case of absolute monopolistic practices, "any person" may file a written complaint against the alleged responsible party.[169] If the challenged activity is a relative monopolistic practice, the complainant must show that he has sustained, or may sustain, "substantial damage or loss."[170] All competition law complaints must be filed with the Commission.[171] Private enforcement actions may turn out to be considerably less important than the Commission's own authority to initiate enforcement proceedings. As described below, during 1993-1994, the Commission received a total of only twenty-two private party complaints alleging unlawful monopolistic practices.[172]

The narrow role for private plaintiffs under the LFCE presents interesting — and instructive — contrasts with the approach developed in United States antitrust law. As discussed, private parties in Mexico may only bring claims before the Commission.[173] Thus, no claims may be brought in the federal courts.

In contrast, the United States grants broad rights for private party actions under the antitrust statutes.[174] United States law, in fact, provides significant incentives to antitrust plaintiffs. For example, treble damages are available,[175] and, under the Clayton Act, private litigants may bring class actions.[176] Not surprisingly, private party enforcement actions have played a significant role in the development of antitrust law in the United States. Liberal private enforcement mechanisms have at least two substantial advantages. First, private enforcement allows a much greater volume of antitrust enforcement actions to proceed. Since the government does not have

---

168. LFCE, *supra* note 1, art. 32.

169. *Id.*

170. *Id.* The law neither specifies how "substantial" the alleged loss must be, nor how the Commission is to measure alleged losses in private party actions.

171. *Id.* art. 38 (stating that "[no] judicial or administrative action based on this Law will proceed unless it has been established herein").

172. Annual Report, *supra* note 56, at 3.

173. *See supra* note 155 and accompanying text (noting that the LFCE grants the Federal Competition Commission exclusive jurisdiction over antitrust actions).

174. *See* 15 U.S.C. § 15(a) (1980) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . .").

175. *Id.* § 15 (stating that an individual who prevails in an antitrust action "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

176. *Id.*

nearly enough resources to pursue every antitrust violation, private enforcement allows it to concentrate its resources on the most important, ground-breaking cases. Because of the treble damages and class action provisions, private parties have adequate incentive to bring such suits. Second, government agencies are often captured by the corporations that they are charged with regulating. Allowance of private antitrust actions ensures that even if the antitrust enforcement agencies are captured, suits may still proceed uninhibited.

3. *Role of the Judiciary and Judicial Review*

The LFCE envisions only a modest role for the Mexican courts in enforcing the competition law. It may be best that the Mexican judiciary have a limited role in the enforcement of the new law. The Mexican judiciary has historically been viewed as lacking independence and as prone to corruption.[177] Although it would be unfair to make such accusations in a blanket manner, there is certainly some truth to it. Once a private party plaintiff has prevailed in a proceeding before the Commission, he may file an action in the federal court but only to recover damages.[178] The LFCE provides an "appeal" procedure for review of the Commission's determinations.[179] However, this procedure acts as a request for reconsideration since only the CFC itself may review the prior administrative determination.[180] In reconsidering a prior ruling, the CFC may revoke, modify or affirm "the determination from which relief is sought."[181]

While the LFCE does not contain any statutory mechanism for direct judicial review of Commission rulings, an aggrieved party may file a constitutional challenge in the federal courts under a procedure known in Mexico as a *juicio de amparo* or writ of protec-

---

177. *See, e.g.*, Juanita Darling, *Mexican Judge Overturns Ex-Union Boss's Conviction*, L.A. TIMES, June 3, 1995; Tod Robberson, *Mexican Drug Dealers Cut Pervasive Path: Nation is Top Narcotics Supplier to U.S.*, WASH. POST, May 31 1993; Jim Schacter, *Widespread Camera Case Bribery Alleged*, L.A. TIMES, May 28, 1987.

178. Under the LFCE, an aggrieved party that has demonstrated an antitrust violation, and competitive injury, may be entitled to damages. LFCE, *supra* note 1, art. 38. The CFC has the authority to assess damages in private party actions. However, the CFC cannot enforce the damages order. Private litigants must file an action in the courts to enforce the CFC's assessment of damages. *Id.*

179. *Id.* art. 39.

180. *Id.*

181. LFCE, *supra* note 1, art. 35. If the Commission rejects an "appeal" involving the imposition of a fine, the appealing party may file an administrative adversary proceeding before the Federal Tax Court. Annual Report *supra* note 56, at 5.

tion.[182] As Mexican constitutional law experts have commented, the *amparo* is available to protect individual guarantees provided to all Mexicans under the Constitution.[183] However, *amparo* relief is available only for acts or laws by government authorities and not for the acts of private parties.[184] This is essentially a "state action" requirement. Further, only individuals who can establish concrete, individualized harm can petition for *amparo*.[185] Finally, a statute or administrative act successfully challenged in an *amparo* action becomes invalid only as to the parties to the proceeding.[186]

Due to the substantial procedural limitations in *amparo* actions, the judiciary is not likely to review many decisions of the Commission. Additionally, most judges and lawyers are not yet familiar with the provisions of the LFCE, and its application to specific market practices in Mexico.[187] Although the availability of an *amparo* action may result in a few judicial rulings in the area of antitrust, these court rulings are not likely to play a major role in this new area of the law.[188] During the first year since enactment of the law, no court decision interpreting the LFCE was published. Instead, the CFC has had, and likely will continue to have, exclusive jurisdiction over interpretation and enforcement of the new antitrust law.

C. *The Importance of Exclusive Jurisdiction and Centralized Enforcement in the Mexican Context*

The LFCE's centralized antitrust enforcement regime and its limited review mechanisms are consistent with the civil law tradition in Mexico and Latin America.[189] Several other civil law jurisdictions

---

182. For discussion of the role of the Writ of *Amparo* in Mexico's judicial system, see RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT 111-63 (1971); Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306 (1979); HERGET & CAMIL, *supra* note 102, at 27-29.

183. Zamudio, *supra* note 182, at 607.

184. HERGET & CAMIL, *supra* note 102, at 28 (stating "state action" requirement for *amparo* relief under Art. 107 of the Mexico Constitution).

185. *Id.* (stating that Art. 107 authorizes *amparo* relief only to concrete cases by petition of an individual).

186. *See* HERGET & CAMIL, *supra* note 102, at 28 (stating that amparo applies only to challenges to government action).

187. *See* Annual Report, *supra* note 56, at 2 (citing examples where the Commission has sought to apply and enforce the LFCE in specific markets).

188. *But see* Newberg, *supra* note 71, at 607 ("[A]mparo suits could substantially involve the courts both in the interpretation of the [LFCE] and in passing judgment on the actions and determinations of the Federal Competition Commission.").

189. For an overview of civil law systems, see JOHN H. MERRYMAN, THE CIVIL LAW TRADI-

in Latin America have created exclusive administrative entities to enforce their respective antitrust laws.[190] Civil law systems such as Mexico's rely largely on administrative procedures for the enforcement of statutory rights in numerous areas.[191] Consequently, administrative agencies, as appendages of the Executive Branch, often have greater power and authority than the judiciary to enforce the law.[192]

The broad powers and centralized authority of the CFC also reflect the relatively limited authority and role of the Mexican judicial system. The judicial system is perceived by many as plagued with considerable delays, institutional corruption and a lack of independence.[193] Given the lack of confidence in the judiciary, empowering the Commission to handle all antitrust cases is therefore possibly the best way to develop a new area of specialized law in Mexico. With exclusive authority to interpret the LFCE,[194] the Commission enjoys maximum control over the quality, timing and overall integrity of the decision-making process.

In addition, litigation in the Mexican courts is not a common method for resolving commercial disputes. The judicial process is lengthy, unpredictable and presents the danger of destroying long-term business relationships.[195] In a society where relationships are all-important, and where many enterprises — even very large ones — remain family-owned, Mexicans avoid litigation at all costs.[196] In contrast, administrative enforcement of the law may be more conducive to compromise. This was evident during the Commission's first year of enforcement of the LFCE. In the two most significant ad-

---

TION (2d ed. 1985). In civil law nations, it is common for numerous judicial and/or administrative court systems to operate simultaneously, each having exclusive jurisdiction over a single entity. *Id.* at 85.

190. Argentina, Brazil and Venezuela also require that *all* enforcement cases be filed with the antitrust authority. Argentine Law 22,262 see Inter Am LR n60.

191. *See,* Zamora, *supra* note 50, at 423 (discussing Mexico's greater reliance on administrative law as opposed to litigation through the judiciary).

192. *See* MERRYMAN, *supra* note 189, at 85-87 (discussing generally the separation of powers between coordinate branches of government in civil law countries).

193. James F. Smith, Comments on NAFTA and the Trade in Agricultural Products, 1 U.S.-MEX. L.J. 287, n.32 (1993).

194. *See supra* notes 155-157 and accompanying text (explaining the grant of authority given to the LFCE).

195. BAKER, *supra* note 182, at 197-250 (discussing *amparo* procedures); HERGERT & CAMIL, *supra* note 102, at 27-28 (discussing the *amparo* system).

196. *See* Zamora, *supra* note 50, at 440 ("Private sector controlled through system of family and personal alliances.").

ministrative investigations, the Commission decided to require that the parties sign consent decrees, rather than impose administrative fines.[197]

Centralized administrative enforcement of the Competition Law however raises the potentially acute danger that the administrative authority — the Commission — selectively will enforce the law. In fact, this issue arises frequently with respect to administrative enforcement of the law in Mexico. In the not-too-distant past, Mexican administrative entities enjoyed unbridled discretionary power selectively to enforce legal requirements against individuals or firms.[198] The bureaucratic structure for administrative enforcement in Mexico was tailor-made for the extension of political favors and other forms of corruption.

The architects of the Commission, however, have sought to minimize the likelihood of such corruption by keeping the commission and its members relatively insulated from the political whims of the Executive Branch. Commissioners serve ten-year terms (four years longer than the President).[199] Additionally, the Commission has a budget independent of any other federal agency.[200] Thus, unlike all other administrative bureaucracies,[201] the Commission enjoys substantial political autonomy, and, by most accounts, has enforced the LFCE in an even-handed fashion.

Indeed, one may view the Commission as a paradigm for administrative agency operations in Mexico. After decades of endemic corruption in administrative agencies,[202] the establishment of an independent Competition Commission creates an opportunity to legitimize administrative procedure as a fair, viable means of enforcing legal rights in Mexico. The fact that the Commission's purview extends over both the public and private sectors adds to its potential to effect change in Mexico beyond the arena of commercial competition alone.

---

197. See Annual Report, *supra* note 56, at 19-22 (briefly describing the Commission's investigations of bank credit cards and gasoline stations and the respective consent agreements entered into with the major companies in those markets).

198. *See supra* notes 17-31 and accompanying text (discussing the past discretionary powers held by administrative offices).

199. LFCE, *supra* note 1, art. 27.

200. Annual Report, *supra* note 56, at 5.

201. The environmental enforcement agency, SEDESOL, for example, operates completely within the Executive Branch for budgeting, management and operational purposes.

202. *See supra* notes 17-31 and accompanying text (discussing the history of power abuse by administrative agencies in Mexico).

IV. THE COMMISSION'S FIRST YEAR

The decisions of the Commission are not published. In fact, the sole source of information regarding the Commission's activity in this area is the Annual Report of the Federal Competition Commission released in July 1994. While the cases reviewed in the Annual Report are not binding,[203] they offer valuable information regarding the Commission's enforcement actions and policy objectives during its first year in existence. At the same time, it is important to underscore the limitations that this scarcity of documentation imposes on conducting a thorough analysis. Not only is the Annual Report but a single document, but it contains only case summaries drafted and published by the Commission itself. Thus, the Report elaborates the Commission's *own* interpretation and analysis of cases and events.

A. Monopolistic Practices

During the Commission's first year, only twenty-two private party complaints alleging monopolistic practices were filed.[204] The Commission has reviewed seventeen of these complaints, dismissing sixteen of them on the grounds that they failed to meet the "minimum conceptual and legal requirements."[205] The Commission has observed that the legal community in Mexico generally is unfamiliar with the provisions of the new law.[206] As lawyers and firms operating in Mexico gain familiarity with the provisions of the Competition Law, it is expected that a greater number of well-founded complaints of anticompetitive conduct will be brought before the Commission.[207]

While private parties were neither very active nor successful in initiating claims under the LFCE, the Commission itself investigated 16 cases of monopolistic market practices.[208] These investigations — referred to as "ex-officio" cases — resulted in fines and consent decrees in important economic sectors.[209] A few examples of the Commission's decisions help to illustrate the Commission's focus

---

203. Annual Report, *supra* note 56, at 26, 30.

204. *Id.* at 24.

205. The Commission may dismiss complaints that are "notoriously inadmissible." LFCE, *supra* note 1, art. 32.

206. Annual Report, *supra* note 56, at 4.

207. *See id.* at 4, 24.

208. *Id.* at 19.

209. *See infra* notes 210-37 and accompanying text.

and activities.

In *Investigation re Auctions of Treasury Certificates of the Federation*, the Commission decided to investigate the bidding practices of several large financial houses[210] in the weekly auctions of federal treasury certificates, or *tesobonos*.[211] The Commission discovered that these financial houses had "coordinated" their bids in several auctions during 1993, thus obtaining the certificates at a discount rate.[212] The Commission concluded that this bid-rigging was "incompatible" with the LFCE, and imposed fines on each financial house.[213]

In another investigation of a price-fixing conspiracy, *Investigation re Laundries and Dry Cleaners*, the Commission examined the laundry and dry cleaning prices charged by several ostensibly competing companies and the participation of two trade associations in establishing those rates.[214] The Commission concluded that the National Chamber of Laundry Industries and the National Association of Professional Cleaners printed, sold and distributed among their members lists of the rates and prices the companies should charge to the public.[215] The Commission enjoined the practice and assessed fines against the trade organizations, and two dry cleaning businesses.[216] The Commission emphasized that "chambers and business associations must avoid facilitating unlawful information exchanges among their members."[217]

The Commission chose not to levy significant fines against firms during the first year, imposing less than $800,000 for all enforcement actions.[218] This may change this year as the Commission becomes less tolerant of firms' ignorance — real or purported — of the requirements of the new law.[219] However, at least in its first year, the Commission did not use its fining authority as a major

---

210. These financial houses included Grupo Bursatil Mexicano, Casa de Bolsa, Banco Nacional de Mexico, Operadora de Bolsa Serfin, Grupo Financiero Probursa, Banco Internacional, and Grupo Financiero Prime Internacional. Annual Report, *supra* note 56, at 22.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Sergio Garcia-Rodriguez, *Managing Free Competition in Mexico*, THE RECORDER, Aug. 29, 1994, at 7.

219. Interview with Commissioner of the Federal Competition Commission, Dr. Leonel Pereznieto Castro (Jan. 31, 1995).

enforcement tool. Rather, the Commission employed broad consent decrees to enforce the LCEF.[220] Two traditionally restricted markets, the credit card market and gasoline station franchising, are examples.

In *Investigation re Bank Credit Cards,* the Commission investigated the participation of Mexico's three largest banks in the "coordination" of their credit card operations.[221] Several factors prompted the Commission's investigation: the fees paid by merchants for credit card transactions appeared to be higher than the average paid in foreign markets; the credit card transaction fees and the interest rates charged by the leading banks were nearly identical; and the profit margins on credit card operations were higher in Mexico than in any other country, and higher than profits on other bank products.[222] Upon examining the credit card industry in other countries, the Commission found that an independent structure exists among card-issuing banks, member banks and payment systems.[223] This structure permitted each bank independently to establish transaction fees and other credit card-related charges.[224] In Mexico, on the other hand, no clear distinction existed between the credit card-issuing bank, the affiliate banks and the interbank payment network, thus facilitating the "coordination" of interest rates and transaction fees among the banks.[225]

As a result of the Commission's investigation, the Mexican banks signed a consent decree (*convenio de coordinacion*) requiring them to cease anticompetitive business practices in the credit card market.[226] Specifically, the banks agreed to eliminate the exchange of any information that may have the object or effect of setting uniform bank commissions or interest rates.[227] The banks further agreed to eliminate any contractual prohibitions on cash purchase discounts by merchants.[228] The consent agreement promotes economic efficiency because transaction fees will be more consistent

220. Annual Report, *supra* note 56, at 3-4.

221. These banks were Bancomer, Banamex and Banco Serfin. *Id.* at 20.

222. *Id.* at 19.

223. *Id.* at 19-20.

224. *Id.*

225. *Id.* at 20.

226. *Id.*

227. *Id.*

228. The Commission reports that these changes should result in lower bank commission rates, increased flexibility for the more than 250,000 establishments linked to the credit card system, and lower interest rates for over 15 million credit cardholders in Mexico. *Id.* at 20-21.

with banks' costs and merchants will have more flexibility in their pricing policies.[229] Over 15 million credit cardholders in Mexico are expected to benefit from the consent decree.[230]

Another significant Commission investigation resulting in a major consent decree involved Petroleos Mexicanos (PEMEX), the government-owned oil monopoly.[231] PEMEX and public utilities like Telmex and the Federal Electricity Commission generally are exempt from the provisions of the Competition Law, as are other constitutionally protected "strategic activities."[232] But the activities of a public enterprise may fall within the scope of the Law if the activity is not deemed "strategic."[233] The Commission concluded that the activities of Pemex-Refinacion, a subsidiary of Pemex, fell within the scope of the LFCE.[234] The Commission investigated Pemex's restrictions over the franchising of gasoline stations, the number of gasoline stations permitted in any given geographic area, and the products authorized for sale at gas stations.[235] As a result of the Commission's investigation, Pemex signed a consent decree requiring, among other things, the preparation of new "Rules for the Establishment and Operation of Service Stations" eliminating many of these restrictions.[236] The Commission predicts that the consent decree will create many more service station franchising opportunities throughout Mexico. It also predicts that increased competition in this sector will result in dramatically improved service for the Mexican consumer.[237]

B. Merger Review

Especially because of the dramatic economic reforms of the past decade, the competitive impact of a corporate merger or acquisition in the Mexican market cannot easily be determined. For example, many firms may find that they suffer from structural inefficiencies, and cannot compete effectively under Mexico's new market conditions. Many of these firms have merged with competing firms, seem-

229. *Id.* at 20.
230. *Id.* at 21.
231. *Id.* at 21-22.
232. *Id.* at 21.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 22.

ingly to obtain efficiencies sufficient to compete in global markets. Recognizing that the national economy is in a state of extraordinary restructuring, the Commission appears to be developing a flexible approach to its review of mergers and acquisitions.[238]

The Commission unconditionally approved 39 mergers; in the remaining cases, the Commission imposed conditions on the transactions "to eliminate the possible anticompetitive effects of their transaction."[239] Additionally, the Commission evaluated the bidding procedures in connection with the sale of seven state-owned entities "to prevent the divestiture process from becoming a vehicle for monopolistic mergers."[240]

The Commission has developed a three-step analysis to evaluate merger cases. In each merger case, the Commission begins its analysis by defining the relevant market for substitute goods and services.[241] The Commission considers "product characteristics, their geographic location and the ease of access to the product and its substitutes."[242] For example, in a merger review case called *Consorcio Integral de Empresas, S.A. de C.V. with Xafra S.A. de C.V.*, the Commission assessed a proposed merger involving nine sugar mills, accounting for 48% of the national market for refined sugar production.[243] Defining the relevant market as the domestic refined sugar market, the Commission concluded that "it was unlikely" that the firm resulting from the merger would be able to exercise substantial power in the relevant market.[244] The Commission reasoned that significant substitutes were available in the event that the new firm tried to dominate the market.[245] Most significantly, the Commission noted that NAFTA substantially liberalized maize production, which is the principal ingredient of high fructose syrup, a "close substitute" for refined sugar as an input for soft drinks.[246] Although the Commission approved the merger, the Commission ordered, "with preventive purposes in mind," the new company to report all future purchases of sugar-related companies or assets, even

238. *Id.* at 30.
239. *Id.* at 7.
240. *Id.*
241. *Id.* at 16-17.
242. *Id.* at 17.
243. *Id.* at 7-8.
244. *Id.* at 8.
245. *Id.*
246. *Id.*

if those transactions fell below the statutory thresholds for notification.[247]

The Commission considers additional factors to provide a context for assessing the net effect of a merger. For example, the Commission considers entry barriers, import conditions, costs of transportation, and the recent conduct of the merging parties.[248] If the Commission concludes that the parties do not possess substantial market power in the relevant market, it will not challenge the merger.[249]

In several cases, the Commission found that the merging partners possessed high market shares, but that the firms' substantial power in the market was offset by economic efficiencies.[250] In *Banco Union, S.A. with Grupo Financiero Cremi, S.A. de C.V.*, for example, the Commission approved the merger of two large banks, specifically noting that establishing larger banks was an appropriate strategy "to face competition from foreign banks" as a result of NAFTA.[251] Likewise, in *IUSACELL, S.A. de C.V. with Telecom. del Golfo, et al.*, the Commission approved the merger of several companies providing cellular telephone services in Mexico.[252] The Commission stressed that the "strongest argument" for approving the merger was that the merger would "create a national competitor for Telcel," a TELMEX subsidiary.[253] As the dominant firm in the market, Telcel had been able to control major segments of the cellular telephone market, facing only small competitors. Thus, the proposed merger was "likely to curb the [market] power of the main existing competitor."[254]

Because the pervasive restructuring of the Mexican economy has

247. *Id.*

248. *Id.* at 17.

249. *Id.*

250. *Id.* at 7-15. The Commission also has developed a new concentration index developed by a member of the Commission, based in part on the Herfindahl-Hirshman Index (HHI). The Commission has modified the index to take into account the size of the merging firms relative to the entire market: "This index is defined as the sum of the square of each company's share in total supply, divided by Herfindahl's Index, and then raised to the second power. In general terms, this index does not increase with mergers of relatively small companies, but does increase with mergers of relatively large ones (given the size distribution of companies in a particular market.)." *Id.* at 33. This calculation yields what the Commission considers to be a "reliable" measure of the anti-competitive potential of a merger. *Id.*

251. *Id.* at 11.

252. *Id.* at 8-10.

253. *Id.* at 9. TELMEX is the recently privatized national telecommunications monopoly. Telcel, a subsidiary of TELMEX, enjoys an exclusive concession to operate cellular telephone service on Band B, *i.e.*, long distance cellular telephone service. *See id.*

254. *Id.* at 10.

caused many companies to dramatically alter their operations, the Commission has found it necessary to distinguish cases that involve corporate reorganizations from actual mergers and acquisitions. In particular, the Commission is studying possible criteria for evaluating whether a proposed transaction involves a *concentración* (*i.e.*, merger or acquisition) or a corporate reorganization.[255] The LFCE defines a "concentración" as any "merger, or acquisition of control or an other act whereby companies, partnerships, shares, equity, trusts or assets in general are concentrated among competitors, suppliers, customers or any other economic agent."[256] At present, the Commission evaluates the equity structure before and after a proposed transaction to evaluate whether the transaction is simply operational, *i.e.*, a corporate reorganization or a concentration subject to the LFCE.[257] If the Commission concludes that the transaction does not involve "any change in the actual control of the companies involved," then the transaction is deemed to be a corporate reorganization, not subject to the notification provisions of the law.[258]

C. *Potential Obstacles To Enforcement*

The Commission faces at least four substantial obstacles to vigorous enforcement of the Competition Law in Mexico. First, antitrust is a fairly novel development in Mexican law.[259] Even as firms and lawyers gain familiarity with the LFCE, a "litigation explosion" in the antitrust area is not likely. As a civil law jurisdiction, Mexico has not allowed private litigants broad access to the courts or administrative agencies in order to enforce individual rights.[260] To the contrary, Mexico's legal system is abundant with multiple procedural obstacles that effectively curtail private party access to the court system.[261] Mexican statutes generally do not create a private cause of action for enforcement of rights under the law. The LFCE is no exception. Consequently, private parties must pursue a Writ of

---

255. To facilitate merger notification, the Commission has prepared a questionnaire, available to the public, upon request to the Commission's correspondence office. *See id.* at 15.

256. LFCE, *supra* note 1, art. 16.

257. Annual Report, *supra* note 56, at 16.

258. *Id.*

259. *See supra* notes 57-60 and accompanying text (discussing Mexico's first antitrust statute).

260. *See generally* BAKER, *supra* note 182, at 111-12 (explaining that *amparo* is limited to the first twenty-nine articles of the constitution); HERGET & CAMIL, *supra* note 102, at 27-28 (explaining the restrictions on the *juicio de amparo*, or writ of protection).

261. *See supra* notes 182-87 and accompanying text (discussing the procedural barriers to the courts).

Amparo to challenge governmental actions.[262] *Amparo* suits, however, are difficult to bring because the plaintiff must allege a constitutional violation of rights, and establish actual individualized harm.[263] Equally important, *amparo* suits involve relatively complex and lengthy procedures, thus making the action extraordinarily costly. Due in part to these judicial and regulatory barriers, Mexicans generally do not use the court system or administrative processes to enforce legal rights.

Moreover, Mexico does not follow the doctrine of *stare decisis*.[264] Courts and administrative agencies generally do not recognize prior decisions or rulings as binding precedent.[265] Only the party whose conduct is challenged is bound by the decision of a court or administrative body.[266] Therefore, the Commission's decision in one case does not lessen the burden of enforcing the law in an analogous case involving a different party. Also, the Mexican code of civil procedure does not allow class actions. As a result, many victims of antitrust would not recover enough to make litigation financially worthwhile.

Finally, and perhaps most important, vigorous enforcement of the LFCE confronts daunting political barriers. The largest conglomerates in Mexico maintain close ties to the government, and are able to retaliate if challenged by less powerful competitors.[267] For example, Mexico's entertainment giant, Televisa, enjoys close to 90 percent of Mexico's television audience and wields enormous power over economic and political developments in the country.[268] Televisa

---

262. *See supra* notes 182-87 (discussing *Writs of Amparo*).

263. *See supra* notes 184-87 and accompanying text.

264. Stare decisis is the familiar common law doctrine of courts basing new decisions on the holdings of prior cases. MERRYMAN, *supra* note 188, at 22. "Adherence to precedent [stare decisis] promotes stability, predictability, and respect for judicial authority." Hilton v. South Carolina Pub. Ry. Comm'n, 112 S. Ct. 560, 563-64 (1991).

265. *See* MERRYMAN, *supra* note 187, at 23-24 (recognizing "custom" as acceptable only as long as there is no applicable statute or regulation to the contrary). However, due in part to the influence of U.S. legal culture, the Mexican courts have adopted a doctrine of precedent called "jurisprudentia." Under the doctrine of jurisprudentia, the rulings of the Mexican Supreme Court of Justice constitute jurisprudentia when the Court has decided five consecutive cases on a specific legal issue in a like manner. *See* EARL WEISBAU, MEXICO: A LEGAL AND BIBLIOGRAPHIC GUIDE (1990).

266. *See* HERGERT & CAMIL, *Supra* note 102, at 77 (stating that there is no "formal requirement" for courts to follow prior precedents but noting, however, that courts are likely to decide similar cases the same way).

267. Elisabeth Malkin, *Busting Trusts - Commission's Soft Approach May Change After the Election*, MEXICO INSIGHT, Aug. 7, 1994, at 18.

268. *Id.*

is a major source of revenue for the government, paying nearly $100 million in television concession in 1992 alone.[269] The Commission has been sharply criticized for not investigating Televisa and its anticompetitive business practices.[270] Among Televisa's suspect business practices are exclusive dealing contracts with television performers, and pernicious control of advertisement rates in the television industry.[271]

The Commission has acknowledged that it operates with substantial limitations. In its Annual Report, the Commission recognizes that, "lack of a vigorous competition policy in the past has led to an overly concentrated industrial structure" enabling firms to continue anticompetitive practices.[272] Most problematic for the work of the Commission is the fact that many exclusive or long-term government concessions, in telecommunications and other important sectors, preceded the enactment of the Competition Law and thus are grandfathered.[273] The Commission acknowledges that these concessions, have produced a "negative effect on efficiency and equity for many years to come."[274]

In fact, the Commission underscores that its enforcement in this area is a poor substitute for proper government regulations:

> Unless the regulatory authorities coordinate their actions with those of the competition authorities, the [Commission's] efforts will not yield the expected results. It is very important that regulatory authorities abstain from issuing rulings, orders or other types of provisions which restrict the entry of new competitors or create exclusive advantages for a select group. In the future it will be increasingly important to incorporate competition criteria in the regulatory authorities' conduct, and in the concession and permit-granting processes.[275]

The Commission, in effect, has warned government officials that it will not tolerate a continuation of the old policy of using regulatory processes to grant favors or advantages to a "select group."[276] As in the *Iusacell* case,[277] the Commission appears willing to take definitive action to strip away anticompetitive, and exclusive, advantages

269. *Id.*
270. *Id.* at 19.
271. *Id.*
272. Annual Report, *supra* note 56, at 14.
273. *Id.*
274. *Id.* at 5.
275. *Id.* at 6.
276. *Id.*
277. *See supra* note 252-54 and accompanying text (describing the *Iusacell* case).

granted to dominant firms by the government.

D. Key Issues Of Interpretation Of The LFCE

The LFCE draws a fundamental distinction between relative monopolistic practices and absolute monopolistic practices. This statutory distinction raises important legal and practical issues of interpretation.

1. The Per Se Bar on Absolute Monopolistic Practices

Mexico's adoption of a *per se* rule of illegality for absolute monopolistic practices highlights an important competition policy decision: business practices falling within the *per se* category will be condemned automatically, without regard to the actual economic effect of, or business justification for, the market conduct.[278] One of the most difficult tasks the Commission may face will be deciding how properly to "label" a challenged market practice. Determining when the *per se* rule ought to apply is not a simple task. United States courts have struggled for years to strike a balance in applying the *per se* rule.[279] Despite their benefits, *e.g.*, promoting certainty and possibly deterrence, *per se* rules have produced substantial confusion in United States antitrust jurisprudence.[280]

By neatly dividing practices into "absolute monopolistic practices," subject to the *per se* rule, and "relative monopolistic practices," subject to rule of reason, the Competition Law creates the danger that the rule of automatic illegality will be applied to otherwise desirable market arrangements.[281] For example, a market arrangement where price-fixing may be only ancillary to a perfectly legal distribution arrangement may be found *per se* illegal, despite economic efficiency justifications.[282] In contrast, under United States

278. ROBERT BORK, THE ANTITRUST PARADOX, 18 (1978) (defining the rational of the per se rule); *see also supra* notes 117-26 and accompanying text (discussing the *per se* rule).

279. BORK, *supra* note 278, at 267-79 (describing the U.S. Supreme Courts' struggle in applying the *per se* rule to case law).

280. *See id.* at 263 (discussing confusion in application of the *per se* rule to an agreement that is not ancillary to cooperative productive activity).

281. *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 124-34 (1985) (creating categories of market conduct that may or may not violate the antitrust laws is problematic).

282. *See supra* notes 279-80 and accompanying text (discussing the application of the *per se* rule and the contextual problems that the rule creates); *see also* United States v. Sealy, Inc., 388 U.S. 350, 355-58 (1967) (holding a restraint of the resale price of a trademarked article cannot be defended as ancillary to a trademark licensing scheme and set manufacture's fixing of retail price

antitrust law, such an arrangement may be valid where the price-fixing arrangement serves an economic efficiency purpose.[283] Under the LFCE, however, a firm defending such a practice barred from presenting any pro-competitive justifications for the practice.

This concern is heightened by Mexico's civil law tradition. In civil code systems, written law (*i.e.*, statutes, codes) carries much more weight than historical or common law.[284] Judges generally strictly apply statutes, leaving themselves little room for judicial interpretation.[285] Thus, laws in civil law systems must be more specific than those in common law jurisdictions.[286] However, the LFCE contains no guidance regarding how the *per se* rule ought to be applied, which party has the burden of proof, or how much evidence of a *per se* violation the Commission will require before applying the presumption of illegality. The Commission recognizes the need for regulations in this, and other, areas.[287] The Commission intends to submit draft regulations to Congress for approval by September 1995.[288] These regulations, among other things, should clarify how the *per se* rule will be applied in practice, not simply in theoretical terms.[289]

The codification of specific offenses as *per se* illegal has no analogue under United States antitrust legislation. In fact, the present antitrust approach in the United States reflects a clear retreat from strict adherence to the *per se* labeling approach of the past.[290] In

---

was "so serious that courts will not pause to assess them in light of the rule of reason").

283. *See, e.g.*, N.C.A.A. v. Board of Regents of Univ. of Okl., 468 U.S. 85, 100 (1984) (holding that when analyzing trade under the rule of reason test, the inquiry is confined to a consideration of impact on competitive conditions); BMI v. CBS, 441 U.S. 1, 20 (1979) (stating that procompetitive benefits in restrictive broadcast licensing agreements justified a rule of reason analysis); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 226-27 (D.C. Cir. 1986) (noting that agency exclusivity is "economically beneficial" in some circumstances, and that the van line's decision to terminate the contract of the agent with interstate authority was not *per se* illegal).

284. *See* MERRYMAN, *supra* note 189, at 26-29 (describing the civil code system "not as a form of expression but as the expression of an ideology.").

285. *Id.* at 35 (portraying the civil law judge as a civil servant who performs important but essentially uncreative functions).

286. *Id.* at 32.

287. Interview with Comm'r Pereznieto, *supra* note 219.

288. *Id.*

289. *Id.*

290. A rigid application of the *per se* label would be inconsistent with the present antitrust approach in the U.S. U.S. courts increasingly have departed from the labeling approach in antitrust, focusing instead on whether the practice promotes economic efficiency or competition. *See, e.g.*, Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567-69 (11th Cir. 1991) (applying the per se test, with caution, "only when history and analysis have shown that in sufficiently

recent years, the Supreme Court has warned against formalistic line-drawing between those practices that presumably are *per se* illegal and those that merit a full rule of reason analysis.[291] In essence, the *per se* rule is now only applied with respect to business practices that, based on experience in the marketplace have proved to be almost always anticompetitive.[292]

In Mexico, no such experience of judicial or administrative evaluation of the economic effect of trade restraints exists. The Commission therefore will rely, in some measure, on the experience of the United States and other jurisdictions concerning specific business practices. Three of the Commissioners have travelled to the FTC and the DOJ to study how United States antitrust law is enforced in this country. Also, the Commission recently subscribed to LEXIS in order to have immediate access to United States enforcement actions and judicial opinions on antitrust.[293]

At a more practical level, Mexico's decision to codify a *per se* rule may have been motivated by a desire strictly to enforce the law against the most flagrant anticompetitive business practices. In light of the extent of industrial concentration in the national economy, and the prevalence of anticompetitive business practices in many sectors, the *per se* rule may serve to focus the Commission's enforcement efforts in those areas where national firms continue to enjoy some protection from international competition.[294] Through vigorous application of the *per se* rule, therefore, the Commission can concentrate its limited resources investigating the most egregious market practices.[295] The Commission has indicated a clear policy to pursue anticompetitive practices especially in those markets that re-

---

similar circumstances the rule of reason unequivocally results in a finding of liability"); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 215-16 (D.C. Cir. 1986) (refusing to apply per se rule to policy of van line carrier to terminate agents competing with the company).

291. *See, e.g.*, National Collegiate Athletic Ass'n v. University of Okla., 468 U.S. 85, 90 (1984) ("[T]he essential inquiry . . . is whether or not the challenged restraint enhances competition"); Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 58-59 (1977) ("[A]ny 'departure' from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.").

292. *See* Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284, 298 (1985) (declaring that "the act of expulsion from a wholesale cooperative does not raise a probability of anticompetitive effect").

293. Interview with Comm'r Pereznieto, *supra* note 219.

294. *See* Annual Report, *supra* note 56, at 4 (stating that the Commission will focus on those sectors that traditionally have not been exposed to international competition).

295. *See id.* at 4-5 (noting the Commission's change in focus).

main insulated to some extent from international competition.[296]

2. *The Rule of Reason and Relative Monopolistic Practices*

Apart from the *per se* rule, the Competition Law adopts an analysis substantially similar to the rule of reason analysis employed in United States antitrust law.[297] Articles 10 through 13 of the Competition Law provide that "relative monopolistic practices" are violations of the law only if the alleged offender has "substantial market power" in the "relevant market."[298] The Competition Law therefore adopts the two-step United States "rule of reason" analysis which seeks to: (1) define the relevant market; and (2) measure the defendant's power within the defined market.[299]

In fact, the LFCE sets forth virtually the same criteria that United States courts consider in defining the relevant market. As in the United States, the LFCE focuses on two important factors that generally define a relevant market under United States law -- the availability of substitute goods or services (demand substitutability) and the potential of securing supply from other areas (supply substitutability).[300]

United States courts also routinely examine the remaining criteria found in the Competition Law, such as 1) the existence, participation and market power of competitors;[301] 2) the existence of barriers to entry into the market;[302] 3) the access of the defendant firm and its competitors to critical raw materials or technology.[303]

Under Mexico's civil code system, legislation aims to be compre-

---

296. *See generally id.* (implying that the Commission passed the *per se* rule, at least in part, in order to concentrate on insulated markets).

297. *See supra* notes 130-36 and accompanying text (discussing the rule of reason analysis).

298. *Le de Invenciones y Marca,* DIARIO OFFICIAL, Feb. 10, 1976.

299. *See supra* notes 131-32 and accompanying text (citing United States rule of reason caselaw).

300. *See, e.g.,* Kodak v. Image Technical Serv., 504 U.S. 451 (1992) (holding copying and micrographic equipment manufacture had the market power to interfere with the availability of independent service organizations in supplying equipment maintainence).

301. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 461 F. Supp. 1046, 1052 (N.D. Cal. 1978) (finding that the television industry was not oligopolistic wherein the industry had over 100 competing manufacturers), *aff'd* 694 F.2d 1132 (9th Cir. 1982).

302. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 606 (1974) (stating that commercial banking must take into account the regulatory restraints on entry into commerce).

303. *But cf.* Monahan's Marine, Inc v. Boston Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989) (stating that the defendant's conduct "did not significantly change the structure of the . . . market"); Barry Wright Corp. v. ITT Grinnell Corp., 725 F.2d 227, 231 (1st Cir. 1983) (illustrating the "procompetitive" objective of the Robinson-Patman Act and how it protects competitors by forbidding sellers to "discriminate in price between different purchasers of commodities.").

hensive, leaving the courts or administrative agencies with little or no room to develop case law interpretations or doctrines.[304] As a result, common law concepts like "judge-made law" are not recognized as playing a role in the formation and development of legal doctrine and principles.[305] Therefore, it is not surprising that there is virtually no case law interpreting Mexico's 60-year old antitrust law history.

3. *Establishing Viable Legal Standards and Procedures*

Given the civil law tradition in Mexico, it may be difficult for the Commission or the Mexican courts to develop definitions and interpretations that parties may depend on in rule of reason cases.[306] In each case, the Commission must determine how the relevant market is defined and whether a firm possesses substantial power in that market. These common law concepts are essentially legal creations that have evolved over the course of thousands of American antitrust decisions.

Despite these limitations, the Commission, as a non-judicial body, may have greater freedom to develop "common law-type" jurisprudence than would the courts in Mexico. For example, the Commission is studying the possibility of developing guidelines on the question of market definition and market power assessment. Additionally, the Commission is free to look at foreign sources of antitrust for guidance on the many complex legal issues that it will face in interpreting the LFCE.

Inevitably, the Commission also will play a significant role in constructing the legal and procedural building blocks for the litigation process in the new competition law regime. Given the minor role of private party litigation in antitrust disputes, many crucial elements of the litigation system remain relatively undefined. Although the examples which could be cited in the area of competition law alone are almost innumerable, an illustration of the point would be helpful. For example, essential to a finding of an absolute or relative monopolistic practice will be proof of the existence of an "agree-

304. *See* MERRYMAN, *supra* note 189, at 26-29 (recognizing that if "the legislature alone could make laws and the judiciary could only apply them . . ., such legislation had to be complete, coherent, and clear.").

305. *Id.* at 36-37 (identifying the judges' image as "an operator of a machine designed and built by legislator.").

306. *See supra* note 304 and accompanying text (discussing Mexican court's traditional role as appliers of the law, rather than as interpreters).

ment" among ostensibly competing entities. Under present Mexican law, it is far from clear what evidence will be required to substantiate a finding of such an agreement. Indeed, it is even uncertain which party would have the burden of proof in a Commission proceeding.[307] Moreover, because Mexico does not have civil discovery procedures, it is not clear precisely what kind of inquiry the Commission, much less a private litigant, may pursue in seeking to prove an antitrust violation. As it interprets and enforces the new Competition Law, the Commission will need to address these basic procedural and substantive questions.

V. COMPETITION POLICY AND THE NORTH AMERICAN FREE TRADE AGREEMENT

The increasing economic integration of North America presents significant new opportunities for coordinating a competition policy among the member states — Canada, Mexico and the United States.[308] NAFTA is a comprehensive agreement intended 1) to eliminate barriers to trade in, and facilitate cross-border movement of, goods and services among the Parties; 2) to promote fair competition within the free trade area; 3) to increase investment opportunities within the trade area; 4) to provide adequate and effective protection of intellectual property rights; 5) to create effective procedures for application of the Agreement, including dispute resolution procedures; and 6) to establish the basis for further trilateral, regional and multilateral cooperation to enhance the benefits of NAFTA.[309] Each chapter in the Agreement is designed to implement one or more of these central goals.

Competition policy stands as an integral component of NAFTA. Chapter 15 of NAFTA, entitled "Competition Policy, Monopolies and State Enterprises," contains the Agreement's provisions relating to competition policy in the free trade area.[310] NAFTA's competition law provisions establish a basic framework for effective competition law enforcement in North America. Article 1501(1) provides that the Parties shall "adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate actions with re-

307. *See supra* notes 178-88 and accompanying text (discussing Commission procedures).
308. NAFTA, *supra* note 3, prmbl.
309. *Id.* art. 102.
310. *Id.* art. 15.

spect thereto."[311] Article 1501(2) commits the Parties to "recognize[] the importance of cooperation and coordination among their authorities"; and, further, that the Parties shall "cooperate on issues of competition law enforcement policy, including mutual assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area."[312]

As the national economies of the three NAFTA countries become more integrated, antitrust enforcement agencies in each nation will face a broad range of situations where interagency cooperation may be necessary. Enhanced cooperation and coordination may be promoted through executive agreements or memoranda of understanding ("MOU") that now are quite common in the antitrust area.[313] The United States has MOUs with Canada,[314] the European Community,[315] Germany[316] and Australia.[317] Canada and the United States also are signatories to the 1986 OECD Recommendation regarding cooperation between member states on restrictive business practices affecting international trade.[318] Cooperation may also be improved through GATT and the World Trade Organization. There have already been attempts to hasten the convergence of antitrust policy, as well as regulation of anticompetitive practices (e.g, subsidies and dumping) through GATT.[319] Though currently resisted by a number of nations, this trend will no doubt continue.

To extend cooperation principles to include Mexico, the existing MOU between Canada and the United States may be "trilateral-

311. *Id.* art. 1501(1).

312. *Id.* art. 1501(2).

313. Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1994.

314. *Id.*

315. Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Sept. 22, 1991.

316. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976.

317. Agreement Between the Government of the United States of America and the Government of Australia Concerning Cooperation on Antitrust Matters, June 29, 1982.

318. U.S., Canada Agree on Procedure for Cooperation and Antitrust Probes, 46 ANTITRUST AND TRADE REG. REP. (BNA) No. 1156, at 524 (Mar. 15, 1984) (highlighting the agreement's notice and consultation requirements as encouraging both governments to assist each other in antitrust enforcement).

319. GARY N. HORLICK AND MICHAEL A. MEYER, *The International Convergence of Competition Policy*, 29 THE INT'L LAWYER 65-76 (Spr. 1995).

ized." A trilateral arrangement would promote cooperation among the three countries' enforcement agencies and would help to avoid disputes in international antitrust enforcement.[320] MOU's and other international cooperation arrangements provide an institutional setting for consultation between antitrust authorities. Frequent consultation among authorities in Canada, the United States and Mexico in turn should lead to a greater understanding of each countries' unique approach and policy priorities in the area of antitrust.[321]

Mexico's new Competition Law creates the foundation for more complementary antitrust application and enforcement in North America. The Commission recognizes the central role of NAFTA and other trade agreements in gaining broad support for a new competition policy in Mexico.[322] The enactment of a Competition Law in Mexico, and the ratification of NAFTA present a unique opportunity in North America to maximize coordination of the respective competition policies of the NAFTA countries.[323]

VI. CONCLUSION

Antitrust in Mexico is a broad, and potentially dynamic, new area of law and government policy. Antitrust/competition policy likely will undergo significant evolution in the short term as the Commission develops standards and rules for interpretation and enforcement of the 1992 Competition Law. Decades of direct government intervention in the national economy, promotion of state and private monopolies, and import substitution policies have combined to create an overly concentrated and oligopolistic market in Mexico. This situation makes effective competition law enforcement difficult, if not impossible. However, the Commission is engaged in a valiant effort to apply the law in critical sectors of the Mexican economy. By most accounts, the Commission has been quite successful in sending a clear message to firms in Mexico that the Competition Law will be vigorously enforced.[324]

---

320. For a thorough discussion of the competition issues raised by NAFTA, see *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the NAFTA* (July 20, 1994).

321. *Id.*

322. Annual Report, *supra* note 56, at 1 (declaring that foreign trade liberalization and "recently signed free trade agreements" have increased competition in many markets).

323. NAFTA, *supra* note 3, art. 102(1).

324. Malkin, *supra* note 267, at 18 (describing the Commission's success battling the banks, dry cleaning, communications and transportation industries).

With the LFCE, Mexico has an opportunity to develop a transparent and efficient legal framework to promote free competition for all market participants. The close relationship that has developed between the Competition Commission and the United States Federal Trade Commission and the Justice Department will potentially lead to increasing cooperation between the two countries' authorities on competition law issues, exchange of non-confidential information, merger review and substantive rules and standards. These relationships certainly will play a major role in evaluating the increasing trans-border transactions affecting both Mexico and the United States.

As in other areas, the strains and limited resources of the newly-constituted Commission to conduct thorough and well-founded investigations will be an important issue. As important, the credibility of the Commission's findings and decisions will be subject to intense scrutiny in the short term as the Commission establishes itself as Mexico's most significant enforcement agency. Vigorous enforcement of Mexico's new Competition Law will depend, in large measure, on the integrity, consistency and credibility of the Commission's decision-making process.