Competition Law in Latin America: Markets, Politics, Expertise

Andrés Palacios Lleras

University College London (UCL)

Thesis submitted for the degree of MPhil/PhD in Law

February, 2016

Acknowledgements

This dissertation would not have been possible without the generous support of many people. I would like to begin by thanking my wife, Tatiana Rodriguez Leal, my parents, Hugo and María Mercedes, and Prof. Ioannis Lianos for their support, good advice and patience. I also wish to thank my friends from UCL - Putri, Claire, Oisin, Larissa, Chris, J.F., Joe, Amber, Cristina, Ilias, Guillermo, Alberto, Carlos, Erika, Kristy, Kimberly, Simon, Lea, Eleanore, Aislin, Bolanle, Ashleigh, Murilo, Jonathan, June, Anna, Eleni, Deni and Florence. Florian Wagner Von Papp and Allison Diduck also deserve special thanks. Marcello Llaraz, Catherine Arias, Ricardo Silva, Christian Granados, Ricardo Pachón, Julian Nowag, José Miguel Mendoza and Juan David Gutierrez were also highly supportive. Many people in Bogotá provided considerable inspiration to the PhD process, including Juan Pablo Herrera, and my friends from high school. Finally, I would like also to extend my gratitude to UCL's Faculty of Laws for their support and to Colciencias for my scholarship.

Pledge

I, Andrés Palacios Lleras, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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This dissertation has adopted a variation of the Chicago citation system. All website addresses were accurate as November 2015.

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Abstract

What are the ideas, institutions and actors involved in the development of competition law regimes in Latin America, and how do the interactions between them shape these regimes? In this dissertation we offer a new way of understanding the trajectories of this area of law in Latin America, and especially in Chile, Colombia and Chile. We argue that the competition law regimes of these countries are shaped by a tension between two "projects", that is, networks of individuals and institutions organized towards the promotion of certain ideas about what competition law is about. These are the State-centered competition law project and its counterpart, the neoliberal competition law project. The first views the State as a tool for collective transformation, and hence responsible for how markets work, while the latter is about protecting individual freedom and enabling economic efficiency by shaping the State around such goals. The first Latin American regimes were similar in their State-centered outlook and resulted from similar field dynamics. The advance of the neoliberal competition law project in the 1990s (in Chile since the 1970s) placed each regime on its own path. In Chile, the transformation of competition law institutions exemplifies the indeterminacy within the neoliberal project. In Colombia, field dynamics prevented the development of neoliberal institutions, but enforcers have developed a *de facto* neoliberal practice. In Mexico competition law became a tool for challenging abuses of sheer economic power. More recently, international organizations are driving the global outreach of these regimes by promoting their convergence, with limited success. Overall, the argument we advance in this dissertation overcomes particular limitations found in the literature about this topic and offers a more nuanced understanding about the origins and trajectories of competition law in this region.

1. The Original Puzzles

I. Introduction

For the last three decades Latin American States have incurred considerable efforts to develop new competition law regimes (hereinafter CLRs) and amend previously existing ones.[1] The history of competition law in this region is very rich, although a good part of it is often overlooked in the relevant literature.[2] The first regimes appeared as early as the 1910s, and by the late 1950s they were part of the policies considered necessary for preventing abuses of economic power, a goal consistent with economic thinking prevailing at the time. In the 1990s, however, a different way of understanding what competition law was about arrived to Latin America. This way focused more on economic efficiency and curbing the role of the State in markets and their functioning. Since then, these regimes have become a contested field between these differing views about what competition law stands for - and the actors that promote them. This dissertation looks at the development of the CLRs in Chile, Colombia and Mexico in order to show how this rivalry has shaped these regimes.

In this introductory chapter we describe what this dissertation is about and why it is relevant. In section II we present briefly the questions that guided our research, describe the main arguments that we advance, and how it unfolds in the chapters of this dissertation. Then, in section III we describe the data collected and how it relates to the arguments we advance and the theoretical framework. Finally, in section IV we conclude by discussing the contributions that this dissertation makes and its overall relevance for the study of competition law in Latin America.

II. The Making of Competition Law: How the Argument Unfolds

II.A. Research Questions

Since their origins, CLRs in Latin America have been the result of complex processes involving the transplantation of foreign legal rules and theories unto Latin American contexts.

[1] By "Latin America" we refer to all the States in Central and South America, including Mexico and Brazil, but not the States in the Caribbean.
[2] We discuss this issue later on in chapter 3.

These processes are often posed as just being about "tailoring" foreign competition law rules to local circumstances, but in reality they address a wide variety of issues, some of which are politically sensitive. Among these are the delimitation of industries and sectors exempted from the application of these regimes, the conformation and independence of the enforcement bodies, their relation to other State institutions such as courts, and their investigative and punitive powers. Besides these issues, the adaptation of foreign legal rules also involves drawing on theories about the interpretation of the rules themselves, which are often referred to by actors in these new contexts in order to guide their application. Hence, the histories of CLRs in Latin America can be framed through the lenses of contemporary discussions about legal transplants.

A particularly salient topic in comparative law theory throughout the second half of the 20th century focused on the feasibility of transplanting legal rules to different contexts and yet preserving their meaning and effectiveness.[3] This is a highly relevant issue for the transplantation of competition law rules. The question of whether legal rules could be transplanted and yet maintain their original meanings and effectiveness generated two different trends in the academic literature. A first trend gathers views that consider that legal transplants are possible and ubiquitous, while a second, and reactive trend, gathers views that are more skeptical. Below we briefly summarize these trends and the later developments that have taken place based on their insights.

The most well known author within the optimist trend is Alan Watson, who argues that legal rules can be transplanted between jurisdictions in spite of the differences of context between them. The relative autonomy of legal rules with regard to their context does not mean that the latter is irrelevant; rather, that legal rules can be transplanted between contexts while maintaining their meaning.[4] For Watson, legal transplants are not just possible; they are the most common form of legal change.[5] For example, he points to the reception across medieval and modern Europe of Roman law doctrines and institutions as examples not only of legal transplants themselves, but also of their importance in the development of the Western legal tradition.[6] The

[3] Graziadei, Michele. "Comparative Law As the Study of Transplants and Receptions." *The Oxford Handbook of Comparative Law.* Edited by Mathias Reimann and Reinhard Zimmermann. 2006.
[4] Watson, Alan. *Legal Transplants: An Approach to Comparative Law.* 2nd ed. University of Georgia Press, 1993. Pg. 96 (Herinafter *Legal Transplants*)
[5] Watson, Alan. "Comparative Law and Legal Change." *Cambridge Law Journal* (1978): 313, 318 - 321 (1978).
[6] Watson, Op.cit. *Legal Transplants*. Pgs. 22 – 26.

adoption and endurance of the French *Code Civil* in varied set of contexts provides some support to Watson's arguments.[7]

More recent approaches based on law and economics insights focus on the relative efficiency of comparable legal regimes that originate in different legal traditions. These approaches tend to focus on the conditions that make the transplanted rules effective across different contexts.[8] An example of this can be found in a well-known article co-authored by Rafael La Porta about different types or "families" of corporate law regimes. Their argument is that such regimes originating in the common law tradition offer more protection to investors than regimes from other traditions, thus increasing the incentives for investments and the development of entrepreneurial activity.[9] This is so because these regimes protect investors more than others, which in turn increases their confidence in the governance of corporations that are governed by these legal regimes.[10] Similar arguments have been made regarding CLRs; for example, Armando E. Rodriguez suggests that common law CLRs fare much better than those that have been developed within the civil law tradition.[11]

The second trend views with skepticism that legal rules can be relatively autonomous from the contexts they originate in, and so challenges the ideas that legal transplants can take place without substantial transformations. This skepticism dates back to Montesquieu, who asserted that legal rules are extremely dependent on the uniqueness of their contexts.[12] Contemporary positions suggest that the "transferability" of legal rules depends on the degree of embeddedness they have with regard to their contexts. Otto Kahn-Freund, for example, argued that particular legal regimes are better suited for transplantation than others depending on the extent to which they drew from deeply embedded social structures that reflect power relationships.[13] Therefore, according to this author, rules regarding divorce and marriage have proven to be much more

[7] Graziadei, Op.cit. Regarding the diffusion of the *Code* and European private law, see See, in general, Merryman, John Henry, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America.* Stanford University Press, 2007.
[8] Mattei, Ugo. "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics." *International Review of Law and Economics* 14, no. 1 (1994): 3-19.
[9] La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W Vishny. "Law and Finance." *The Journal of Political Economy* 106, no. 6 (1998): 1113-1155.
[10] Ibid. Pgs. 1151 & 1152.
[11] See for example Rodríguez, A E. "Does Legal Tradition Affect Competition Policy Performance?" *The International Trade Journal* 21, no. 4 (2007): 417-454.
[12] Montesquieu, Charles. *The Spirit of Laws.* Translated by Thomas Nugent. Batoche Books, (1748) 2001. Pgs. 22 - 23.
[13] Kahn-Freund, Otto. "On Uses and Misuses of Comparative Law." *The Modern Law Review* 37, no. 1 (1974): 1-27. Pg. 13.

easy to transfer across jurisdictions than rules that allocate political power and policy-making prerogatives along society.[14]

More skeptic positions suggest that the pervasiveness of legal transplantation do not necessarily improve legal regimes, and result from distinctively political efforts to accommodate legal rules to particularly influential interests. For example, Pierre Legrand criticizes Watson by arguing that legal rules are so context-dependent that the concept of legal transplants is particularly misguided.[15] "At best, what can be displaced (…) is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaning-ful* sense of the term, 'legal transplants', therefore, cannot happen."[16] Rather, what is at stake with legal transplants is the displacement of the values embedded in legal rules, not simply the adoption of new formal commands.[17] The literature based on law and economics arguments has also produces skeptic accounts of the feasibility of legal transplants. For example, Daniel Berkowitz and his co-authors argue that contexts - and the social dynamics that are part of them - play a highly determinant role in the success of the transplanted rules than their origins.[18] That is, independently of whether a set of rules comes from a common law or civil law tradition, what determines their effectiveness is their compatibility with the "borrowing" jurisdiction.[19]

The body of literature addressing the transplantation of CLRs echoes to a large extent the two trends mentioned above.[20] It is important to note that this particular body of literature is closely related with "law and development" projects undertaken by both national governments and international institutions. A first strand argues that developing countries should transplant CLRs identified as efficient. In doing so, this particular strand relies considerably on law and economics insights and on doctrines developed mostly in the United States (hereinafter US). It is

[14] Ibid. Pgs. 13 – 19.
[15] Legrand, Pierre. "The Impossibility of Legal Transplants" *Maastricht J. Eur. & Comp. L.* 4 (1997): 111 - 127.
[16] Ibid Pg. 120. (emphasis in the original text)
[17] Ibid. Pgs. 121 – 123.
[18] Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. "The Transplant Effect." *The American Journal of Comparative Law* (2003): 163-203. (Hereinafter *Transplant Effect.*) Also Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. "Economic Development, Legality, and the Transplant Effect." *European Economic Review* 47, no. 1 (2003): 165-195. (Hereinafter *Economic Development.*)
[19] Berkowits, *Transplant Effect* Ibid. Pg. 189
[20] Gerber, David J. "Comparative Antitrust Law." In *The Oxford Handbook of Comparative Law.* Edited by Mathias Reinmann and Reinhard Zimmerman. Oxford University Press, 2006.

not uncommon to find casual comparisons between the CLRs of developing States and their US counterparts to see how well they measure up.[21]

In turn, the second trend of this body literature is skeptic of the possibility of transplanting CLRs across jurisdictions as a strategy for contributing to development. In this sense, it is reactive to the body of literature mentioned just before. Drawing in part from the preceding discussion in comparative law theory, it is composed of a diverse literature that suggest that regimes like US competition law are so embedded in their contexts that it is virtually impossible to transplant them.[22] Also, it includes arguments that show that US competition law is not the only competition law regime that is efficient, for EU competition law has efficient (but different) rules as well.[23] This body of literature also includes works that focus on the development of competition law regimes in the EU and in Asian countries by showing how competition law regimes resulted from reformist agendas and political struggles between social groups in particular contexts.[24]

Since the early 2000s there has been a partial consensus in the making regarding the feasibility of legal transplants in general and of transplanting CLRs in particular. This consensus acknowledges that legal transplants are widespread and can be successful, and that contextual dynamics are key in their success or failure independently of their origins or prestige. Thus, legal transplants should be about more than simply redrafting rules as they appear in the books; they should also involve different actions to assure their effective enforcement through time.[25] Regarding CLRs, the new consensus continues to adhere to its law and economics origins while conceding the importance of "tailoring" foreign rules and doctrines to particular contexts. In particular, this more recent trend argues that there are no "one-size fits all" approaches to the design of CLRs, and that core law and economics insights can be translated unto different

[21] See for example Coate, Malcolm B, Rene Bustamante, and A E Rodriguez. "Antitrust in Latin America: Regulating Government and Business." *The University of Miami Inter-American Law Review* (1992): 37-85. Also Rodriguez, Op.cit.

[22] Waller, Spencer Weber. "Neo-Realism and the International Harmonization of Law: Lessons From Antitrust." *U. Kan. L. Rev.* 42 (1993): 557 - 604.

[23] See, for example, Fox, Eleanor M. "We Protect Competition, You Protect Competitors." *World Competition* 26, no. 2 (2003): 149-165. Also Fox, Eleanor M. "Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide." *Utah L. Rev.* 3 (2006): 725-913.

[24] In particular, Gerber, David J. *Law and Competition in Twentieth Century Europe: Protecting Prometheus.* Oxford University Press, 1998. See also Freyer, Tony A. *Antitrust and Global Capitalism, 1930--2004.* Cambridge University Press, 2006.

[25] Perhaps the best statement of this new, albeit hesitant consensus, is Davis, Kevin E, and Michael J Trebilcock. "The Relationship Between Law and Development: Optimists Versus Skeptics." *Am. J. Comp. L.* 56 (2008): 895-1095. Also Twining, William. "Diffusion of Law: A Global Perspective." *The Journal of Legal Pluralism and Unofficial Law* 36, no. 49 (2004): 1-45.

institutional forms[26] However, that is as far as these consensus go. The focus on implementation has rekindled interest in the political nature of legal transplants undergone by States, as they displace local political dynamics and values, usually under the guise of technical assistance.[27] Regarding CLRs in particular, this new trend says preciously little about how to "navigate" through the different social dynamics that characterize each context in which new rules are being transplanted in order to ensure their effectiveness.

The focus on the local conditions that determine the eventual success of a legal transplant tends to highlight the social relations between actors involved in the craft and application of legal rules. In the case of CLRs, this focus leads to analyzing the role that different actors play in the development of such regimes within and across jurisdictions. The literature that addresses these issues is not particularly broad,[28] and either it focuses on the CLRs of other jurisdictions,[29] or focuses on Latin America but does not address competition law directly.[30] Hence, we identify a gap in the literature regarding the particular ways in which legal transplants involving competition law have been shaped by the different actors involved in the making and application of CLRs in Latin America.

Against this background, the general enquiry that guided our research is about the interactions between contextual dynamics and the transplantation of foreign rules and theories about competition law in Latin America. In particular, what are the ideas, institutions and actors involved in the development of CLRs in Latin America, and how do the interactions between them shape their trajectories? This general question can be broken down into more concrete questions, like the following: Who are the individuals and the organizations involved in the adoption and the transformation of these regimes? What are their agendas, and how were they connected to broad changes in law and economic policy? How are these agendas, and the ideas

[26] See for example Kovacic, William E. "Institutional Foundations for Economic Legal Reform Transition Economies: The Case of Competition Policy and Antitrust Enforcement." *Chicago-Kent Law Review* 77, no. 265 (2001): 265-315. Also Gal, Michal. "Antitrust in a Globalized Economy: The Unique Challenges of Small and of Developed Economies." *Fordham International Law Journal* 33 (2009): 1-56.
[27] Kennedy, Duncan. "Three Globalizations of Law and Legal Thought: 1850 - 2000." In *The New Law and Economic Development: A Critical Appraisal.* Edited by David M Trubek and Alvaro Santos. Cambridge University Press, 2006.
[28] See for example Gal, Michal. "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement." *New York University Law and Economics Working Papers No. 57* (2006).
[29] See Dezalay, Yves. "Technological Warfare: The Battle to Control the Mergers and Acquisitions Market in Europe." In *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets.* Edited by Yves Dezalay and David Sugarman. Routledge, 1995.
[30] Dezalay, Yves, and Bryant G Garth. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States.* University of Chicago Press, 2002.

and institutions they support, related to the substantive content of these CLRs and their interpretation?

II.B. What this Dissertation is About: The Main Arguments

In this dissertation we argue that the development of CLRs in Latin America, and especially in Chile, Colombia and Mexico, has been shaped by the tension between two different "projects", that is, sets of ideas, theories and beliefs that make the understandings of the actors populating a particular field regarding what competition law is about and how it should be practiced.[31] These are the State-centered competition law project and its counterpart, the neoliberal competition law project.

The main difference between these two projects resides in their approaches to markets as institutional arrangements for organizing social life. In a nutshell, the State-centered competition law project views markets as institutional arrangements that result from and should be subject to the regular functioning of democratic politics. This view not only holds that markets are constructed (as opposed to considering them a form of natural ordering), but also that the State, viewed as the institutional embodiment of the mechanisms for collective governance, is responsible for the outcomes resulting from the operation of markets. The intellectual origins of this project are varied, and they range from Rousseau's "Discourse on the Origins of Inequality"[32] to John M. Keynes' "The General Theory of Employment, Interest and Money"[33] and Raul Prebisch's "The Economic Development of Latin America and Its Principal Problems."[34] The different ideas that make up this project informed the first CLRs adopted in Latin America, which were viewed as legal mechanisms for controlling the economic power of big businesses and as part of the policies established to bring about economic development. This project was dominant for most part of the second half of the 20th century, and especially between the 1950s and the 1980s; moreover, some of its institutional forms and rationales continue to be highly important in the present.

[31] We further describe this term and the concept of field in chapter 2.
[32] Rousseau, Jean-Jacques. *Discourse on the Origin of Inequality.* Edited by Franklin Philip and Patrick Coleman. Oxford University Press, 1999.
[33] Keynes, John Maynard. *The General Theory of Employment, Interest and Money.* Atlantic Publishers & Dist, 2006. (Reprint)
[34] Prebisch, Raúl. "The Economic Development of Latin America and Its Principal Problems." CEPAL 1950.

In turn, the neoliberal competition law project originated from a profound skepticism towards the State as an embodiment of collective governance and its capacity to direct economic processes effectively. This skepticism is partly based on the idea that the economic rationale that characterizes markets is the best parameter for assessing the adequacy of the State. In doing so, this project views the State as a visible, supporting hand whose functions are conceived upon and assessed from the viewpoint of economic rationales. In this sense, democratic political processes have a limit as to their capacity to address markets and their outcomes. The intellectual roots of this project date back to the middle of the 20th century, and include texts such as Friedrich von Hayek's "The Road to Serfdom",[35] Milton Friedman's "The Role of Monetary Policy"[36] and George Stigler's "The Theory of Economic Regulation".[37] The ideas that make up this project have been used in Latin America mostly in a reactive manner to the State-centered project since the 1980s and were expressed in policy prescriptions like the so-called "Washington Consensus"[38] and the wave of reforms that followed. These considerations, which we refer to as neoliberal, influenced in important ways the development of CLRs in this region. They provided the intellectual grounds to criticize the existing regimes, characterizing them as ineffective and inefficient, and for building new ones based on a new economic rationale. The new regimes were also considered part of the policies that were necessary to bring about economic development, albeit under the new guise of increasing efficiency and growth. This project has become dominant since the 1990s, although it too has undergone transformations of its own: in particular, we will refer to the growing importance of neoinstitutional insights about the role that institutions have in the success or failure of enforcement of the CLRs.

We also argue that the development of the tensions between these two projects unfolds historically against the local political dynamics taking place in each of the countries we study - Chile, Colombia and Mexico - mostly during the second half of the 20th century and the first decade and a half of the 21st. The first CLRs in these countries appeared after the constitutional protection extended to property rights had been softened and the bureaucratic apparatus of the State had extended and consolidated politically. It is not surprising that these regimes were administrative in nature and bound to the executive branch of the State. The advance of the

[35] Von Hayek, Friedrich. *The Road to Serfdom.* University of Chicago Press, 1944.
[36] Friedman, Milton. "The Role of Monetary Policy." *58 The American Economic Review* , no. 1 (1968): 1- 17.
[37] Stigler, George J. "The Theory of Economic Regulation." *The Bell journal of economics and management science* (1971): 3-21
[38] The Washington Consensus is the name given to the policies that were advised by international financial institutions, often under conditional terms, to developing countries in order to improve their economies. See Williamson, John. "What Washington Means by Policy Reform." *Latin American Adjustment: How Much Has Happened?* Edited by John Williamson. Institute for International Economics, 1990.

neoliberal competition law project began, at least intellectually, with a challenge to the established regimes, and then took on to establish new CLRs based on the ideas that nurture it. Since then, its advance has been steady but not without problems. In some instances like Chile during the early 2000s, the adoption of institutions inspired in neoliberal ideas created severe malfunctions that diminished drastically the effectiveness of the regimes for almost a decade.[39] More recent efforts geared towards achieving convergence between CLRs have not been entirely successful, as evidenced by the development of Colombia's leniency regime.[40] Overall, as the tensions between these projects unfold, we evidence the pre-eminence of the neoliberal project in these three countries, although the *project* has been resilient in some circumstances.[41]

II.C. How the Argument Unfolds - Chapter Plan.

In this sub-section we unfold the main argument advanced above by providing a brief summary of the different chapters that are part of this dissertation. The narrative arch that binds all the chapters together is precisely the argument advanced above, according to which the tensions between (and sometimes within) the State-centered competition law project and its neoliberal counterpart unfolds historically in the development of the CLRs in each of the countries that we study. This binding takes place in different ways. Chapters 4, 8 and 9 address a few common features of the CLRs of the different countries we study, while chapters 5, 6 and 7 focus individually on particular manifestations of how these tensions unfold in each of these countries. In doing so, we aim to provide a view that is both general and particular in order to develop more clearly the arguments as presented above.

Our analysis begins with chapter 2, in which we present the theoretical framework we use for analyzing and presenting the data we gathered during our research. (In the following subsection we describe the data in detail.) This framework combines two different strands of enquiry. On one hand, it draws from the history of political and economic ideas in order to frame the substantive content of the CLRs. This first strand is about the origins and evolution of the core ideas inspiring each of the projects we identify - the State-centered competition law project and its neoliberal counterpart. On the other, it draws from "field theory", a particular theoretical frame of analysis common to several disciplines in the social sciences including sociology, political economy, and institutionalism. We also describe the concept of "project", and use it as a

[39] See chapter 5.
[40] See chapter 8.
[41] See chapter 5.

hinge that connects both strands; building upon the concepts developed by Pierre Bourdieu,[42] we argue that a project can be understood as "*doxa* in the making", and fill the two projects with the ideas that we have found to inform the craft and application of CLRs in Latin America. Overall, this chapter provides the main ideas and considerations that inform the following chapters of this dissertation.

Chapter 3 presents a literature review of the different texts concerning the development of competition law in Latin America as a region as well as a local phenomenon in Chile, Colombia and Mexico. This chapter is premised on the idea that these bodies of literature are part of the fields of our enquiries just as the legal provisions or administrative decisions issued by enforcement bodies. We begin by locating this body of literature as part of other, more general bodies of literature with which it has close ties, and then we address different texts on competition law in Latin America. We do this at two levels; we first address the texts addressing the trajectory of CLRs regionally, and then we focus on the texts addressing the trajectory of the CLRs of each of the countries we study. Our main finding is that the advance of the neoliberal competition law project in the 1990s led to a re-characterization of the CLRs that were in place at that time by disregarding both their functioning as well as the literature that describes it. In doing so, the literature that is part of the neoliberal project began to develop the myth that the CLRs in place at the time were misguided and had hardly been enforced. At the local level, we trace how local authors used neoliberal ideas to defend the legal reforms of the 1990s (and with which they had varying degrees of involvement). Overall, this chapter challenges the neoliberal views that have become prevalent about the trajectories of CLRs in this region and sets the stage for the arguments presented in the following chapters.

Chapter 4 addresses the adoption and enforcement of the first CLRs regimes in Chile, Colombia and Mexico. In this chapter we argue that the adoption of the original regimes followed from ideas related with granting the State more tools to address economic issues. Underlying this process were changes in constitutional politics resulting from the pressures exerted by new radical ideas, industrialization and the consolidation of urban labor in this region. Mexico was the first of the three countries here studied in which these changes took place, as evidenced with the promulgation of the 1917 Constitution, the first of its kind establishing a developmental approach to competition law. In Chile and Colombia the changes involving

[42] In particular, Wacquant, Loic J.D. "Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu." Sociological Theory 7, no. 1 (1989): 26-63. (Hereinafter Reflexive Sociology). Other texts in which Bourdieu develops these concepts are *The Logic of Practice*. Stanford University Press, 1990.

constitutional politics took a different path; after amendments to the constitutional protection afforded to private property, the States expanded their regulatory capacity. The first CLRs followed from these changes, as they complemented price-control regulations and other economic policies that granted to the State a considerable control over the economy. Overall, the analyses presented in this chapter present a new way of understanding the evolution of these regimes and invite discussing critically the shortcomings noted before in the relevant literature.

In chapters 5, 6 and 7 we focus on the development of the CLRs of Chile, Colombia and Mexico since the 1990s until mid 2015. Rather than addressing the different areas of law and focusing solely on all their content, we focus on particular developments of the regimes that highlight the conflicts between and within the two projects mentioned before. While focusing on these aspects implied not focusing on others, we stand by our choices because we believe they are the most significant given the data available and the history of the regimes themselves. (We discuss below our criteria for these choices).

In chapter 5 we argue that the development of Chile's CLR since the 1990s can be characterized as being about the development and transformation of the tensions resulting from rival versions of the neoliberal competition law project. Contrary to Colombia and Mexico, by the 1990s neoliberalism was well entrenched in the Chilean legal and political context. However, the ideas that were entrenched were part of an older neoliberal project that emphasized individual autonomy more than economic efficiency. As a consequence of the increasing importance of economic rationales in neoliberal discourse that took place during the 1990s, this older project was challenged and became subdued by a more recent neoliberal project. The grounds in which this contest between rival neoliberal projects took place were firstly the design of the enforcement bodies, and later on, the enforcement of the provisions concerning collusion and the amendments to the regime conceived to make it more effective. Even though the latter neoliberal project prevailed, in the process of doing so it faced considerable challenges and the actors supporting it met with unforeseen circumstances that threatened the achievement of their goals. Overall, the changes taking place in Chile's CLR evidences the internal tensions that can take place *within* a project.

In chapter 6 we address the tension between the two rival projects mentioned before as it unravels in the transformation of Colombia's CLR since 1990. The story of this regime can be characterized as the institutional unraveling of a tension between State-centered institutions and

their neoliberal enforcement practice. The origins of the tension dates back to the 1991 Constitution, which established an explicit mandate for protecting competition that was not developed significantly by the government of Cesar Gaviria (1990 - 1994) because of the political consequences that might follow. As result, Colombia's CLR continued well into the 1990s with an institutional setup clearly fashioned after the State-centered project that inspired the appearance of this regime in the 1950s. However, within this institutional setting, several directors of the enforcement body, the *Superintendencia de Industria y Comercio* (hereinafter SIC), developed an increasingly activist agenda during the 2000s that targeted business associations. This agenda paid off, for in 2009 a new statute made SIC the sole enforcer of the different competition law provisions that were dispersed throughout Colombia's legal system and granted it more powers via new enforcement tools and higher sanctions. However, once SIC decided to use its new powers, it faced a backlash from a new government and the business sector - the main supporters of SIC's State-centered nature. Also SIC's reliability as an unbiased enforcer has been questioned by its mismanagement of sensitive information obtained during leniency applications. Although a new competition law is in the making, it is unclear whether it will bring about a drastic change to the institutional setup of SIC that brings it closer to its neoliberal practice.

In a similar vein to the previous two chapters, Chapter 7 looks at the development of Mexico's CLR since the 1990s. We show how two neoliberal policies - the privatization of a State-owned enterprise and the modernization of this country's CLR - led to conflicting outcomes. This chapter not only highlights a tension within neoliberal law reform projects in general, it also shows how a neoliberal initiative can turn into State-centered development precisely because of how this tension unfolds in a given context. It does so by focusing on the complex interactions between *Telmex,* a former State-owned telecoms company, and the competition law enforcement agency, the *Comisión Federal de Competencia* (hereinafter CFC). The privatization of *Telmex* was one of the most commented issues of the administration of Carlos Salinas de Gortari (1988 - 1994), and a new competition law statute, the Ley Federal de Competencia Económica, enacted in 1992, followed it. The sequence of these events and the content of the new statute prevented the CFC from addressing the behaviors undergone by this company; however, such involvement began to take place since the late 1990s. As *Telmex* used its resources to delay the actual application of the sanctions imposed against it, affected parties sought protection under the international trade regulations, and the CFC sought more enforcement tools from the legislative. Even though each of these parties was successful

internationally and locally, the struggle to reign over *Telmex* 's dominance has continued, to the extent that it became one of the leading issues in the 2012 elections and in the constitutional and statutory amendments promoted by the current government of Enrique Peña Nieto (2012 - 2018). Overall, this aspect of the history of Mexico's CLR shows that a regime clearly inspired by neoliberal insights could be turned around and converted into a contemporary example of State-centered competition law enforcement.

In chapter 8 we address the roles that international organizations, such as the Organisation for Economic Co-operation and Development (hereinafter OECD), the United Nations Conference on Trade and Development (hereinafter UNCTAD) and the International Competition Network (hereinafter ICN) have in the development of CLRs in Latin America. In the absence of a global CLR, these organizations have assumed the role of promoting the convergence of individual CLRs across the world. Their efforts revolve around combinations of ideas and institutional blueprints based on the CLRs of the United States and the European Union (hereinafter EU). In the particular case of Latin America, these organizations have been particularly active since the 2000s, carrying forth programs that have contributed to shape the CLRs of this region, and in particular those of Chile, Colombia and Mexico. In doing so, their efforts to shape these regimes have laid bare their strategies involving collaborations and rivalries. These strategies have been partially successful, as evidenced by the disparate outcomes produced by the transplantation of leniency regimes in Chile, Colombia and Mexico. Also, the activities of these organizations contributed to the consolidation of a field constructed around technical assistance programs for States.

Finally, in chapter 9 we present the conclusions of this dissertation. Using the analyses of the previous chapters, it offers an alternative account of the trajectory of the CLRs in Latin America by resorting to the experiences in Chile, Colombia and Mexico. We do so as a conclusion precisely because it is an opportunity to offer a more general view of the argument we advance and to emphasize our claim that these regimes are not converging but are developing along particular trajectories of their own. If anything, there continues to be a considerable diversity among CLRs. We also address the relevance and contributions of this dissertation, the limitations of our research, and suggest further venues of enquiry.

III. Data Gathering and Analysis

In this subsection we will address the data we have gathered and describe how our analysis fits with the arguments and the chapter plan presented above. We begin by discussing the time periods we focus on and the selection of Chile, Colombia and Mexico (and their CLRs) as subjects of our enquiries. Then we describe the data itself and how it relates to the arguments we advance.

III.A. Periodization

Coming up with the particular contours of the different projects and how they develop in Latin America requires making choices about the scope of the research and the data collected. In order to simplify our analyses, we focus on two different periods of time - from the 1950s to the 1990s and from the 1990s to 2015, and in three jurisdictions - Chile, Colombia and Mexico. The main reason for organizing our analyses in these two periods follows from the data itself. As we discuss in chapters 3 through 8, an important change associated with the advent of the neoliberal competition law project took place in the 1990s. The literature about CLRs in this region, as well as the political and legal changes that were taking place at the time, all provide support of the occurrence of this change. We believe this periodization focuses on the different field dynamics that led to the happening of this change and the consolidation of the different institutions and ideas associated with it. Moreover, we focus considerably more on the developments that have taken place since the 1990s precisely to account for the particular dynamics and developments that have shaped these regimes until their present form.

III.B. Why Chile, Colombia and Mexico?

Our decision to focus on Chile, Colombia and Mexico results from a variety of reasons. The first reason concerns the relative influence that certain aspects of the legal systems of these countries have along their Latin American peers. The second reason concerns the different paths that the CLRs in each of these countries have taken, and which show the diversity of CLRs in this region. Finally, the third reason has to do with the availability of data regarding the development of these regimes.

Firstly, these countries are considered to be quite influential among Latin American countries in terms of the production and circulation of law. The reasons for using "influence" to establish a sample of countries to research about are mostly historical. Chile acquired a reputation for the study of private law, and especially of the *Code Civil*, thanks to the diffusion across Latin America of the Chilean version of the *Code* drafted by Andrés Bello and enacted in 1855.[43] Regarding competition law, the institutional blueprint of Chile's enforcement system in place since 2003 has become a sort of a regional model around which regional convergence can be achieved. Mexico, in turn, is particularly well known in this region for its constitutional law. The 1917 Mexican constitution was the first to establish the "social function of property", to establish social and economic rights along first-generation rights, and to establish a judicial mechanism for their protection - the *acción de amparo*. All of these aspects have been the subject of numerous legal transplants across Latin America.[44] This constitution is also the first to establish an explicit prohibition against anticompetitive practices and to establish a mandate for the State to protect competition. Finally, Colombia is perhaps the least influential of these three countries, although in the past three decades the jurisprudence produced by the Constitutional Court regarding social and economic rights has become well known globally.[45] While Colombia continues to be at the receiving end of the global networks involving the circulation of institutional blueprints and theories concerning competition, it is starting to become influential among its close neighbors. Evidence of this can be found in the technical assistance program that SIC developed with Ecuador.[46] Finally, it is worth mentioning that Brazil is also considered a highly important country on both issues of constitutional law and competition law; however, because of language barriers it has not been as influential as Chile or Mexico have been, although this may change in the near future.

A second reason behind our choice of these three countries has to do with their similarities and differences regarding their legal systems. This reason complements the previous one, for it highlights the diversity of our sample. To begin with, these three countries share colonial traditions resulting from their common institutional and cultural heritage as former Spanish colonies. Even after their independence, these three countries adopted civil law institutions

[43] García Villegas, Mauricio. "Apuntes Sobre Codificación Y Costumbre En La Historia Del Derecho Colombiano." *Precedente - Anuario Jurídico* (2003): 97 - 124. Pgs. 113 - 114.
[44] See for example Mac Gregor, Eduardo Ferrer. "El Amparo Iberoamericano." *Estudios constitucionales: Revista del Centro de Estudios Constitucionales* 4, no. 2 (2006): 39-65.
[45] Rodríguez-Garavito, Cesar. "Latin American Constitutionalism: Social and Economic Rights: Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America." *Tex. L. Rev.* 89 (2011): 1669-1977.
[46] "Superindustria Asesora a Ecuatorianos En Protección Al Consumidor." *Elespectador.com*, 1 February 2010.

fashioned after European private law like the *Code Civil*, mentioned before. This influence extended well unto the reception of anti-formalist legal writers like Leon Duguit and continues to be felt today.[47] However, during the 20th century the local political dynamics taking place in each of these countries led to different constitutional law regimes that, albeit their similarities, established unique institutional trajectories. Hence, the intellectual roots of the Chilean Constitution of 1980 are quite different from those of the Mexican 1917 Constitution or those of the Colombian 1991 Constitution. Even aspects that could be considered similar - for example the constitutional mandate to protect competition established in article 28 of the Mexican Constitution and in article 333 of the 1991 Colombian Constitution - have played very different roles in the development of the CLRs of these two countries. Just as well, the absence of such constitutional mandate has not prevented the development of an effective CLR in Chile. Overall, the fact that the tension between the State-centered competition law project and its neoliberal counterpart unfolded differently in each of these countries suggests that focusing on each one of them could be particularly revealing.

Finally, our third reason has to do with the availability of data that could be useful for answering our research questions. This reason also proved to be very important for justifying our sample. The delimitation of the different fields related to competition law requires amassing and analyzing a considerable amount of data. It requires having access to the decisions issued by enforcement bodies and courts, academic texts, and newspaper articles or other sources of information that reveal the impact of decisions, changes in the applicable provisions, and investigations. We focused on three countries where all these materials were relatively abundant. There are a few Latin American States that have created online databases with the decisions issued by their competition law enforcers. The databases developed in Brazil, Chile and Mexico are among the most complete, but because of language barriers we dropped Brazil from our analysis. The database developed by Colombia's competition law enforcer, SIC, lacks many important decisions issued during the 1990s but has most of the decisions issued since the year 2000. Other countries that could have been of interest, like Venezuela, do not have databases as reliable as the ones from these other countries. Just as well, competition law issues have reached the national media on several occasions in each of the countries we selected, which hinted that the enforcement of these regimes was a politically contested subject that merited further attention. This, unfortunately, has not been the case of other countries we considered initially.

[47] García Villegas, Op.cit.

While this in itself is an interesting aspect of the CLRs in those countries, we decided instead to focus on those countries where the availability of data enabled us to ground better our analyses.

As we analyzed the data we also started to notice that there were some field dynamics that were more interesting than others. For example, when considering the dynamics shaping Colombia's CLR, it became evident that to focus on the trajectory of abuse of dominance law would have been considerably less interesting than focusing on the area of cartels or mergers. One of the reasons for this is that there are considerably few decisions regarding abuse of dominance with regard to the number of decisions issued on other areas. Moreover, such decisions had less coverage in the national media and there are very few academic articles written about them. Also, issues of abuse of dominance did not figurate prominently in the congressional record of the amendments to Colombia's CLR. Business associations, moreover, have not complained about the enforcement of these provisions as they have regarding provisions from the other areas jut mentioned. While these reasons suggest a state of affairs that deserves analysis on its own, we decided instead to focus on areas where the interactions between different actors are well documented and available for third parties interested in this research. This is why we focus on the development of enforcement bodies and their activities regarding horizontal agreements (Chile and Colombia) and abuse of dominance in the telecoms sector (Mexico).

III.C. Type of Data

In order to support our arguments, we have gathered different types of data. A first type of data is what we can consider "strictly" legal, and is made up of official decisions issued by the competition law enforcement bodies, judicial decisions issued by courts, statutes issued by legislative bodies, decrees issued by ministers or presidents, and constitutions issued by the respective assemblies. When we relied on databases provided by the enforcement authorities, our searches were guided either by the type of conduct (for example *"acuerdos colusorios"*) or by the parties involved (for example "*Telmex".*) We also rely on congressional records especially for the debates surrounding the amendments to the CLRs in each of these countries. In some cases, gathering different bits of this type of data has required archival research. For example, some of the decisions issued before the 1990s in Colombia were not readily available online or in the libraries of Colombian universities but were available in print in the national archives.

A second type of data is made of the academic literature on CLRs in Latin America and written by local and foreign authors. This literature includes for the most part articles and book chapters, although a few key texts are books, such as Ignacio de León's seminal books on these issues. We have gathered literature addressing the development of CLRs at regional and national levels, and in particular we have gathered the most relevant texts addressing the dynamics we discuss in chapters 5 through 7. We have also focused on texts authored by individuals that belong to enforcement bodies, international organizations or that are specialized litigants in these regimes, because we consider that their particular roles provide them with useful insights related with the different projects in question.

Finally, a third type of data is made of media reports and articles taken from newspapers, magazines and online news portals from each of the countries we study. For example, we rely on newspaper clips from *El Mercurio* and *La Tercera* regarding Chile and from *El Tiempo* and *Revista Semana* regarding Colombia. We sought articles online that addressed three particular topics: i) political discussions surrounding the enactment of or the amendments to established CLRs, ii) final decisions issued by the enforcement bodies punishing or absolving parties for their engagement in anticompetitive practices, and iii) interviews (in print or in video) or journalistic profiles that provide background information about the perspectives of the leading officials directing these bodies.

III.D. Data Analyses

Our analysis of the different data involved a gradual process of developing a sense of the particular developments in the CLRs of Chile, Colombia and Mexico from the perspective of the framework and the arguments we advance. We focused especially on analyzing all the data in a way that i) made sense as a whole - from the ideas that make up the projects to the particular newspaper articles commenting the reaction to a particular decision - and that ii) left as few issues unanswered as possible. The process was reiterative, as it involved looking at the data several times, and usually after taking steps to narrow our focus of enquiry.

We began by reading academic texts about the political history of Chile, Colombia and Mexico since. Particular texts, like Edwin Williamson's "The Penguin History of Latin America",[48] were particularly useful for relating political dynamics with changes at the level of

[48] Williamson, Edwin. *The Penguin History of Latin America.* Penguin UK, 2003.

constitutions and the general regulatory apparatus of the State. Other academic texts, especially those mentioned in the literature review, were highly useful to locate the debates about competition law against the general landscape of the mayor changes that had taken place in this region.

Against the background provided by these texts, we searched for the legal materials, especially those related with the decisions issued by the different competition law enforcement authorities we engage with in chapters 5, 6 and 7. We focused on the statutes and the changes that particular issues had received over time - for example, the conformation of the enforcement bodies, the goals of the CLRs, among others. Once we gathered all the relevant legal materials for the three countries, we compared and contrasted the content of these materials with the academic texts regarding competition law as well as the more general texts about political changes in Latin America. In doing so, we wanted to evidence how the authors of these texts acknowledge and characterize the legal development of these regimes.

Once we had a general sense of the CLRs and their trajectories, we made choices as to which developments were of particular interest for our purposes. In some cases, for example Mexico, this decision was rather easy because of all the attention that *Telmex* and the CFC have received in the last two decades. In other cases, the choice was more difficult because there were several developments that could be used to develop our arguments. Regarding Chile, we considered it would be interesting to focus on collusion decisions because it would highlight the institutional mismatch resulting from the creation of the *Tribunal de Defensa de la Libre Competencia* in 2003 and its aftermath. As for Colombia, we focused on collusion decisions as well because they highlighted the tension between SIC and business associations. By then we already had a sense of how the different CLRs were fields in which the tension between the different projects unfolded, but we still had to collect data that showed the social relevance of the political discussions surrounding the enactment or amendment of the regimes and the decisions issued. In order to so, we resort to media articles and interviews that confirmed or rejected our reading of the events under analysis or that contributed to enrich it.

The result of this is a text that draws on media reports and articles of different sorts to illustrate the dynamics taking place within the establishment of CLRs as fields characterized by the tension between the State-centered competition law project and its neoliberal counterpart. While our focus is on legal materials - to the extent that we use them to challenge unfounded

empiric assumptions present in the relevant literature - we aim to highlight their social importance as much as possible, and to ground our claims in different data that we believe provides them with support. The outcome is a dissertation that highlights the social relevance of the tension between different projects and that grounds legal and theoretical issues on concrete and particular manifestations of social activity.

IV. Contributions and Relevance

In the previous sections we presented the main argument that we advance in this dissertation, the research questions that led to it and how it unfolds in the different chapters that follow. We also described briefly the data collected and analyzed. In this final section we would like to address the contributions of this dissertation and its relevance.

The most important contribution we make in this dissertation is to offer a different way of understanding the origins and trajectories of CLRs, as illustrated with our analyses of the Chilean, Colombian and Mexican regimes. We challenge the prevailing view of competition law in Latin America as presented by local and foreign commentators, by showing that it lacks the empirical support required to properly ground its assertions and by introducing new data that contradicts their allegations. Using our framework, we show that a more nuanced and careful appreciation of the history of these regimes is possible. We welcome the debates that our analysis may generate.

It may be argued that our analyses are too focused on particular fields to be able to generalize about the development of CLRs in Latin America. This argument aims to undermine the *regional* dimension of this dissertation, and it is successful to the extent that we hold that different field dynamics shape these respective CLRs differently. However, our purpose is not to create a generalized knowledge or to present perspectives that would follow from such knowledge for the reform (or not) of the different CLRs. We are particularly skeptic about such efforts precisely because we emphasize the uniqueness of the dynamics that characterize the different regimes as fields. Instead, we contribute to the current state of reflections and discussions about competition law in Latin America by aspiring to provoke two different outcomes. On one hand, we welcome more discussions about the issues addressed, and in particular about the role of power and ideas in the shaping of CLRs in this region, and invite other voices to join the discussion. On the other, we hope to contribute by generating critical

reflections about how we write and talk about competition law. It would be to the benefit of the Latin American competition law community at large to have more discussions about the unstated premises we have when discussing about competition law. Readers from jurisdictions different from Chile, Colombia or Mexico may find that the theoretical framework developed in chapter 2 can be useful for enquiring about the origins and trajectories of their own CLRs and to analyze their future developments.

Besides these, we also offer other contributions that also support the relevance of this dissertation. One of the most important aspects of this dissertation is that it relies on actual decisions and judicial rulings issued by the enforcement bodies and by courts involved in competition law enforcement activities. Readers familiar with the literature on competition law in Latin America know that this is uncommon, for most of the analyses done with a regional scope does not address particular decisions.[49] The analysis of first-hand data thus distinguishes this contribution from most of the literature commented above. Besides this, we also introduce new data that has not been analyzed at the level of the countries involved. In particular, we found 94 decisions issued by the Mexican Supreme Court between 1917 and 1990 regarding the constitutionality of different bylaws according to the mandate to protect competition established in article 28 of the 1917 Constitution. We also found 23 decisions issued by the Colombian competition law enforcement body between 1962 and 1968 addressing mergers, abuse of dominance cases, and a few horizontal agreements (see annex 1). Moreover, we found the first modern competition law statute in this country, dating from 1955. This is significant because it shows that the efforts to control economic power did not originate in the reformist government that followed the military regime of Gustavo Rojas Pinilla, but in the military regime itself. (See chapter 4)

These contributions highlight the relevance of this dissertation from two separate perspectives. First, this dissertation is highly relevant for the study of competition law in Latin America for the reasons mentioned above, and in particular because it contrasts importantly with the literature on this topic. Second, it is also highly relevant for the study of how ideas and power

[49] See for example Peña, Julián. "Limits of Competition Law in Latin America." In *The Global Limits of Competition Law*. Edited by Ioannis Lianos and Daniel D. Sokol. 2012. Alvarez, Ana Maria, and Pierre Horna. "Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance." *Chi.-Kent L. Rev.* 83 (2008): 91 - 128. Naím, Moisés. "Does Latin America Need Competition Policy to Compete?" In *Competition Policy, Deregulation, and Modernization in Latin America.* Edited by Moisés Naím and Joseph Tulchin. Lynne Rienner Publishers, 1999. Coate, Malcolm B, Rene Bustamante, and A E Rodriguez. "Antitrust in Latin America: Regulating Government and Business." *The University of Miami Inter-American Law Review* (1992): 37-85.

shape legal rules. In particular, we believe that by relying on field theory, this dissertation becomes highly relevant for lawyers and social scientists that want to approach Latin American economic regulation and competition law. In doing so, it bridges different theories and approaches that show the importance of studying law as a social fact. Overall, the relevance of this dissertation is related with its approach to the development of the different CLRs studied, and with the wealth of the legal data collected and analyzed.

2. Theoretical Framework

I. Introduction

In chapter 1 we stated that this dissertation is about how competition law regimes (hereinafter CLRs) in Latin America appeared and developed because of the interactions between different actors - lawyers, politicians, public officials among others - taking place within the State's dynamics. We also mentioned that to show this we would focus on the development of CLRs in Chile, Colombia and México. By focusing on these interactions, and in the ideas that shape them, we account for the most salient traits of these challenges and explore the established ways in which the development of these regimes has been understood.

This chapter is about the framework we rely upon in order to develop these analyses. This framework combines two different strands of enquiry. The first strand is about the history of legal and economic ideas, and in particular, about the intellectual history of neoliberalism and its rival tradition State-centered developmentalism. We address this first strand in section II of this chapter. The second strand is "field theory", a strand of social sciences theory and methodology developed by authors like Pierre Bourdieu. We address this second strand in section III of this chapter. The combination of these two strands is particularly important for our purposes because it highlights our emphasis on the role that conflicting ideas play in the history of CLRs in Latin America. In chapter IV we conclude by showing how both parts are complementary and comment briefly on examples in other areas of legal research in which this combination has taken place successfully.

II. Ideas That Shape Competition Law in Latin America: An Overview.

This section presents the first part of our framework, which consists of an overview of the main economic ideas that shaped Latin American regulation during the second half of the 20th century. We proceed from the more general to the more precise. We begin by identifying the main strands to which neoliberalism and State-centered developmentalism belong in the tradition of liberal political philosophy, and then we narrow our perspective towards more precise and contextually dependent ideas.

II.A. The Imperatives of Capitalism and the Demands of Democracy

We begin our characterization of these two strands is by locating them within the tradition of liberal political philosophy and the different divisions it presents. Since its origins, this tradition has harbored different ideas that often come across as opposed to each other. We can evidence this by referring briefly to how two central authors to the liberal political philosophy, John Locke and J.J. Rousseau, address the issues of freedom and inequality. In his *Second Treatise*, Locke offers a characterization of society in which individuals have rights because of their nature as rationale beings (and created by God) and roughly the same capabilities. Inequality results from the success that a few individuals have by combining their skills with hard work. The institution of government is devised in order to protect the rights of individuals, and this protection is extended to the inequalities that result from their skills and work.[50] Rousseau viewed issues quite differently. In his *Discourse on the Origins of Inequality* this particular trait is a pervasive characteristic of human nature, and it results from both skills as well as violence. However, the institutions of private property contribute to legitimize the unequal relations between individuals by providing a facade to the power property-owners have to determine how other individuals access the resources they control.[51] The social compact that Rousseau advances is a collectivist endeavor in which individuals can decide the relations that are part of their society, including those that stem from private law. In doing so, Rousseau's arguments are about using the State as a mechanism for social transformation.[52] The tension between Locke's concerns for the protection of individual rights and freedoms and Rousseau's call for a social contract that transforms social relations provides an ample ground for considering how neoliberalism and State-centered developmentalism are related.

The brief introduction and the examples presented above enable us to provide a more precise characterization of these two terms. A recent reinterpretation by Grewal and Purdy of the division within the tradition of liberal political philosophy views the contention as being about a contest between the imperatives of capitalism *vs.* the demands of democracy.[53] The imperatives of capitalism are related with facilitating how it works and the relations it produces.

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[50] Locke, John. *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government.* John Wiley & Sons, (1689) 2014.
[51] Rousseau, Jean-Jacques. *Discourse on the Origin of Inequality.* Edited by Franklin Philip and Patrick Coleman. Oxford University Press, (1755) 1999.
[52] Rousseau, Jean-Jacques. *The Social Contract and Other Later Political Writings.* Edited by Victor Gourevitch. Cambridge University Press, 1997.
[53] For reference to this body of literature, see Grewal, David Singh, and Jedediah Purdy. "Introduction: Law and Neoliberalism." *Law & Contemp. Probs.* 77 (2014): Pgs. 1 - 3.

These include the protection of private property and contract, as well as more elaborated concepts including the expectations of return on investments and corporate managerial autonomy.[54] The demands of democracy, in turn, are about achieving a series of conditions that run counter to the former, including equality of opportunity, fairness, solidarity and other conditions associated with the legitimacy of the social ordering of a community.[55] While the contest or confrontation between these ideas is largely abstract, it becomes concrete as it unfolds in particular social contexts.[56]

For Grewal and Purdy, it is this contest that allows for a characterization of neoliberalism; we add that it also adds for a characterization of State-centered developmentalism. For these authors neoliberalism "(…) names a suite of arguments, dispositions, presuppositions, ways of framing questions and even visions of social order that get called on to press against democratic claims in the service of market imperatives."[57] In this sense, neoliberalism is a strand of theory that encompasses particular ideas and arguments about promoting markets (and their rationalities) as the best mechanisms for collective ordering and public governance. Neoliberals often (but not always) describe markets as spaces in which individuals exercise their autonomy and freedom by making choices with the information at hand without being coerced to do so. Different ideas contribute to this particular understanding, but we will just mention two. Firstly, this characterization of markets views them as aggregate of single transactions carried forth by individuals acting by their own accord and in the absence of coercion. Second, what makes markets work so well as mechanisms for allocating social resources is the price system. Prices coordinate almost effortlessly the activities of different individuals, for their movement transmits useful information about the relative abundance or scarcity of goods and services exchanged between individuals in the absence of a central, like governmental agencies.[58] Hence, the promotion of markets is often defended on various grounds that combine both arguments about individual freedom and dignity as well as an efficient allocation of resources.[59]

What, then, is new about neoliberalism? We contend that the differences between this strand and classical liberalism involve a certain perspective related with the events taking place during

[54] Ibid. Pg. 3
[55] Ibid. Pg. 4
[56] Ibid. Pg. 4
[57] Ibid. Pg. 4.
[58] Hayek, Friedrich. *The Use of Knowledge in Society*. In: Individualism and Economic Order. U. of Chicago Press. 1st. Edition (1948). Third Impression (1958).
[59] A combination of these two ideas can be found in Friedman, Milton, and Rose Friedman. *Free to Choose: A Personal Statement.* Houghton Mifflin Harcourt, 1980. Chapter 1.

the second half of the 20th century. Firstly, neoliberal ideas do not involve a separation of spheres of social activity as the classic liberal motto *laissez faire, laisser passer* suggests. In this sense, neoliberals view markets as social constructs purposefully built by legal rules, not as a pre-existing form of social ordering.[60] A particularity of this shift is that while classic liberal authors like John Locke conceived the State as a shield against third parties as well as a possible danger (via tyranny),[61] neoliberals focus their fears on the State and its potential as a vehicle for totalitarian ideas and the suppression of individual freedom. This particular issue can be appreciated in the work of early neoliberal authors such as noted Austrian lawyer and economist Friedrich Hayek. In his book *The Road to Serfdom* he addresses the dangers of "collectivist" regimes that curtailed economic freedom through heavy-handed regulation in the name of national ideals.[62] In his later works Hayek advanced a theory about the complementarity between the State and markets. In a nutshell, markets are particularly apt institutions for coordinating economic activity for the reasons mentioned in the preceding paragraph. However, for successful coordination to take place, markets require a facilitating structure, which he identified with the generality, universality and certainty that should characterize "the Rule of Law".[63] Underlying such a legal order is a constitutional choice involving the protection of freedom, not just a passive attitude.

Second, more recent neoliberal authors rely on economic theory to reimagine how the State should work and the adequacy of its endeavors. In doing so, they use economic theory as a template for different aspects of public governance, ranging from the design and implementation of public policies to enforcement of the law.[64] We offer two examples of this neoliberal "move" from the works of Gary Becker and George Stigler. The work of Becker, in particular, expanded the logic of economic analysis into social spheres that were until then considered non-economic, like family law and law enforcement. For example, in *Crime and Punishment: An Economic Approach* Becker argues that optimal deterrence resulting from law enforcement should be based on the trade-off between the costs and benefits of crime, including aspects like the cost of enforcement and the nature of punishment. Under-deterrence occurs when criminal benefits outweigh the social costs of crime prevention, and as such is wasteful because ineffective; over-deterrence, on

[60] Foucault, Michel. *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979*. Edited by Graham Burchell, Alessandro Fontana, François Ewald and Michel Senellart. Palgrave Macmillan, 2010. Pg. 131.
[61] Locke, Op.cit. Pg. 125 - 129.
[62] Hayek, Friedrich. *The Road to Serfdom*. University of Chicago Press, 1944
[63] Hayek, Friedrich. *The Constitution of Liberty*. U. of Chicago Press. (1960). Pgs. 152 – 154 (referring to the general character of laws and the universality of their application) & 208 (referring to certainty). See also *Law, Legislation and Liberty*. Vol. I. *Rules and Order* Vol. I. U. of Chicago Press (1973). Pg. 55.
[64] Foucault, Op.cit. Pgs. 243 - 246, 219 – 221.

the other hand, is also wasteful because the social costs of preventing crime exceeds its benefits. George Stigler, in turn, extended economic analysis into the development of regulation itself. In *The Theory of Economic Regulation* he makes the case for a theory of regulation based on the supply offered by government officials and politicians and demand by different economic actors bent on furthering their interests. Such a theory, he claims, is better than the alternatives based on public interest or the irrationality of politics for explaining issues like regulatory barriers to entry or qualification requirements for certain professions.[65] In doing so, both authors use economic analysis as a template for how the State works and to assess the adequacy of its functions.

State-centered developmentalism can also be defined by relating it to the contest between the imperatives of capitalism and the demands of democracy. It can be defined as "(…) a suite of arguments, dispositions, presuppositions, ways of framing questions and even visions of social order"[66] used to oppose to the imperatives of capitalism in the service of the demands of democracy. It is, in other words, a strand of theory that encompasses different ideas and arguments about the primacy of democracy over markets, or other alternatives, for organizing different aspects of social life. In this sense, democracy is often viewed as both a process and an end-result. Democracy as a process is about how participating in democratic practices is beneficial for the individual and the community she belongs to. In turn, democracy as an end-result is about the legitimacy of the decisions reached, and which resides not in their accuracy but precisely on the substantive value resulting from following the democratic process in the first place.[67] The State, then, can be seen as a highly complex mechanism established to harbor democratic institutions, but also to enforce the decisions they produce; through its prerogatives the State is in charge of making democratic ideals a reality.

Just as we enquired about what does neoliberalism contribute to liberalism, we can enquire about what the "developmentalism" in State-centered developmentalism is about. We contend that it stands for the desire to use the political process and in particular the State as an agent of social change empowered to pursue the demands of democracy over the imperatives of capitalism. In this sense, it is a State that contrasts with the classical liberal State, which is considered passive on such issues, and with the neoliberal State, which is also active bur for the opposite reasons. Furthermore, we argue that the roots of State-centered developmentalism are

[65] Stigler, George J. "The Theory of Economic Regulation." *The Bell Journal of Economics and Management Science* (1971): 3-21.
[66] Grewal & Purdy, Op.cit. Pg. 4.
[67] A combination of these ideas can be found in Habermas, Jürgen. *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy.* Polity Press, 2015.

both political and theoretical, and they are intertwined in the developments that took place locally and globally during the second half of the 20th century.

We begin with the political events and their theoretical backgrounds that contributed to shape the broad contours of economic policies in western States, both developed and developing, during the second half of the 20th century. At the international level, among the most significant of these events was the crafting of an international economic regime. Shortly after the end of WW II several States gathered in the Bretton Woods conference of 1944 in order to conceive an international monetary system that ameliorated the issues posed by currency instability and to bring about peaceful commercial relations between States that would facilitate the conditions of social welfare. In doing so, the drafters of these institutions aimed to prevent the economic issues that led to WW II.[68] This materialized in a global monetary system in which each State fixed their currency exchange rates to a gold standard, and new institutions like the International Monetary Fund and the World Bank to cover for their fiscal imbalances and contribute to the financing of their development projects.[69] At the local level, economic policy developments followed two broad guidelines. Firstly, there was an understanding that there was ample room for the State to intervene and direct if necessary certain economic processes in order to attain full employment, economic growth and social welfare. In doing so, the State could complement, or even supersede, markets through different policies, including industrial policies. Along this idea, fiscal and monetary policies played an important role in maintaining high employment levels and to counteract business cycles. Second, States developed social welfare systems through which they provided directly particular services (for example health services) financed through the fiscal system.[70] These welfare systems aimed to ameliorate the social consequences resulting from the advances of industrialization in the different countries.[71] The expression "embedded liberalism" refers to this combination of entrepreneurial and corporate processes that were embedded in a web of social welfare policies, and which resulted from both international and national efforts to bring about economic stability after WW II.[72]

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[68] Lowenfeld, A. F.. "The International Monetary System: A Look Back Over Seven Decades." *Journal of International Economic Law* 13, no. 3 (2010) Pg. 2.
[69] Ibid. Pgs. 10 - 12.
[70] Fourcade-Gourinchas, Marion, and Sarah L Babb. "The Rebirth of the Liberal Creed: Paths to Neoliberalism in Four Countries." *American Journal of Sociology* 108, no. 3 (2002): 533-579, Pgs. 537 - 542
[71] An example of the blueprint of these systems is the famous Beveridge Report. See Beveridge, William Henry. *Social Insurance and Allied Services: Beveridge Report.* HM Stationery Office, 1942.
[72] Ruggie, John Gerard. "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order." *International organization* 36, no. 02 (1982): 379-415.

The policies that made up the "embedded liberalism" reflect the influence of John Maynard Keynes in economic policy-making and theory. Keynes himself was part of the drafting team of the Bretton Woods agreements.[73] He is well known for arguing in favor of using monetary policy to counteract business cycles and to keep unemployment low in times of limited industrial activity. This idea was based on the insight that, contrary to what classical economists argued, labor wages did not follow smoothly the supply and demand in the markets of goods and services. The cases in which this happened were exceptional, and the absence of such phenomenon justified the use of monetary policy to prevent and counter high levels of unemployment and its social consequences.[74] According to Albert Hirschman, this particular insight was particularly important for the emergence of development economics as a field of enquiry.[75] In turn, "expansive" monetary policies became one of the targets of neoliberals policy makers and authors like Milton Friedman.[76]

Developing States took stock of the organizations and institutions that were part of "embedded liberalism", although they did so in their own accord. A particularly important consideration in Latin America was that the terms of trade between developed and developing States had been deteriorating since the end of the 19th century. Raul Prebisch argued in his 1950 report *The Economic Development of Latin America and Its Principal Problems* that developed nations benefit twofold from international trade with their developing counterparts; first by importing raw materials at increasingly lower prices, and twice by exporting manufactured goods to these States at prices that did not reflect their technological advances.[77] Prebisch's ideas contributed to reassessing the protectionist policies that were already in place, for they could then be understood as part of a larger design aimed to achieve development. While the policies themselves varied importantly across States, the broad contours of the policies adopted in this region consisted in combining import substitution with the promotion of particular exports. That is, on the one hand governments established different restrictions to certain imports in order to shift the demand to locally produced substitutes. On the other it promoted the strengthening of certain exports that were highly important because they were sources of foreign

[73] Lowenfeld, Op.cit. Pg. 2.
[74] Keynes, John Maynard. The General Theory of Employment, Interest and Money (1936). Book 1 Chapter 2.
[75] On Keynes impact, see Hirschman, Albert O. "The Rise and Decline of Development Economics" in: *Essays in Trespassing: Economics to Politics and Beyond.* Cambridge University Press, 1981. Pg. 6.
[76] See for example Friedman, Milton. "The Role of Monetary Policy." *58 The American Economic Review*, no. 1 (1968): 1-17.
[77] Prebisch, Raúl. *The Economic Development of Latin America and Its Principal Problems* United Nations, 1950. Available at: http://archivo.cepal.org/pdfs/cdPrebisch/002.pdf. Pgs. 9 - 14. Published originally in Spanish as "El desarrollo económico de la America Latina y algunos de sus principales problemas" CEPAL (1949).

currency and contributed to the maintaining the balance of payments.[78] The overall effect is a reallocation of social resources towards more productive uses, boosting local industries and bringing about benefits for the economy at large. Other complementary policies included establishing different fixed exchange rates, providing local industries with privileged lines of credit, subsidies, and others.[79] The prominent role of these policies also emphasizes the role of the State in the State-centered developmentalism strand.

Prebisch's report is an example of a policy analysis that also provides theoretical insights. In the particular case of *The Economic Development of Latin America and Its Principal Problems* it revealed a challenge against the classic theory of comparative advantage developed originally by David Ricardo. According to this theory, trade between countries could be beneficial to all the parties involved if each one of them specializes in the goods demanded by other countries and which it can produce at the lowest cost.[80] According to Joseph Love, this theory was congenial to the governmental support that the producers of traditional exports received by the end of the 19th century and during the first decades of the 20th.[81] Prebisch's argument, however, showed that developing States were not benefiting from international trade as they were supposed under the theory of comparative advantage. Instead, the idea that came across was that of *dependancia*; developing States were bound to follow the fate that their developed counterparts fixed for them through their commercial agreements. The call for industrialization in developing States, and especially in Latin America, challenged the theory of comparative advantage because it required support for developing industries in new contexts rather than contributing to previously established ones.[82] Besides this particular theoretical contribution, the notion of *dependencia* was further on developed by Latin American economists like Fernando Henrique Cardoso.[83]

II.B. Central Ideas to the Development of Competition law in Latin America

In the preceding subsection we offered a general characterization of neoliberalism and State-centered developmentalism and how they relate to the tradition of liberal political philosophy. In

[78] Bértola, Luis, and José Antonio Ocampo. *The Economic Development of Latin America Since Independence.* Oxford University Press, 2012. Pgs. 156 - 157.
[79] Ibid. Pg. 164.
[80] See Ricardo, David. *On the Principles of Political Economy, and Taxation.* J. Murray, 1817.
[81] Love, Joseph. "Economic Ideas and Ideologies in Latin America Since 1930." *The Cambridge History of Latin America* 6, no. 1 (1994). Pgs. 395 - 396.
[82] Ibid. Pgs. 396 - 402.
[83] Cardoso, Fernando Henrique. "Dependency and Development in Latin America." New Left Review, no. 74 (1972).

this subsection, we focus more on the relation of these two strands with the origins and trajectories of CLRs in Latin America.

We begin with theories and policies about State-centered developmentalism. As mentioned above, one of the particularities of the theories and policies that are characteristic of "embedded liberalism" and the developmental institutions adopted in developing States is the prominence of the State itself. This evidences a break with the postulates of classic economics, as well as certain confidence on what the State can actually achieve. In particular, these theories and policies place in the State the ultimate role of controlling economic processes and their outcomes. This implies that the State has the means and the capacity to shape economic processes in ways that are congenial to its goals. It also implies that the State is responsible of procuring a series of results or desirable states of affairs. In doing so, it is a premise that relies considerably on the State's bureaucratic capacity to achieve social change. The works of classic development authors like Paul Rosenstein-Rodan,[84] Arthur Lewis[85] and Albert Hirschman[86] evidence this belief in the instrumental capacity of the State to take certain inputs and produce the desired economic and social outputs.

Contemporary authors working within State-centered developmentalism also rely on markets and make arguments for their adoption.[87] In doing so, however, they do not envision markets as ends in themselves, but as social mechanisms that further other non-economic goals (like the dispersion of economic power). Their contention, in many cases, is that in particular situations and contexts the imposition of market discipline seems unjustifiably skewed in favor of a few individuals or organizations and to the detriment of others. In doing so, it is important to note that the justifications they discuss are not framed from an economic rationale, but rather from a broader perspective based on democracy. Consider the following statement by Roberto Mangabeira Unger and Carlos Salinas de Gortari:

[84] Rosenstein-Rodan, Paul N. "Problems of Industrialisation of Eastern and South-eastern Europe." *The economic journal* (1943): 202-211.
[85] Lewis, Arthur W. *Economic Development with Unlimited Supplies of Labour*. 22 Manchester School of Economic and Social Studies. 139 (1958)
[86] Hirschman, Albert O. *The Strategy of Economic Development*. Yale University Press (1958)
[87] See for example Salinas de Gortari, Carlos, and Roberto Mangabeira Unger. "The Market Turn Without Neoliberalism." *Challenge* (1999): 14-33.

> The focus of conflict and debate in the world is changing. The old opposition between state and market is dead or dying. (…) Reforms undertaken in the name of the market economy can start us down more than one road of reinvigorating political, economic, and social freedom. One of these roads turns people into enemies of markets because it turns markets into enemies of people. Another road leads to a society reconciling more decentralized and diversified economies with more intense democracies, and productive innovation.[88]

The instrumental view of the State in development theory has a "mirror image" in the development of law and legal theory in Latin America during the 20th century. Since the first decades of this century, anti-formalist legal thinking took a stronghold over this region, leading to the idea that law can be molded to achieve the ends its society considers worth aspiring to.[89] Since then, law is seen as a tool for social change (as opposed to, for example, a repository of traditional values), reflecting the circumstances that are unique to the Latin American contexts.[90] This instrumental view of law can be appreciated in several aspects of the legal regimes resulting from the political events taking place in the region. One of these aspects is the considerable discretion that the executive power had by constitutional fiat or legislative mandate to design and implement regulation. The officials subject to the executive power are considered his delegates, and their lack of autonomy compensates for the capacity of the President, or of his cabinet, to coordinate the different policies in place. Overall, the flexibility embedded in administrative law is translated into the discretion that legal rules provide to the different bodies and officials in charge of policy enforcement. (See also chapter 4.)

This emphasis on the State had a profound impact in the development of CLRs in Latin America, although it is often argued that State-centered ideas and policies are at odds with the protection of competition.[91] Certainly import-substitution policies suggest that much, but only partially, for they do not address the competition exerted by rival goods and services produced

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[88] Ibid. Pg. 33.

[89] See López Medina, Diego Eduardo. *Teoría Impura Del Derecho: La Transformación De La Cultura Jurídica Latinoamericana.* Universidad De Los Andes, Legis y Universidad Nacional De Colombia, 2004. A classic example of anti-formalist theory in Latin America can be found in Recasens Siches, Luis. *Nueva Filosofía De La Interpretación Del Derecho.* Fondo de Cultura Económica, 1956.

[90] We discuss these particular developments in chapter 4 regarding the reception of Leon Duiguit's doctrine of the "social function" of private property in Latin American constitutionalism.

[91] See chapter 3. For an overview of development theory and its role with antitrust, see Lianos, Ioannis, Abel Mateus, and Azza Raslan. "Is There a Tension Between Development Economics and Competition?" In *Competition Law and Development.* Edited by Thomas Cheng, Ioannis Lianos and D. Daniel Sokol. Stanford University Press, 2013.

locally. Our research suggests that State-centered ideas and policies include different views about the importance of protecting competition. On one hand, as we show in chapter 4, the first CLRs were adopted during the heyday of these policies and by governments – first in Mexico, and then in Colombia and in Chile - that adhered to these ideas. This is an aspect that we consider of critical importance, and that casts a doubt over how the development of competition law in Latin America has been understood by local and foreign commentators. On the other, we find among the individuals that endorsed these policies and ideas a support for competition, although the intensity of this support varied considerably.

Let us consider first the lukewarm ambivalence of Raul Prebisch on this issue. In his 1962 article "*Reflexiones sobre la integración económica latinoamericana",* he argued that excessive reliance on custom tariffs and other protectionist instruments have led to monopolist practices that affect negatively economic productivity - a consequence he condemns.[92] However, in later articles he focuses on issues he considered structural. In his 1979 article about neoclassic economic theories and development he states that he is a defender of competition, but that the structural issues of peripheral capitalism cannot be addressed through competition protection.[93] The following year, he argued that the neoclassical idea that competition leads to diminishing producer surplus contradicts the experience of capitalism in the periphery.[94] In contrast, let us consider briefly the position of Jorge Ahumada, also a foreign-trained economist who worked at the United Nations Economic Commission for Latin America and the Caribbean. In the second edition of his 1958 book "*En vez de la miseria"*, Ahumada openly criticized monopolies and the increasing monopolization of the Chilean economy and made a call for fostering competition.[95] The record of State-centered policies and ideas does not support the argument that these were flatly against the protection of competition.

The advance of neoliberal ideas and policies in Latin America was particularly traumatic. In part, this was so because many policies inspired in neoliberal ideas were advanced as prescriptions to address the problems that Latin American countries were facing by the late 1970s and early 1980s, including its level of debt. Arguably, the crises themselves were triggered by neoliberal changes in monetary policy, which in turn led to the advance of the above-

[92] Prebisch, Raúl. "Reflexiones Sobre La Integración Económica Latinoamericana." *Revista de Economía y Estadística* 6, no. 1 (1962): 175-188. Pg. 176.
[93] Prebisch, Raúl. "Las Teorías Neoclásicas Del Liberalismo Económico." *Revista de la CEPAL* (1979). Pg. 171.
[94] Prebisch, Raúl. "Hacia Una Teoría De La Transformación." *Revista de la CEPAL* 10 (1980): 165 - 216. Pg. 169.
[95] Ahumada, Jorge. *En Vez De La Miseria.* Editorial del Pacífico, 1958. Pgs. 71 - 72.

mentioned neoliberal policies in this region.[96] The first region-wide package of neoliberal reforms is often referred to as "the Washington Consensus" because of a paper by John Williamson in which he describes the main structural reforms that Washington-based institutions had prepared for developing countries during decade of the 1980s.[97] Since then, experimentation with economic policies of different sorts (including CLRs) departed from its State-centered roots to embrace different forms of neoliberalism.[98]

One of the reasons we refer to neoliberalism and State-centered developmentalism as strands of theories is because they group different positions that while share important elements differ in others. This is particularly the case of neoliberalism, both abroad and in Latin America. Before we described briefly two variants of these versions when we addressed the works of Friedrich Hayek, Gary Becker and George Stigler. Below we will address these two variants and a third one, and comment briefly on their impact in Latin American competition law.

The first variant we wish to address emphasizes the importance of individual freedom as the cornerstone of the legal and economic orderings of society. We previously identified it with the ideas of Friedrich Hayek, and this is also one of the first variants of neoliberalism to emerge. As other forms of neoliberalism, it is not about *laissez faire* because it conceives an active role for the State and the legal system. This role, in particular, is constitutive; the legal system should be construed around individual freedom and should create spaces where individuals are able to exercise this freedom without coercion, very much like their view of markets. As we will argue in chapters 3 and 4, this particular form of neoliberalism developed in Chile during the late 1970s and 1980s and can still be appreciated in the works of a few competition law authors. Hayek himself visited Chile in two occasions and met briefly with Pinochet once.[99]

The second variant of neoliberalism influential in Latin America is related with the "Chicago School" of economics. We already hinted as much when we mentioned before the works of Gary Becker and George Stigler and what made their academic stances as distinctively neoliberal. How neoliberal ideas developed within the "Chicago School" is a fascinating subject that is also

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[96] See Harvey, David. *A Brief History of Neoliberalism*. Oxford University Press, 2005. Pgs. 23 - 31.
[97] Williamson, John. "What Washington Means by Policy Reform." In *Latin American Adjustment: How Much Has Happened?* Edited by John Williamson. Institute for International Economics, 1990.
[98] Even so, the discussions between the goals of competition law and other policies continue to define academic discussions in other jurisdictions. For an example based on the European Union, see Townley, Christopher. *Article 81 EC and Public Policy*. Hart, 2009.
[99] See Caldwell, Bruce, and Leonidas Montes. "Friedrich Hayek and His Visits to Chile." *The Review of Austrian Economics* (2014): 1-49.

closely related with the development of neoliberalism in Chile. However, we will only address some elements of this topic here. To begin with, Hayek became a professor in the humanities in 1950, and from there he continued with his plans for furthering the political influence of his ideas and developing networks of like-minded individuals, like the Mount Pelerin Society.[100] The faculty of economics harbored intellectuals that, like Hayek, viewed a positive role for the State in promoting individual freedom and competition. One of these was Henry Simons, who would eventually become a mentor of Milton Friedman. Simons, like Friedman after him, was a critic of the New Deal and argued for a State that would dedicate itself to a limited set of activities; one of them was the active promotion of competition.[101] Friedman came eventually to propose this idea in a 1951 essay entitled *Neo-liberalism And Its Prospects*. In this essay, he argued that the State should promote competition by protecting the freedom to establish an enterprise, enter any profession, and provide for monetary stability.[102] However, Friedman dropped the promotion of competition as a policy proposal in his later works,[103] while remaining consistent in his critical views of the New Deal and an expansive monetary policy.[104] As to his influence in Latin America, Friedman became the advisor of many of the so-called "Chicago Boys", the Chilean economists that participated in the economic direction of this country during the military regime.[105] Later on, Friedman would write a letter to Pinochet in support of the economic plan adopted by the regime.[106]

Within the Chicago School, the perspective on competition law changed rather drastically (when compared from the perspective of the views of Simons and the early Friedman) with the work of George Stigler. We mentioned that one of Stigler's contributions was to develop a critique of the existing theories of regulation at the time by relying on a market-based approach to the demand and supply of regulation by different interest groups.[107] Regarding competition law, Stigler proposed a view of cartels that changed in important ways both the academic and policy approaches towards this practice. We refer, in particular, to his argument about the

[100] Jones, Daniel Stedman. *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics.* Princeton University Press, 2012. Pg. 90.
[101] Simons, Henry "A Positive Programme for Laissez-faire". Quoted in Stedman, Ibid. Pg. 94.
[102] Friedman, Milton. "Neo-liberalism and Its Prospects." *Milton Friedman Papers, Box* 42 (1951)
[103] Stedman, Op.cit. Pgs. 95 - 97.
[104] See for example Friedman, Milton. "A Monetary and Fiscal Framework for Economic Stability." *The American Economic Review* (1948): 245-264. See also Friedman, Milton, and Anna Jacobson Schwartz. *A Monetary History of the United States, 1867-1960.* Princeton University Press, 1963. Also "The Role of Monetary Policy." *58 The American Economic Review* , no. 1 (1968): 1- 17.
[105] See Silva, Patricio. "Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks." *Journal of Latin American Studies* 23, no. 02 (1991): 385-410. Pg. 390.
[106] Friedman, Milton. "Letter to General Pinochet on Our Return From Chile and His Reply." April 21, 1975.
[107] Stigler, Op.cit.

inherent instability of cartels resulting from the incentives their members have to cheat each other.[108] As we argue in chapter 8, this argument contributed to the craft of leniency policies in the United States (hereinafter US) and abroad, including Latin America.

However, perhaps the most widespread source of influence of the "Chicago School" comes from individuals broadly identified as being part of this "school" such as Richard Posner and Robert Bork. Posner, who is worldly known for his writings on law and economics, acknowledges the influence of both Stigler and Bork in defining the position of this School towards the established doctrines at the time.[109] Bork, in particular, argued that competition law in the US (known as antitrust law) was divided between two variants, one of which promoted economic efficiency and the other that thwarted it by protecting competitors instead. In order to reform antitrust law and make it coherent, Bork proposes a theory based on microeconomics that he complements with a particular historical interpretation of the goals of antitrust law in the US.[110] As it turns out, Latin American authors commonly cite Bork during the 1990s in texts discussing the goals of their own CLRs (as we will show in later chapters).

The third and final variant of neoliberalism involves a combination of neoliberal elements like the ones described until know and neoinstitutional arguments. In the US, the combination of these two strands has led to a variant of antitrust law theory that combines law and economics insights with transaction costs analyses. An example of this can be appreciated in the work of Oliver Williamson, who in "*Markets and Hierarchies: Analysis and Antitrust Implications*" shows the extent to which market interactions can break down easily and thus meriting governmental intervention (but only in some particular instances).[111] The combination of neoliberalism and neoinstitutionalism in Latin America has drifted more towards issues related with the functioning and the possible reform of CLRs in order to improve their performance. The most common example is the argument (that we address in later chapters) that the adoption of a CLR contributes to the advances achieved in other areas of law regarding the liberalization of the economy. In this sense, neoinstitutionalism has become a lens for addressing the foundations of

[108] See Stigler, George J. "A Theory of Oligopoly." *The Journal of Political Economy* (1964): 44-61.
[109] Posner, Richard A. "The Chicago School of Antitrust Analysis." *University of Pennsylvania Law Review* (1979): 925-948. Pgs. 932 - 933.
[110] Bork, Robert A. *The Antitrust Paradox: A Policy at War with Itself.* Basic Books, 1978.
[111] See Oliver, Williamson. *Markets and Hierarchies: Analysis and Antitrust Implications.* Free Press, 1975.

these regimes, their functions and limitations, and a source of inspiration for particular reforms in Latin America.[112]

Table 2.1 The Neoliberal and State-Centered Competition Law Projects Compared

	Neoliberal competition law project	State-centered competition law project
Core ideas	*General Idea* - The State should actively promote and protect markets and competition. Deep skepticism regarding other goals.	- The State is a tool for collective social transformation and improvement. - The State should promote markets and competition only to the extent that it contributes to furthering other goals. - CLRs complement State-led policies aiming at economic development. - Democratic rationales are an adequate baseline for devising and evaluating legal regimes.
	Variant 1 - Markets are the best forms of social ordering because they are based on individual freedom.	
	Variant 2 - Markets are the best forms of social ordering because they bring about efficient allocation of resources. - Economic rationales are an adequate baseline for devising and evaluating legal regimes.	

Overall, both State-centered ideas and their neoliberal counterpart exercised considerable influence in the policy landscape of Latin America. In this subsection, we have situated both strands of theory in a larger historical context and identified their differences, especially as to how they play out in competition law and their relevance in Latin America. In the next section we will present a framework that will be useful for identifying more precisely how they contributed to shape CLRs in this region.

III. Field Theory and Law

In this section, we use field theory to complement the previous analyses by focusing, through the lens of field theory, on the interactions between social actors that promote or reject these strands of theory. We will describe the concept of fields, the interactions that take place within them and how they emerge and transform. In doing so, we will rely on the explanations provided

[112] See for example Sokol, D Daniel. "The Development of Human Capital in Latin American Competition Policy." In *Competition Law and Policy in Latin America.* Edited by Eleanor M Fox and D Daniel Sokol. Oxford: Hart Pub., 2009. Also De León, Ignacio. *An Institutional Assessment of Antitrust Policy: The Latin American Experience.* Kluwer Law International, 2009.

by different authors that are part of this theory, including Pierre Bourdieu.[113] Finally we will provide an overview of his text *The Force of Law* in which he applied some of the concepts referred to above to the study of law.

III.A. Field Theory: Basic Concepts

The concept of field refers to a semi autonomous social space in which interactions of different nature take place between the actors that are part of them. Fields vary importantly in their structures and memberships, and are related among themselves in different ways. As Fligstein and McAdam point out, they can incorporate different degrees of social activity, from the narrowest of social interactions to those incorporating highly aggregated, complex actors.[114] Pierre Bourdieu defines fields and their operation in the following way:

> To think in terms of field is to *think relationally*. (…) I define a field as a network, or a configuration, of objective relations between positions objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.) Each field presupposes and generates by its very functioning, the belief in the value of the stakes it offers. (…) In highly differentiated societies, the social cosmos is made up of a number of such relatively autonomous social microcosms, i.e. spaces of objective relations, which are the site of a logic and of a necessity that is specific and irreducible to those that regulate other fields.[115]

Just as fields are made of particular interactions, the positions or situation of the different actors in the field is very important. This relates to the structure of a field itself. The interactions between actors are what give fields their structure and their boundaries; hence they are defined internally by the different interactions that take place within them, and defined externally by the

[113] Regarding Bourdieu, we will rely on Wacquant, Loic J.D. "Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu." Sociological Theory 7, no. 1 (1989): 26-63. (Hereinafter Reflexive Sociology). Other texts in which Bourdieu develops these concepts are *The Logic of Practice*. Stanford University Press, 1990, and *The State Nobility: Elite Schools in the Field of Powe*r. Stanford University Press, 1998.
[114] Fligstein, Neil, and Doug McAdam. *A Theory of Fields*. Oxford University Press, 2012. Pg. 9.
[115] Reflexive Sociology, Ibid. Pg. 39. Italics in the original text.

interactions taking place in or across other fields. The resulting structures can be horizontal, thus suggesting that the actors populating the field have roughly the same power, or vertical, suggesting instead that the field is organized towards a hierarchy. It is common to find fields with structures that combine horizontal with vertical elements.[116] The structure of fields is also determined by the particular roles that the different actors in them have. Broadly, there are two types of actors - incumbents and challengers - whose interactions make the field in the first place and shape its trajectory over time. Incumbents are "(…) actors who wield disproportionate influence within a field and whose interests and views tend to heavily reflected in the dominant organisation of the (…) field".[117] Their advantageous position enables them to shape the interactions taking place in the field to their favor, and to shape the understandings that shape what the field is about and legitimize their role and their actions. Challengers, in turn, are actors that do not have privileged positions within the field and have a limited capacity to change its structure. Although they understand their role in the field just as they are aware of incumbents and their roles, they do not necessarily share the beliefs of incumbents nor consider their control over the field legitimate. Just as well, they may control particular resources that are important in the field, but not enough to alter a field's structure. The oppositional situation or position of incumbents and challengers is not fixed, but is a result of how they emerge, consolidate and change over time - their trajectories. Both incumbents and challengers can compete for control of the resources produced in the field, but they can unite and work together towards a common goal given a contingent threat or opportunity.[118]

As we just mentioned, the interactions between actors are related with the control of the resources available in the field. These resources can be of different kind and are generated by different activities. Bourdieu refers to these resources as different forms of capital. It is important to bear in mind that capital does not refer only to the ownership of assets of considerable economic worth. This term is also used to the exercise of, for example, political influence or an established reputation to control or shape the interactions taking place in the field. In his own words,

> The forces that are active in the field (…) are those that define the specific capital. A capital does not exist and function but in relation to a field: it confers a power over the field, over the materialised or embodied instruments of production or reproduction

[116] Ibid. Pg. 90.
[117] Fligstein & McAdam, Op.cit. Pg. 13
[118] Fligstein & McAdam, Op.cit. Pg. 13

whose distribution constitutes the very structure of the field, and over the regularities and the rules which define the ordinary functioning of the field, and thereby over the profits engendered in this field.[119]

Bourdieu also relates the use of capital with the potentially contentious nature of the field as well as with the particular positions that the actors in them occupy. He continues:

As a space of potential and active forces, the field is also a *field of struggles* aimed at preserving or transforming the configuration of these forces. Concretely, the field as a structure of objective relations of force between positions undergirds and guides the strategies whereby the occupants of these positions seek, individually or collectively to safeguard or improve their position, and to impose the principles of hierarchisation most favourable to their own products. The strategies of agents depend on their position in the field, that is, in the distribution of specific capital.[120]

Incumbents and challengers share a series of understandings about their roles, the stakes involved in their interactions and the nature of the field itself. As to their roles, both incumbents and challengers develop rationales that justify their trajectories within the field and legitimate their actions. Bourdieu refers to such rationales as *habitus*, which he defines in the following way:

The *habitus* - embodied history, internalized as a second nature and so forgotten as history - is the active presence of the whole past of which it is the product. As such, it is what gives practices their relative autonomy with respect to the external determinations of the immediate present. This autonomy is that of the past, enacted and acting, which, functioning as a accumulated capital, produces history on the basis of history and so ensures the world. The *habitus* is a spontaneity without consciousness or will, opposed as much to the mechanical necessity of things without history in mechanistic theories as it is to the reflexive freedom of subjects 'without inertia' in rationalistic theories.[121]

It is important to note that this concept aims to overcome the opposition between determinism and agency devoid of context in the analysis of individual or group behavior. Rather

[119] Ibid. Pgs. 39 - 40
[120] Reflexive Sociology, Ibid. Pg. 40. Italics in the original text. See also Bourdieu, Pierre. "The Forms of Capital." In *Cultural Theory: An Anthology*. Edited by Imre Szeman and Timothy Kaposy. 2011.
[121] Bourdieu, Pierre. *The Logic of Practice*. Op.cit. Pg. 53. Italics in the original text.

than characterizing the trajectories of the actors only as a result of the structures they inhabit, or as a result of their unfettered agency, this concept refers to the actor's dispositions - engrained patterns of thought and action - resulting from both their backgrounds as well as from their own capacity to make trajectory-changing decisions *within* the field. In doing so, this notion provides room for experience-based learning and identity development.[122]

Just as actors develop narratives of themselves, they also develop understandings about the field itself. These basic understandings entail awareness about the particular positions of other actors (and the capital they control) as well as the stakes resulting from their interactions and the overall trajectory of the field.[123] Bourdieu posits the concept of "doxa" as the regularly exercised belief in the different dispositions that make up the *habitus* and which is necessary for the functioning of the field. "Doxa is the relationship of immediate adherence that is established in practice between a *habitus* and the field to which it is attuned, the pre-verbal taking-for-granted of the world that flows from practical sense."[124] In other words, *doxa* is what makes the dispositions that make the habitus to come across as natural and legitimate to the actors in the field.[125] Even so, that these understandings or *doxa* are shared does not mean that the different actors necessarily adhere to them uncritically. While incumbents develop understandings about the field that become widely accepted, even if self-serving, challengers can develop alternative accounts through which they reinterpret their position in the field. These alternative accounts are based on the same elements and address the same field as the understandings developed by the incumbents; however they can be more oppositional, challenging their role in legitimating their place in the field.[126]

Both concepts of *habitus* and *doxa* are particularly useful for explaining the concept of "project" as used throughout this dissertation. By "project" we mean the efforts to make the set of ideas, theories and beliefs that make the understandings of particular actors predominant in a particular field through their interactions with other actors.[127] Borrowing from Bourdieu, a "project" is *doxa* in the making; neither particular enough to be ascribed to a single actor as

[122] Ibid. Pgs. 42 - 44.
[123] Fligstein & McAdam, Op.cit Pgs. 10 - 11.
[124] Bourdieu, The Logic of Practice. Op.cit. Pg. 68.
[125] Ibid. Pg. 68.
[126] Fligstein & McAdam, Ibid. Pg. 11.
[127] This particular usage of the term project is based on Rodríguez-Garavito, César. "Toward a Sociology of the Global Rule of Law Field." In *Lawyers and the Rule of Law in An Era of Globalization.* Edited by Yves Dezalay and Bryant Garth. Taylor & Francis, 2011. Pgs. 159 - 160. See also McMichael, Philip. *Development and Social Change: A Global Perspective.* Sage Publications, 2004. (Hereinafter Development and Social Change). Pg. xxxix.

habitus nor broad enough to be *doxa*, projects emerge from the former and aspire to the latter. As such, this concept entails a sense of purposeful dynamism; the agendas, and the collective endeavors underlying them, have to continuously unravel in order to be fulfilled. However, their plasticity resulting from being unfinished and accommodating makes them (intellectually) indeterminate and porous. This particular issue is very important. As (successful) projects become more encompassing, they incorporate the potentially conflicting ideas and theories developed by both incumbents and challengers into understandings that aspire to be coherent. This can be achieved by allowing grey areas in the *doxa*, or by avoiding potential contradictions between salient ideas by formulating highly abstract premises that minimize challenges. By drawing on the concept of "project", we wish to highlight the importance that ideas, theories and other elements that make the *doxa* have in the making of CLRs as fields.

The plasticity of projects invites consideration about the origins and changes taking place in and across fields. According to Fligstein and McAdam, fields result from the interactions between different actors in a society.[128] Not all social spaces are fields in themselves. New fields develop from previously established ones, especially as social activity becomes more specialized. What lies behind this process is the capacity of actors to mobilize their resources in order to take advantage of new opportunities or to feign off particular threats. The development of a field in of itself can therefore entail a promise of redefining already existing interactions in ways that are more productive to the future incumbents behind such initiative.[129] In this sense, while new fields emerge from proximate fields, they themselves come across as an opportunity to re-assert new interactions, new forms of capital accumulation, and new narratives to make sense of them all. However, not all efforts in establishing a field are successful; "settlement" takes place when the interactions between actors lead to their reproduction (and that of their interactions), and this is not always the case.[130]

The emergence of State-related fields is of particular interest to our purposes. The State itself is composed of various different fields organized in very particular ways and in which legal rules play a predominant role. Just as well, these fields are also often connected with other non-State fields, like markets or the academia.[131] Moreover, in societies in which ideas about the law play an important role in the organization of different aspects of social life, as in Latin America, State-

[128] Fligstein & McAdam, Ibid. Pgs. 86 - 90.
[129] Ibid.
[130] Ibid. Pgs. 92 - 94.
[131] Ibid. Pgs. 71 - 76.

related fields become privileged spaces for the definition of power and the structure of social life.[132] The emergence and transformation of these fields are often expressed through political process that bring about legal reforms, or are the result of other, related legal processes.

The relevance of field theory for understanding how different ideas and the actors that promote them shape CLRs can be appreciated by recalling the notion that there is a contest between different and opposing ideas - neoliberalism and State-centered developmentalism - in how social life is ordered. Field theory suggests that this conflict takes place in different legal areas, including competition law, and that it is waged by different actors who compete and collaborate in order to make their projects the *doxa* of these different areas. In particular, control over the law, including the control of how the law allocates right and duties and how it is understood are part of the stakes involved in this contention. Hence, field theory enables us to relate the substantive content of legal doctrines and legal rules with the different stakes involved in the contest about how an area like competition law is understood.

III.B. Local and Transnational "Juridical Fields"

In "*The Force of Law: Toward a Sociology of The Juridical Field"* Bourdieu applied the concept of field to sketch some basic issues of what he considered a scientific approach to law using adjudication as an example.[133] This author argues that the interactions between different the actors (litigants, judges, academics and others) that populate the "juridical field" shape the prevailing ideas about how the content and application of the law is understood. These interactions are antagonistic and result from the structural position that the different actors have with regards to each other.[134] Different views about the law are possible because of the operations involved in legal reasoning itself; law takes words from lay language and transforms them into legal rules working under dynamics of their own. This prevents the development of a single way of understanding of how an area of law should be interpreted and applied. Mastery over legal language and other basic aspects of the "juridical field" are prerequisites for developing views about what the law is and should be about.[135] This mastery enables actors (especially litigants) to come forward and advance different views about the interpretation of

[132] The focus of research has been on lawyers rather than on legal fields themselves. See Pérez-Perdomo, Rogelio. *Latin American Lawyers: A Historical Introduction.* Stanford University Press, 2006.
[133] Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings LJ* 38 (1987): 805.
[134] Ibid. Pg. 821. (Referring to the structural hostility between different theories)
[135] Ibid. Pgs. 817 - 821.

legal rules and their relation with the area of law they are part of; Bourdieu, in particular distinguished between conceptualist and practice-oriented views.[136] Judges play a fundamental role in the development of dominant views. Their position in the juridical field allows them to "speak" for the law, announcing which are the views and legal arguments they find compelling. Moreover, in doing so, they reinforce the symbolic effectiveness of the law.[137] This is why, for Bourdieu, jurisprudential theories are part of the "juridical field", and not useful for developing a scientific understanding how such field works.[138]

This particular insight has two important implications for our work. First, it prevents us from transferring directly ideas developed in other jurisdictions like the US or the EU to study the development of CLRs in Latin America, even those that are congenial to our own efforts.[139] This is so because while theories are often expressed in universal terms, they are the result of the interactions taking place in particular fields belonging to particular contexts. As Bourdieu points out, these ideas are as part of the "juridical field" as the interpretations of the legal rules they contribute to develop. Resorting to alien ideas instead of unearthing the ones that have been central in the field is not useful if the task at hand involves understanding how a particular field of law came to be. This is particularly relevant regarding discussions about the goals of the different CLRs, for such discussions often do not take into consideration the institutions involved in the attainment of such goals in the first place.[140]

Second, it prevents the mechanical application of Bourdieu's analysis to fields that are structured differently from the one he discussed in the article mentioned above. In this sense, it is important to note that this author's analysis can be extended to other "juridicial fields" as CLRs, as long as the interactions, structures and meanings of the fields they are part of are accounted for. This is a consequence of considering that there are unavoidable ties between the interactions taking place in a field, its structure, and the meanings about what such field is about. In particular, certain issues become highly relevant for the field study of CLRs such as the conformation of the bodies that adjudicate cases, their relative political independence, and even

[136] Ibid. Pgs. 821 - 823.
[137] Ibid. Pgs. 825 - 826.
[138] This is the thesis that Bourdieu sets at the beginning of this article. See Ibid. Pgs. 815 - 816.
[139] Among these are Amato, Giuliano. *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market.* Hart Publishing, 1997. Also Page, William H. "Ideological Conflict and the Origins of Antitrust Policy." *Tulane Law Review* 66, no. 1 (1991). Finally, Peritz, Rudolph J.R. *Competition Policy in America, 1888-1992: History, Rhetoric, Law* Oxford University Press, 1996, 2001.
[140] See Lianos, Ioannis "Some Reflections on the Question of the Goals of EU Competition Law" CLES Working Paper Series 3/2013.

the mastery over particular forms of knowledge that, like economics, play a very important role in how competition law is understood.

IV. Bringing the Pieces Together: The Roles of Ideas in Legal Fields

In this final section we show how the historical overview of the ideas and the basic tenets of "field theory" can fit together in making the theoretical framework from which we assess the development of CLRs in Latin America in the following chapters. We also offer an example of a related effort that, combining both history and field theory, provides an account of the transformation of Latin American law in general.

In the introduction of this chapter we argued that the two parts presented in the previous two sections could complement each other and contribute to a framework useful for understanding the role those ideas play in the development of an area like competition law. This complementarity results from the contributions that each part makes. While the discussions about neoliberalism promote the ideas that become embedded in CLRs, field theory engages with the struggles and collaborations that led to the embedding process of such ideas in the first place. An analysis of CLRs based on "field theory" benefits importantly from an overview of ideas because they provide an initial framework for understanding the dynamics and structure of these regimes as fields. Moreover, it also provides necessary elements that allow the identification of both *habitus* and *doxa*. At the same time, an intellectual history of CLRs benefits from identifying the conditions that led to the prevalence or demise of certain ideas in these regimes. In particular, it benefits from being able to relate the ideas advanced by the different actors that participate in a given field with the interactions between these actors, such as competitive struggles or collaborations. Hence, by coming together we can use field theory to account for the roles of ideas in the development of CLRs, and contribute to identifying contextually the elements and boundaries of these regimes as fields.

To sum up, our framework can be summarized as follows: CLRs are part of semi-structured and semi-autonomous fields populated by different actors that from their own *habitus* compete and collaborate for establishing their own understanding of what this field is about - their *doxa*. These fields are mostly national and local although the presence of State and non-State, national and international actors, along with the influence of neighboring fields, place them in areas that defy stark categorizations. We use the word "project" to refer to the particular understandings

that these actors aim to establish for the entire field, that is, *doxa* in the making. Furthermore, we identify two sets of ideas that inform the neoliberal competition law project and its counterpart, the State-centered competition law project. Both sets of ideas are in tension with each other, but when considered together they account for the views underlying competition law in Latin America.

IV.B. An Example of The Framework in Practice

An example of a work that has important commonalities with this dissertation is *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*, a book written by Yves Dezalay and Bryant G. Garth and which relies considerably on the variant of "field theory" developed by Pierre Bourdieu.[141] This book traces how ideas about law and economics produced in the United States became influential in Argentina, Brazil and Chile, during the second half of the 20th century. It is important to note that the scope of this book is considerably wider than this dissertation, addresses other fields different from CLRs, and does not focus on particular legal developments. However it is useful for our purposes because it is a preeminent example of the analysis that results from combining the history of ideas in Latin America and "field theory".

The account presented in *Palace Wars* begins with the increasing presence of the US in Latin America, resulting from its positioning as a global power after WW II, and especially from its concern for the increasing presence of communism in this region. During the Cold war, the US invested considerably in programs aiming to bring about what were understood as core elements for development - basic economics and human rights. However, the ideas underlying these programs developed in such a way that they ended confronting each other. In Chile, for example, Chicago School economists assumed an important role in the military dictatorship, which in turn placed them against the activists that denounced the military regime for its violation of human rights.[142]

In *Palace Wars* Garth and Dezalay also show how changes in the US academic landscape regarding what was considered "correct" economic learning had a profound impact in this region. This is in part because economists replaced lawyers in key position within the State, a

[141] Dezalay, Yves, and Bryant G Garth. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. University of Chicago Press, 2002.
[142] Ibid. Chapter 9.

development that peaked during the 1980s, as they became the elite entrusted to steer their country's economies during the debt crises taking place then. As a result, having a degree from a top economics school became a political requirement for addressing key issues of economic management in Latin America. Members of the elite with close ties to the legal profession, in turn, adapted to these circumstances. Following a trajectory similar to that of economists, their professional paths began to rely increasingly more on acquiring graduate degrees in US law schools. In doing so, the content of their education changed as well. The new generations of lawyers focus on fields related with the economic reforms taking place from the private side (like corporate law) and on new theories like law and economics. Overall, the analysis in this book shows how the interactions taking place within networks of actors and their beliefs shape how State governance is understood.[143]

The ideas developed by Bourdieu and expanded by scholars like Dezalay and Garth are useful for understanding how the circulation of different legal and economic ideas shape the interactions between the actors that populate a field. Not only does the *Palace Wars* address common topics to this dissertation, like the circulation of ideas about law, economics and the State, but it also focuses on key interactions related with the development of particular areas of law involving human rights and commercial law. We believe the ideas developed by these authors complement the framework we propose in two particular ways. First, we consider very important to include a new series of actors and interactions that are not part of the framework set out by Bourdieu in *The Force of Law*. In particular, it requires being able to assess the roles of competition law enforcement bodies and international organizations, both of which defy easy categorization. Second, following Dezalay and Garth, we rely on the premise that Latin American views about what a field of law is or should be about are infused from ideas produced in other jurisdictions and fields. This is a consequence of the "peripheral" position that Latin American CLRs have with regard to "core" fields geographically situated in the US and Europe populated by actors that have been highly successful in colonizing many other fields with their own ideas and understandings.[144] This awareness contributes to understanding the origins of the ideas posited by actors within the field as well as by how proximate fields affect the development of CLRs.

[143] Ibid.
[144] See also López Medina, Diego Eduardo. *Teoría Impura Del Derecho: La Transformación De La Cultura Jurídica Latinoamericana.* Universidad De Los Andes, Legis y Universidad Nacional De Colombia, 2004.

In this chapter we presented the main elements that make up the framework from which we will analyze the emergence and trajectories of the CLRs of Chile, Colombia and Mexico. This framework consists of two parts that complement each other. The first part is an overview of the history of ideas and events that have shaped regulation in Latin America during the second half of the 20th century. We identified two prominent sets of ideas and compared them with regard to how they envision the role of the State *vis a vis* economic processes. The second part consists of "field theory", a broad theoretical perspective that studies social change based on the concept of "field" as developed in social science. In doing so, we relied on the explanations and definitions provided by various authors including Pierre Bourdieu, and introduced the concept of "project", which we defined as *doxa* in the making. We also provided two examples of how field theory can be highly useful for understanding legal issues, one of which is particularly relevant because it exemplifies the usefulness of a very similar framework. With this in mind, we can now turn to the relevant literature regarding the history of competition law in Latin America.

3. Writing about Competition Law in Latin America

I. Introduction

We begin our analysis of the development of competition law regimes (hereinafter CLRs) in Latin America by describing and analyzing the literature that has been produced about this field of law. In this chapter we describe the main ideas that make this rather heterogeneous body of literature and relate it with the field dynamics that shape the development of these regimes in this region. We will show how this literature relates to the more general body of literature about Latin American law, describe its most important variants and comment upon a few texts we consider important. Finally, we will also argue that the perspective established in the texts about competition law in this region during the 1990s and after is a by-product of the political changes taking place in the region, in particular the advance of neoliberalism.

This chapter is organized as follows. In section II we address the place that the literature about competition law in Latin America has within the more general body of literature about law in this region. In section III we describe in more detail what this literature is about, and we describe two main strands in it. We focus here mostly on books and articles that address competition law issues from a regional perspective, while in section IV we focus on a few key articles and books in Chile, Colombia and México. Finally, in section V we conclude.

II. Competition law and the Latin American Legal Tradition

In general terms, the rather heterogeneous body of literature concerning Latin American law can be classified in two strands. The first strand emphasizes the European origins of core Latin American legal institutions and acknowledges the growing importance of certain institutions drawn from the United States (hereinafter US) and local developments. The second strand, in turn, has a more developmental approach to law, and focuses on how Latin American legal institutions contribute (or hinder) the development of the Rule of Law. This second strand, while arguably more recent, has become increasingly important and is prominent in both local and international policy circles. Notably, both strands have considerably different outlooks. While the first strand views Latin American law as a continuation, sometimes imperfect, of well-

established legal traditions, the latter views it from a policy perspective, focusing more on how it works and the outcomes it produces.[145]

Readers familiar with the comparative law literature on legal families should be quite aware with the first strand mentioned above. Its definitive trait is about highlighting how certain legal institutions have travelled across jurisdictions and over time, leading to particular new developments. In the case of Latin America, a central element is the reception and transformation of the French 1804 *Code Civil* in this region.[146] The reception of the *Code* has been important for several lines of enquiry. Firstly, the *Code* - and the civil law tradition it is embedded in - is often considered a key element in Latin America's legal history. Hence, studies about how the *Code* has been received, amended and transferred across Latin America are particularly important.[147] Second, the *Code* also played an important role in shaping the core ideas underlying the development of a *creole* legal culture in this region. Its reception contributed to shape a local identity that mixed theoretical sophistication with a pragmatic approach to local politics.[148] Finally, the adoption of the *Code* also facilitated the on-going reception of theories and ideas about the law based on it, contributing to shape local legal cultures.[149] This is a strand that continues to develop today, especially in universities within jurisdictions where Civil Law institutions have had a particularly important historical role.

While emphasizing the heritage of European legal traditions continues to be very important in Latin American law, it is not the only important current that we find in it today within this strand of literature. During the last three decades or so the body of literature focusing on constitutional law and human rights has burgeoned. We contend that this is related to the changes taking place in these areas of law during this period of time; the "constitutionalisation" of entire legal systems, as it is often posed, results from the increasing importance that constitutional courts have acquired.[150] Along with this change, there has been an increasing

[145] See in general Esquirol, Jorge L. "Writing the Law of Latin America." *Geo. Wash. Int'l L. Rev.* 40 (2008): 693.
[146] See for example Merryman, John Henry, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America.* Stanford University Press, 2007.
[147] Mirow, Matthew C. "The Power of Codification in Latin America: Simon Bolivar and the Code Napoleon." *Tulane Journal of International & Comparative Law* 8 (2000): 10-11.
[148] See Pérez-Perdomo, Rogelio. *Latin American Lawyers: A Historical Introduction.* Stanford University Press, 2006. Also Mirow, Mathew C. "Borrowing Private Law in Latin America: Andrés Bello's Use of TheCode Napoleon in Drafting the Chilean Civil Code." *Louisiana Law Review* 61, no. 2 (2001): 1
[149] López Medina, Diego Eduardo. *Teoría Impura Del Derecho: La Transformación De La Cultura Jurídica Latinoamericana.* Universidad De Los Andes, Legis y Universidad Nacional De Colombia, 2004
[150] This is of course not unique to Latin America. See Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Harvard University Press, 2009. On Latin America more

reception of theories about rights and constitutional adjudication that are originally from the US and Germany. This can be appreciated, along other things, in the reception of authors like Ronald Dworkin and Robert Alexy by Latin American judges, practitioners and academics.[151] One of the consequences of the "constitutionalisation" of legal systems has been that these theories about rights have "trickled down" unto fields that until recently were dominated by traditional legal thought, like criminal law.[152] Importantly, the authors that contribute to this tradition have developed their own, particular approaches and their texts are, overall, constructive, for they support the changes taking place.

These two currents seem to describe entirely different legal cultures, and yet in Latin America they co-exist side by side and are integrating into one strand within the literature about law in this region. The integration process has been uneasy, for each of these currents stands for particular ideas and social structures that are not always congenial. Discussions about the "constitutionalisation" of various legal regimes tips-off these difficulties, for they are about the advance of constitutional analysis (and Courts) in areas where they had not been involved until recently. Therefore, they are interactions where incumbents engage with new participants that threaten to establish their own views of these regimes as the new "common sense". In some instances, incumbents have denounced that the new "constitutionalisation" amounts to an abusive use of legal theory by courts to usurp the functions of Congress.[153] Besides this dimension of the confrontation, this integration process also evidences a generational change that evidences the rise of the United States as a new epicenter of legal knowledge.[154] We contend that the accommodation of these different elements or currents is leading to the view that Latin America is a "diverse" legal tradition where new theories and institutions drawn from the United States share the spotlight with their more traditional civil law counterparts.[155]

We can use this description of the first strand of literature about Latin American law as a background for explaining the origins and developments of the second strand. Readers familiar

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specifically, see Schor, Miguel. "Constitutionalism Through the Looking Glass of Latin America." *Tex. Int'l LJ* 41 (2006): 1.

[151] An interesting example is Carbonell, Miguel, and Leonardo García. *El Canon Neoconstitucional*. U. Externado de Colombia, 2010.

[152] See for example Cote-Barco, Gustavo Emilio. "Constitucionalización Del Derecho Penal Y Proporcionalidad De La Pena." *Vniversitas* , no. 116 (2008): 119-151.

[153] See, for example, Jaramillo, Javier Tamayo. "El Nuevo Derecho, El Escepticismo Ante Las Normas Y El Uso Alternativo Del Derecho." *Revista Facultad de derecho y ciencias políticas* , no. 105 (2006): 361-397

[154] For an interesting discussion, see Mattei, Ugo. "Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi, the." *Md. L. Rev.* 64 (2005): 220 - 249.

[155] López Medina, Op.cit.

with the law and development literature will recognize most of the defining traits of this particular strand. Several traits characterize it. First, it views legal issues from a policy perspective, and thus its analyses and recommendations are policy-driven. In doing so, it contrasts sharply with the historical and analytical styles that permeate the strand described before. This is also related to the fact that most of this strand has been written under auspices of different international organizations that have programs in Latin America, whether in the form of aid or technical assistance.[156] Second, although the different works that make it up address different legal regimes and practices, they share perspectives based on their potential to promote economic growth, development and the Rule of Law.[157] Arguments about rights have a central role in this strand. While the protection of individual rights in general is considered a hallmark of democracy and the Rule of Law,[158] the protection of property rights is considered essential for the development of efficient markets and attaining growth. Hence a topic like judicial reform became central to this particular strand, for the judiciary has a very important role in making these protections effective - and was a target of key programs of the organizations mentioned above.[159] Thirdly, this particular strand appeared mostly during the late 1980s and the 1990s as neoliberal ideas became prevalent in policy analysis and discussions. This strand is, to some extent, a particular development of John Williamson's *Washington Consensus*.[160] As a result, they are considerably critical of the legal institutions and practices that predominated until then, often arguing that they were inefficient,[161] produced poverty,[162] facilitated corruption,[163] and other negative consequences. Underlying these different views is the premise that Latin American law has failed to produce institutions conducive to democracy and economic development.

Most of the literature about competition law in Latin America is part of this second strand of the more general body about law in this region. The bulk of this literature was written during the

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[156] Such organisations include the Inter American Development Bank, The World Bank, the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, among others.

[157] See for example Messick, Richard E. "Judicial Reform and Economic Development: A Survey of the Issues." *The World Bank Research Observer* 14, no. 1 (1999): 117-136

[158] See for example Ungar, Mark. *Elusive Reform: Democracy and the Rule of Law in Latin America.* Boulder: L. Rienner Publishers, 2002. Also Prillaman, William C. *The Judiciary and Democratic Decay in Latin America : Declining Confidence in the Rule of Law*. Westport, Conn.: Praeger, 2000.

[159] See for example Rowat, Malcom. *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference.* World Bank Publications, 1995.

[160] See Williamson, John. "What Washington Means by Policy Reform." In *Latin American Adjustment: How Much Has Happened?* Edited by John Williamson. Institute for International Economics, 1990.

[161] Williamson, Op.cit. Also See for example Lora, Eduardo. *The State of State Reform in Latin America.* Stanford University Press, 2007.

[162] de Soto, Hernando. *The Other Path: The Invisible Revolution in the Third World.* Harper & Row, 1989.

[163] See for example Haber, Stephen H. *Crony Capitalism and Economic Growth in Latin America: Theory and Evidence.* Hoover Press, 2002.

1990s by local and foreign authors, and it is highly critical of the institutions then in place or ignores them altogether. It is also a literature that emphasizes the importance of protecting competition for having well-functioning markets oriented towards economic growth and development. Moreover, individuals that have stakes in the legal reform of these regimes participate as authors of this body of literature. Finally, we wish to highlight that it is a body of literature that does not engage with the other, more traditional strand about Latin American law. Because of this absence, it fails to discuss how the origins of CLRs in this region were related with the wider political, legal and economic issues taking place at the time.

III. Writing about Competition Law in Latin America

III.A. Before the 1990s: Competition Law, Development and Foreign Investment in Latin America

We begin our analysis by commenting on the texts concerning competition law in Latin America before the 1990s. As we argued in the introduction to this dissertation, the advent of neoliberal reforms during that decade set the CLRs of this region - and the literature addressing them - in a distinctive trajectory of their own. Before the 1990s, texts about competition law in Latin America were rather rare. Except for the United Nations Conference on Trade and Development (hereinafter UNCTAD), international organizations were focused on other issues. The interests of practicing lawyers were also focused on other aspects. The few texts written by practitioners address issues that, like technology licensing, seem to follow from the commercial activities of their clients. In any case, the literature is scarce but nonetheless quite interesting.

The first text we comment upon is based on a study developed by UNCTAD regarding the development of CLRs in Latin America between 1974 and 1978.[164] The text, prepared by Eduardo White, who also made the study for the above-mentioned organization, is a forerunner of the Peer Reviews and similar exercises of the late 1990s and 2000s. It provides valuable insights about the trajectories of the CLRs and their relationship with other policies in Argentina, Brazil, Chile, Colombia and Venezuela, and describes recent developments in each of these States. There are four ideas present in this text that are worth noting. First, these regimes were originally quite different, and that such differences result from the local political dynamics of the countries in which they appear. Second, that the approach to competition evidences in these

regimes is pragmatic, for they complement other policies considered just as important. Third, these policies were in the process of adapting to the changing conditions taking place at the time, including both the on-going crisis of the late 1970s as well as the development of local markets of manufactures goods. Finally, that the development of these regimes does not go along the lines of the development of the competition law in the United States or in other jurisdictions, exhibiting instead certain particularities of its own.[165] Overall, besides being a particularly useful secondary source, this text is quite interesting because it evidences how competition law was conceived and developed in this region during this period.

In turn, the literature produced by the private sector, and in particular by practitioners, seems to follow the interests of foreign firms investing in Latin America. An interesting article about this issue, comparing the potential for the development of competition law of licensing laws and regulations with regard to competition law enforcement was authored by Lawrence F. Ebb and published in 1974.[166] This article is also a forerunner of a common element in this body of literature, and which consists of practitioners explaining particular elements of the CLRs for the benefit of their clients.

Along this line, a 1982 article by Rafael Germán provides a more general commentary of the CLRs in Latin America at the time.[167] It describes the general outlines of the regimes in Latin America, although it places considerable emphasis on Argentina, Brazil, Chile, Colombia and Mexico, and how they relate to other economic policies in place. Like White, he argues that the CLRs in place evidence a pragmatic approach, balancing the promotion of competition and the prevention of anticompetitive abuses with the promotion of national industrialization.[168] An example of this balancing is, according to this author, the special exceptions that the governments can issue, in the name of industrialization, to clear what would otherwise be an anticompetitive practice.[169] Notably, Germán is rather critical of the CLRs he discusses about. He states that neither foreign competition law analyses nor the adoption of competition as an organizing principle have been thoroughly adopted in this region, and questions whether certain

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[164] White, Eduardo. "La Legislación Antimonópolica Y El Control Del Poder Económico En América Latina: Recientes Tendencias." *Derecho de la integración* 11, no. 29 (1978): 35 - 59. I
[165] Ibid. Pgs. 35 - 39.
[166] Ebb, Lawrence F. "Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law." *Fordham L. Rev.* 43 (1974): 719.
[167] German, Rafael. "Latin American Antitrust." *Lawyer of the Americas* (1982): 1-22.
[168] Ibid. Pgs. 2, 7 - 8.
[169] Ibid. Pg. 5.

social conditions - like the close ties between members of the industrial sector - may facilitate their flourishing.[170]

The texts authored by White, Ebb and Germán are different in purpose and outlook. While the first address the evolution of CLRs from a policy perspective, the latter comment on particular issues of interest for the private sector. However, they have one aspect in common, and it is this idea that CLRs were part of a wider net of policies geared towards industrialization as a means for development. Both assert that while the regimes are different and their enforcement varies, they complement other economic policies and are congenial to the goals of the government. Their descriptions highlight the State-centered competition law project as described in the previous chapter.

III.B. The Advent of Neoliberalism

The crisis of the 1980s prompted several changes in Latin America concerning economic regulation and competition. The changes were about liberalizing the economies and relying considerably more on markets, and addressed important elements of the legal systems of these countries. In Mexico and Colombia the political inertia resulting from the crisis led to changes in the respective constitutions as well as to amendments to their respective CLRs during the early 1990s. Chile, on the other hand, has already undergone this transformation during the mid 1970s, and by the 1990s was taking its first steps towards democracy again. The literature about competition law taking a regional, Latin American view, has all these issues as part of its background.

Malcolm Coate, René Bustamante and A.E. Rodriguez, all members of the Bureau of Economics of the US Federal Trade Commission during the 1990s, wrote an early article that practically set the tone of future discussions about competition law in this region.[171] This article is quite interesting for several reasons. To begin with, it aims to explain the enforcement priorities that CLRs in this region should have. It notes that recent economic changes such as the privatization of State-owned enterprises can be complemented with adequate competition law enforcement, and then describes what they consider to be adequate on this regard. In doing so, the text suggests that Latin American States have only a limited experience with markets and

[170] Ibid. Pgs. 20 - 21. See also Ebb, Op.cit. Pg. 722.
[171] Coate, Malcolm B, Rene Bustamante, and A E Rodriguez. "Antitrust in Latin America: Regulating Government and Business." *The University of Miami Inter-American Law Review* (1992): 37-85.

resources to devote to competition law enforcement.[172] Second, the text describes various anticompetitive practices, ranging from price fixing to price discrimination, and then comments on how they are addressed by US courts and their counterparts in Europe. The description of the practices relies considerably on texts authored by "Chicago School" members, notably Robert Bork and George Stigler,[173] and their advice for Latin American States hardly follows that of the EU and is more consistent (although not entirely) with that of the US.[174] Moreover, the text explicitly argues that the dynamics of the civil law tradition that permeates this region can bring about difficulties in contributing to the development of particular regimes.[175] Finally, the text inaugurates a rather grim view of past enforcement activities that have taken place in Latin America. Notably, the text refers to Eduardo White's text mentioned above but in a jaundiced way; instead of highlighting the practical approach involved in combining competition law with other policies, they use it to assert that the different regimes have hardly been enforced.[176] Also it provides a rather inaccurate summary of the CLRs in place at the time, and does so by using US categories and in disregard to the rules and doctrines that were already in place in States like Chile,[177] Moreover, the text does not refer to a single decision issued by any of the enforcement authorities in place at the time. Overall, this text is important because it framed the analyses about Latin America that were to come, and in doing so it also contributed to a misrepresentation of the recent past of CLRs in Latin America.

By the end of the 1990s important changes had already taken place in several Latin American jurisdictions. Chile, which had already switched to neoliberal policies in the early 1970s, was about to go a new "modernization" of its CLR. The experiences that were resulting then contribute to a flurry of books and articles evaluating the recent Latin American experience with competition law. Among these was a book published in 1999 containing a collection of essays about the development of competition law on both a regional and national perspective edited by Moises Naím and Joseph Tulchin. In his chapter, Naím, who is an economics PhD from the Massachusetts Institute of Technology and was Venezuela's trade minister between 1989 and 1990, assesses the preconditions required for having competition in this region.[178] He argues that

[172] Ibid. Pgs. 40 - 45, 74 & 80.
[173] Ibid. See for example pgs. 64 - 65 (quoting Bork's definition of predation) and pg. 62 (referring to Stigler's argument about the instability of cartels).
[174] Ibid. Pgs. 80 - 81.
[175] Ibid. Pg. 54.
[176] Ibid. Pgs. 44 - 45.
[177] Ibid. Pgs. 49 - 53.
[178] Naím, Moisés. "Does Latin America Need Competition Policy to Compete?" In *Competition Policy, Deregulation, and Modernization in Latin America.* Edited by Moisés Naím and Joseph Tulchin. Lynne Rienner Publishers, 1999.

the further development of competition law policies should take into consideration local factors, including the residual turbulence resulting from the policy changes themselves. This is so because although the effort done until the moment were highly valuable and evidenced a turn for the better (that is, for more competition law enforcement), there were still important challenges that needed to be met. Some of these efforts include improving the State's capacity to enforce complex policies, but also the capacity to resist protectionist measures, which continued to exist. One change he focuses on is the development of a stock market; unless small and medium enterprises can take full advantage of financial institutions, they will continue to be at disadvantage with regard to well-funded (and well connected) firms. Hence, rather then focusing on the enforcement of legal rules, Naím argues, competition would be better served by addressing certain economic issues that contribute to its actual development in the first place.[179] Overall, Naím's text is particular interesting because, by considering the different policy and especially macroeconomic facts that affect competition, it adopts an institutionalist analysis of CLRs and their effectiveness.

The turn towards institutionalism as part of the neoliberal analyses of Latin America's CLRs would receive a considerable boost from Ignacio de León, arguably the most prolific and influential author on competition law in Latin America. His two books on the development of competition law in Latin America weave in a unique way the different ideas that we have highlighted so far.[180] In the second of the two books, "*An Institutional Assessment of Antitrust Policy: The Latin American Experience*",[181] De León argues that competition law in Latin America is deeply flawed, and offers two mayor arguments in support of it. A summary of the first argument would be as follows: During colonial rule, the Spanish crown controlled economic activities according to its own interests and without regard for establishing well-functioning markets. The independence movements of the first decades of the 19th century did not affect the prevailing ideas regarding this issue in the recently independent Latin American States. Quite the contrary, the nascent Latin American States continued to use law to direct economic activities following their own political prerogatives. During the 20th century, price controls and import-substitution policies prevented the application of the CLRs that were in place at the time, thus continuing the suspicions against free markets. The changes to these regimes that followed the "Washington Consensus", for all their emphasis on market liberalization, were unable to challenge this legacy

[179] Ibid. Pgs. 18 - 31.
[180] De León, Ignacio. *An Institutional Assessment of Antitrust Policy: The Latin American Experience.* Kluwer Law International, 2009. Also De Leon, Ignacio. *Latin American Competition Law and Policy: A Policy in Search of Identity.* Kluwer Law International, 2001.
[181] De León, Ibid *Institutional Assessment.*

of interventionism. As a result, CLRs and their enforcement have become a new vessel for economic dirigisme.[182]

The second argument is more theoretical and less grounded on the specifics of Latin America. De León argues that the economic foundations of competition law enforcement are based on a wrongful premise, mainly that market concentration and competitive performance are closely related. This premise, in turn, is based on the views about perfectly competitive markets and monopolies that emerged in the 1930s developed by notable economist Joan Robinson and as a counterpoint to Alfred Marshall's views. According to De León, Alfred Marshall viewed that the increasing returns that monopolists earned contributed to competition dynamically by luring new entrants into markets, both of which learned in the process. In turn, Robinson used a static theory of competition to argue, on the contrary, that the increasing revenues would benefit monopolists by enabling them to strengthen their position in the market, given birth to the theory of imperfect competition. Moreover, De León argues, underlying such a view was a wrongful interpretation of Marshall's theory, which apparently she herself acknowledged. Eventually, as Robinson's theory of imperfect competition found its way along industrial organization theories, it contributed to the idea that competition law enforcement could bring about the "utopia" of competitive markets.[183] Therefore, De Léon concludes, competition law in Latin American is deeply flawed because it combines a tradition that favors economic dirigisme with a legal apparatus based on the analytical tools that (wrongly) justify it. It has been recast and adapted to follow the same dirigist policies that prevailed before the 1990s by the political forces that drive the development of economic policies in this region.[184]

The skeptic tone developed by Coate and his co-authors and taken to new heights by De León has become a staple of the writing about competition law in Latin America. This can be appreciated in other texts that rely on the combination of historical overview of policies and the institutional analysis to account for the current state of enforcement in this region or to explain particular developments in certain jurisdictions considered problematic.[185] Some of these texts emphasize the role that legal formalism has in the development of this field of law. On one hand, competition law enforcement is distinctively rule-bound, leading to economically inaccurate decisions. This results partly from the resistance of judges trained in the civil law

[182] Ibid. Pgs. 4 - 44.
[183] Ibid. Pgs. 92 - 99.
[184] Ibid. Pgs. 583 - 589.
[185] Peña, Julián. "Limits of Competition Law in Latin America." In *The Global Limits of Competition Law*. Edited by Ioannis Lianos and D. Daniel Sokol. 2012.

tradition who lack the means to rely on economic theories in their reasoning like their common law peers. The roots of this lay in the adoption of a formalist legal culture that is suspicious of non-literalist interpretations of legal rules.[186] On the other, competition authorities have not adapted economic tests to the particularities of their own contexts, characterized by highly concentrated markets and pervasive informality. As a result, they misinterpret the conditions in which competition takes place.[187] Overall, these texts are based on a particular form of institutionalist analysis that is particularly critical of traditional Latin American institutions; at the same time, however, they often fall in generalizations that are hardly defensible. This includes, for example, attributing certain behaviors to Latin American judges, without distinctions, as a consequence of the civil law rather than to the local conditions they are part of.

Not all the texts written after the 1990s have such a skeptic perspective. An exception to the rule, "*The Consolidation of Competition Law in Latin America*", is a short piece by Julián Peña that describes the trajectory of the CLRs in this region in a single linear fashion for the better, even though there are setbacks and problems to be addressed.[188] Peña summarizes the development of competition law in this region in three stages, ranging roughly from the 1930's to the 2010's.[189] In the first stage, which takes place between the 1950s and the 1990s, only a few countries like Chile or Mexico had CLRs, which were basic, vague and poorly enforced. These were adopted at a time in which there was little support for competition law enforcement, a situation that followed from the interventionist bent of the governments. In the second stage, which takes place during the 1990s, most countries updated their regimes or adopted new ones. These processes took place shortly after the Washington Consensus policies were being implemented. The adoption of CLRs and Washington Consensus policies supposedly evidences a break from the interventionist policies that predominated in the past. Also, this second stage is characterized by the involvement of international organizations like UNCTAD in providing assistance for the new regimes to take place. Finally, in the third stage (which begins in the 2000s) the consolidation of the different CLRs begins to take place. This stage is characterized by the support awarded by the highest levels of the government, and the increasing participation of other branches of the State, civil society and academia. Second, it is also characterized by relying

[186] See Alvarez, Ana Maria, and Pierre Horna. "Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance." *Chi.-Kent L. Rev.* 83 (2008): 91. Pgs. 105 & 108 Ft.nt. 41 (Considering that a shortage of economic knowledge can lead a retreat to formalism). See also Peña, Ibid. Pgs. 244 & 245, 250. For a quantitative analysis of the primacy of the common law over the Latin American civil law tradition, see Rodriguez, A E. "Does Legal Tradition Affect Competition Policy Performance?" *The International Trade Journal* 21, no. 4 (2007): 417-454

[187] Peña, Ibid. Pgs. 244 – 245.

[188] Pena, Julian. "The Consolidation of Competition Law in Latin America." *Antitrust Chronicle* 11 (2011).

less on legal transplants and more on learning from enforcement experiences. Thirdly, it is also characterized by the increasing involvement of international organizations, like UNCTAD and the OECD.[190] This text can be seen as going counter to the other texts mentioned above by providing a more positive assessment of the fate of competition law in this region.

Overall, the texts written about the development of CLRs in Latin America after the 1990s are quite skeptic about the effectiveness of the reforms accomplished, as they focus on institutional factors that contribute to hamper their development. As mentioned above, these factors range from a history of undue State interventionism, a pervasive dirigist mentality, the limitations brought upon the civil law, and the relatively adverse contexts in which these regimes are supposed to take place. In sharp contrast with their predecessors, the literature about competition law considered here is highly critical of the experiences before the 1990s, and their criticisms are based on the prevailing views of the 1990s rather than on the views prevailing before then. What was perceived as a practical approach to competition law - the combination of competition law with other developmental policies - was an object of criticism. Moreover, none of these texts engages with the decisions issue by the enforcement authorities before the 1990s, limiting only to state that these regimes were seldom enforced. In this sense, these texts are not empirically grounded, in spite of the fact that they make empirical assessments. In spite of these issues, these views have become common when considering issues about the development of CLRs in this region.[191]

IV. The Local Traditions

In the previous section we commented upon a series of texts that discussed the development of CLRs in Latin America, before and after the 1990s. In this section, we turn to the literature about the CLRs in each of the countries we study - Chile, Colombia and México. Instead of commenting on all or some of the texts that address these regimes, we focus on a few texts related to field dynamics that contributed to shape each of these regimes. In doing so, we also focus our attention to particular periods of time and to particular topics.

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[189] Ibid.
[190] Ibid. Pgs. 2 - 4.
[191] For a recent example, see Umaña, Mario A. Advocacy: Mainstreaming Competition Policy into the Overall Economic Policy and Government Actions in Latin America and the Caribbean. Background paper by the IDB Secretariat, Latin American Competition Forum, Washington: OECD - IDB, 2014.

At the outset we would like to point to some important differences between the literature we review here and the one commented in the previous section besides the rather obvious differences in scope. Firstly, the literature addressing individual CLRs evidences the political issues taking place at the national and international level. In this sense, most of the texts that compose it respond to changes in political perspectives, and imprint these new perspectives unto local competition law analysis. Moreover, most of the texts are written by individuals that are involved in the issues they describe, either as practitioners addressing an aspect of the law related with their own practices (and the situation of their clients), as public officials doing work related to the enforcement authorities, or as consultants addressing issue their clients consider merit attention. Second, this literature is also more empirical than its regional counterpart, for it has considerably more references to actual decisions, laws and other legal materials. It is a highly valuable source of insights about how each of the CLRs we study throughout this dissertation is experienced by the actors that participate in it. Thirdly, while it is a literature that focuses on the institutions of a given State, it can often have an outward, international perspective. It is not uncommon to find texts that, in order to justify a series of policy choices or particular interpretations of legal provisions turn to legal materials from other jurisdictions. For example, references to authors like Robert Bork are common. We believe this is a consequence of the particular trajectories of the authors of these texts; after studying abroad, they rely on foreign sources to justify the institutions or interpretations they prefer. Overall, this body of literature is also less skeptic about the future of the different regimes, although is can be just as critical of the established institutions.

IV.A. Chile: Between the Old and the New Neoliberal Traditions

We begin our analysis with Chile, the only of the countries that we study here that embarked on a neoliberal path before the 1990s. The development of local approaches to this country's regime has been deeply influenced by the political events taking place in it, and in particularly by the neoliberal program developed by the military regime and which led to the adoption of a new CLR in 1973 and a new constitution in 1980.

From the perspective of the development of local approaches to competition law, the texts written between the 1973 coup and the mid 1990s bring forth two different strands of neoliberalism. The differences in approach have not been addressed by the different studies on this regime, for they assume that the original neoliberal outlook of this regime has endured over

time.[192] We argue, instead, that the different pieces of literature issued during the period mentioned above evidence a transition that takes place *within* the neoliberal competition law project.

The period we focus on ranges from the mid 1970s unto the mid 1990s, and during it several important political events took place, including the enactment of *Decreto Ley* 211 of 1973, the adoption of the 1980 constitution, and the return to democracy in 1990. The texts and related events we focus on evidence the consolidation of neoliberalism, but also its change from a concern for protecting markets via legal rules to the attainment of efficient regimes. In this sense, this texts evidence a series of intellectual changes that are taking place within the neoliberal camp as they are reflected upon the particular Chilean context.

The first text we consider here was published two years before the 1973 military coup in the American Journal of Comparative Law and was authored by Dale Furnish, a US law professor.[193] There are several reasons why this text is of interest, including its wealth of details about the enforcement of law 13.305 of 1959 and its references to direct sources, very much in the vein of Eduardo White's. Moreover, we find the text particularly interesting because Furnish noted in 1971 that the enforcement activities were diminishing as a consequence of the mayor changes taking place at the level of economic policy. He concludes soberly that "[b]arring an unlikely turn of events under the present or some future administration, antitrust will never be an important law in Chile, as respects the domestic economy."[194]

Furnish's comments were ominous. The socialist government of Salvador Allende brought competition law enforcement almost to a stand still, but then this field experienced a revival under the military regime. The military coup of 1973 adopted a plan to reverse the economic policies enacted by the previous governments, including the enactment of a new competition law statute, *Decreto Legislativo* 211 of 1973 (hereinafter DL 211). This decree became the cornerstone of Chile's CLR, and its enforcement activities led to texts reflecting on its enforcement. Members of the enforcement authorities wrote most of the texts published in the years that followed the enactment of DL 211 and they are mostly about comments on the case law and the doctrines that were developing. One of these texts, written by Waldo Ortuzar, director of the

[192] Bauer, Michael David. "Chilean Competition Law and Policy: The Extraterritorial Transplantation of American Antitrust Law and Chicago School of Economics in the Chilean Context." *Chicago-Kent Journal of International and Comparative Law* (2011)
[193] Furnish, Dale B. "Chilean Antitrust Law" *19 American Journal of Comparative Law L.* 464 (1971).
[194] Ibid. Pg. 485.

competition law enforcement body, the *Fiscalía Nacional Económica*, is of particular interest because it describes the changes introduced by the DL 211 of 1973 and the decisions resulting from it.[195] This text relies on microeconomic theory to describe issues of competition, but decisively asserts that the goals of its enforcement are the ones defined by the law.[196] In doing so, it does not grant to efficiency considerations the intellectual prowess they received in the competition law literature of other jurisdictions.

Even so, a local neoliberal doctrine was in the making as *fiscal* Ortuzar published his analysis. We refer, in particular to the growing influence that the so-called "Chicago boys" and the *gremialistas* were having in the craft of new policies within the military regime and which led, among other things to the 1980 Constitution. The first group composed by economists from *Universidad Católica* that had participated in a foreign research program organized between this institution and the University of Chicago since in 1956. Among the most visible individuals of this group was Sergio de Castro, an economist who contributed to draft the neoliberal manifesto known as *El Ladrillo* (literally, "The Brick").[197] The second was a group that came to be known as the "gremialistas". It was organized around a catholic-inspired conservative movement led by Jaime Guzmán, who was part of the drafting group of the 1980 Constitution. Although their ideas did not match in all aspects, both groups coincided in the most important agencies of the Chilean State during the military regime and worked together towards the consolidation of what came to be the first neoliberal State in Latin America.[198]

"Think tanks" played a very important role in the making of this local neoliberal doctrine. An example of their activities to such purposes can be found in the record of the activities organized by the *Centro de Estudios Públicos* or CEP. This organisation was established by politicians and academics with ties to other national and international networks related with neoliberalism, including the Mount Pelerin Society. Thanks to their plans, they arranged two visits by Friedrich Hayek to Chile in 1977 and 1981.[199] CEP also arranged the visit to Chile, in 1982 of Ernst Joaquin Mestmäcker, a noted "Ordoliberal" and former director of Germany's competition bureau. During this visit, Mestmäcker participated in a colloquia about competition

[195] See for example Ortuzar Latapiat, Waldo. "La Ley Antimonopolios De Chile: Cuatro Años De Experiencia." *Derecho de la integración: revista jurídica latinoamericana* 11 (1978): 127 - 135
[196] Ibid . Pg. 129.
[197] De Castro, Sergio. *El Ladrillo Bases De La Política Económica Del Gobierno Militar Chileno.* 1992.
[198] Huneeus, Carlos. "Tecnócratas Y Políticos En Un Régimen Autoritario Los "Odeplan Boys" Y Los "Gremialistas" En El Chile De Pinochet." *Revista Ciencia Política* XIX (1998): 125 - 158
[199] Regarding the relationship between the CEP and Hayek, see Caldwell, Bruce, and Leonidas Montes. "Friedrich Hayek and His Visits to Chile." *The Review of Austrian Economics* (2014): 1-49.

law attended among others by *fiscal* Waldo Ortuzar and Jorge Streeter (a well-known competition law professor at the Universidad de Chile). The text of Mestmäcker's intervention was published by CEP and stands todays as an example of the influences on Chilean competition law and constitutional law.[200] During the colloquia Mestmäcker expounded his views about individual freedom and competition law, stating that "[t]he purpose of antitrust laws is the protection of the possibility of free competition. It is impossible to define the content of freedom without destroying it. Freedom is indeterminate by definition. For this reason, it can only be protected through negative rules."[201]

We contend that events taking place in the background, like the consolidation of a neoliberal constitutional regime, as well as special events organized for the benefit of the competition law community, like Mestmäcker's visit, had a profound effect on the way this field of law was conceived by local actors. In particular, it led to an understanding of competition law that, along the lines of the 1980 Constitution, was viewed as a form of administrative punitive law (in Spanish *derecho administrativo sancionatorio*). The reasons for viewing competition law under this light become clearer when considering the disruptive nature of competition law enforcement by a State that is not to be trusted. Since competition law enforcement affects the exercise of property rights and freedom of contract of the parties directly involved, its proceedings should meet high standards, - perhaps analogous to those involved in depriving individuals of their freedom, as in criminal law. This particular view of competition law also found support in the fact that DL 211 had administrative as well as criminal punishments, thus enabling discussions about the adequate canons of interpretation and burdens of proof required for its lawful application. Contemporary discussions about the burden of proof required to ascertain the occurrence of certain practices and the use of criminal law to sanction forbidden anticompetitive practices have their roots in these discussions. A canonical example of the discussions resulting from the criminal law approach to competition law issues can be found in the work of Domingo Valdés, a long-standing professor of competition law at Universidad de Chile. In his book, he states the following:

> It may, perhaps, draw certain attention the use of an expression like "legally protected good" for a body of law that, like Decree Law 211, has been subject to recent modifications leading to the elimination of the criminal provision for monopoly has been

[200] Barros Bourie, Enrique. "Legislación Y Práctica De La Libre Competencia. Un Coloquio Con El Profesor Ernst J. Mestmäcker." *Estudios Públicos* , no. 17 (1985). The colloquium took place in April 1982, but was published three years later.

> withdrawn (…). However, as we will explain below, this is not enough to affirm that Decree Law 211 rejects the use of notions and fundamental guarantees designed originally for the criminal field and that today can be properly extended to the so-called illicit administrative acts. Additionally, we will develop our conception that the difference of degree, and not of nature, that differentiates the criminal from the administrative crime, which will be dealt with in the respective chapter.[202]

If the interpretation of DL 211 through the lens of administrative punitive law is a result of the field dynamics involved in the making of the Chilean State during the last decades, so to are the more recent law and economics approach. The latter of the two is a development that results from the growing importance that economists acquired within the Latin American States, including the Chilean State, a trend that continued during the transition to democracy.[203] In the case of competition law, it is also a consequence of granting access to economists to the public institutions involved in the application of the relevant provisions, as is the case in Chile. The first texts showing this trend date from the early 1990s. Examples of these are a series of texts by the former president of one of the enforcing bodies, Ricardo Paredes, which appeared during the early 1990s. In *"Jurisprudencia De Las Comisiones Antimonopolio En Chile"* Paredes argued that both the legal provisions that make up competition law and their enforcement should be grounded on economic theory. Moreover, the only practices that should be punished are those that diminish social welfare, as assessed from the perspective of economic efficiency. This should lead to cautious, case-by-case analyses of the different acts or agreements prohibited, since most of them can foster competition under some conditions.[204] In doing so, this text marks an important difference with the views expressed by *fiscal* Ortuzar back in 1978; while the *fiscal* uses economic theory to describe issues of competition but frames the goals of law enforcement explicitly in the law, Paredes relies on economic theory as well for setting the goals that enforcement should pursue. This difference is highly significant because it evidences the increasing reliance on economic theory as a normative standard for policy, a development typical of the more recent versions of neoliberalism (see chapter 2).

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[201] Ibid. Pg. 12

[202] Valdés Prieto, Domingo. *Libre Competencia Y Monopolio.* Editorial jurídica de Chile, 2009. Pg. 78. Quotes in the original text. The change referred to is law 19.911 of 2003. (My translation)

[203] See in general Dezalay, Yves, and Bryant G Garth. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States.* University of Chicago Press, 2002.

[204] Paredes, Ricardo. "Jurisprudencia De Las Comisiones Antimonopolio En Chile." *Estudios Públicos*, no. 58 (1994). (Hereinafter *Jurisprudencia*) Pgs. 232 - 233. (Citing Robert Bork's *The Antitrust Paradox*)

Why is there an absence of texts addressing competition law from perspectives different from neoliberalism, as can be found in Mexico? Given the politics of the military regime, the development of State-centered projects would not have been viable given the alignment of academics and practitioners, lawyers and economists, with the political stakeholders during and after the regime.[205] In particular, the effect on legal education and practices was considerable. It strengthened the tendency to continue with traditional ways of legal education and weakened other alternatives based on more sociolegal research.[206] These conditions would explain why there is an almost complete absence of research, based on sociolegal or critical traditions, addressing the Chilean CLR.

IV.B. Colombia: Professors, Litigants and Consultants

Like its Chilean and Mexican counterparts, the literature about Colombia's CLR during the 1990s was a by-product of the changes taking place in this country at the time. It is made of two different approaches or currents. A first current, which has been developed mostly by lawyers, aims to develop particular doctrines regarding how the provisions in the new articles ought to be interpreted. A second current, in turn, framed the adoption of a new statute as part of the government's efforts to overhaul this country's regulatory apparatus.

Against this background, the literature about Colombia's CLR focused on the significance of the changes undergone, and especially on issues related to the application of law 155 of 1959 and *decreto ley* 2153 of 1992. The first of the strands we consider here is arguably the strongest and better established. It has been developed by a more recent generation of "gentleman lawyers" that has taken advantage of these changes to capitalize their knowledge about foreign law.[207] This new generation of lawyers teaches and practices law, but in contrast with previous generations they have a neoliberal approach. Their positions within influential universities like Pontificia Universidad Javeriana (hereinafter PUJ), enabled these lawyers to shape how law students understand what competition law is about. As teachers they provide to their students a sense of the key issues that make this field of law. As practitioners, they litigate

[205] See for law Faivovich, Edmundo Fuenzalida. D*erecho Y Cultura Jurídica En Chile (1974-1999)*. In: Culturas Jurídicas Latinas De Europa Y América En Tiempos De Globalización (2003). Also Ruiz-Tagle, Pablo. *La Intervención Militar De La Facultad De Derecho: Una Historia De Resentimiento Y Cobardía*. Anales de la Universidad de Chile 83 (2013).

[206] Merryman, John Henry. "Law and Development Memoirs I: The Chile Law Program." Am. J. Comp. L. 48 (2000): 481. Also Faivovich, Edmundo Fuenzalida. "Derecho y cultura jurídica en Chile (1974-1999)." In Culturas jurídicas latinas de Europa y América en tiempos de globalización, pp. 195-230. Instituto de Investigaciones Jurídicas, 2003.

before the competition law authority using their academic background to make arguments regarding the adequate interpretation of the law. In the latter scenario they relate with other professionals who were their students or read their texts, and that can typically be working as their counterparts, SIC employees, or counsel to common clients. Their double positioning makes them "brokers" of knowledge and gives them an inordinate capacity to shape how this field is understood.

Alfonso Miranda Londoño stands out as a predominant example. After doing his LL.M. in Cornell Law School, Miranda returned to Colombia and started the *Centro de Estudios de Derecho de la Competencia* (CEDEC), a center for the study of competition law at PUJ in 1995.[208] By then Miranda had already published a few articles in Colombian journals, including an article on the general features of US antitrust law in Spanish.[209] Since then Miranda has argued for the use of foreign doctrines for the understanding of Colombia's CLR. For example, in various occasions he has argued in different articles that the "Rule of Reason" and the *per se* rule are applicable to the legal provisions that prohibit anticompetitive conducts in Colombia.[210] His argument is that the open-ended prohibitions established in articles 1 of law 155 of 1959 and 46 of DL 2153 should be interpreted according to the "Rule of Reason", in order to accommodate for an effects-based approach that takes into consideration the market power of the investigated parties. In turn, the *per se* rule is applicable to all the other provisions that are not open ended because they establish with precision the reach of their prohibition.[211] In another article, Miranda provides an overview of the basic economic issues involved in the protection of competition, linking explicitly economic ideas, legal provisions and institutional arrangements.[212] While the articles authored by Miranda and by the other members of the PUJ "school" are perhaps the ones most interested in the history of competition law, they nonetheless lack evidence to support

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[207] On "gentleman" lawyers, see Dezalay & Garth, Op.cit. Pgs. 17 - 18.
[208] See http://centrocedec.org/20-anos/
[209] Miranda Londoño, Alfonso "Anotaciones sobre el derecho antimonopolístico en los Estados Unidos de Norteamérica" *Revista de Derecho Privado*, Vol. 11 (1992). Pg. 131.
[210] See for example Miranda Londoño, Alfonso. "El Regimen General De La Libre Competencia Características Principales." In *Segundo Congreso Iberoamericano De Derecho Empresarial*. 1997. Also Miranda Londoño, Alfonso. "Origen Y Evolución Del Derecho De La Competencia En Colombia." *Revista Derecho Competencia* 6, no. 6 (2011): 65-148. All references are to this text.
[211] Ibid. Pgs. 83 - 97.
[212] See Miranda Londoño, Alfonso, and Juan David Gutierrez-Rodriguez. "Fundamentos Económicos Del Derecho De La Competencia: Los Beneficios Del Monopolio Vs. Los Beneficios De La Competencia." *Rev. Derecho Competencia, Bogotá (Colombia) vol* 2 (2006): 269-400

their claims about this regime before the 1990s.[213] In doing so, this strand has contributed to the myth that competition law enforcement began in the 1990s.

One of the particularities about the literature on competition law in Colombia is the relative high number of articles addressing the application of competition law rules to the agricultural sector. This is most likely a result of these lawyers reflecting upon their own legal practice and the cases they participate in. One of the more prominent authors from the PUJ, Juan David Gutierrez, has published several texts in which he addresses cartels and other restrictive practices with an eye on the agricultural sector.[214] On the same issue, there is also a notable text by María Clara Lozano and Ricardo Arguello.[215] While not theoretical in outlook, these texts are particularly interesting for appreciating how Colombian practitioners and academics understand these issues.

Until recently, competition law issues were almost exclusively a topic developed by lawyers. Economists have developed a second current, which has been historically less strong. It views the development of competition law as a product of the 1990s and is mostly about explaining the importance of having a CLR for a well-functioning economy. Very much like its international counterpart, this current characterizes the pre 1990s competition law practice as non-existent and the regulation of the time as highly cumbersome and problematic. The legal reforms of the 1990s, in turn, evidence an interest in competition and economic efficiency. An example of this strand is the article about competition and regulation written by the former Minister of Finance during the Gaviria Administration, Rudolph Hommes.[216] This author argues that the absence of a strong CLR in Colombia can be explained by looking at the political economy underlying the development of regulation in this country. Firstly, the populist movements that would support competition law have not taken roots in Colombia, and the other political forces that could do so rely on business associations and conglomerates for their

[213] See for example Piedrahíta, Carlos Andrés Uribe, and Fernando Castillo Cadena. "El Otorgamiento De Garantías En El Derecho De La Libre Competencia (un Análisis Jurídico Y Económico)" *Vniversitas,* no. 110 (2005): 401 - 476

[214] See for example Gutiérrez-Rodríguez, Juan David. "Tacit Collusion: Theory and Case Law in Argentina, Brazil, Chile, Colombia and Panama (1985-2008)." *Rev. Derecho Competencia. Bogotá (Colombia)* 5, no. 5 (2009): 307-497. Also "Agricultural Exceptions to Competition Law." *Rev. Derecho Competencia. Bogotá (Colombia)* 6, no. 6 (2010): 173-287. Finally, "Competition Law Goals in Agricultural Markets: A Latin American Perspective." In *The Goals of Competition Law.* Edited by Daniel Zimmer. Edward Elgar, 2012.

[215] Arguello, Ricardo, and Maria Clara Lozano. "The Agricultural Sector and Competition Policy in Colombia." In *Competition Law and Policy in Latin America.* Edited by Eleanor M. Fox and D. Daniel Sokol. Hart, 2009

[216] Hommes, Rudolph. "Regulation and Deregulation in Colombia Much Ado Nothing?" *Desarrollo y Sociedad*, no. 40 (1997): 124 - 184.

electoral survival.[217] Second, Hommes argues that an even more important reason has been the support of industrialization, which is supposed to be at odds with competition.[218] Thirdly, and this is the reason he details more, the historical evolution of business in Colombia has not created a demand of this kind of regimes. The major Colombian enterprises developed as business conglomerates in order to cope with the governmental regulation as well as to take advantage of the opportunities it entailed. As a consequence, there has been historically little appeal for policies that aim to foster competition.[219] However, he argues, the reforms of the Gaviria administration grant the State with the tools to address anticompetitive practices, if there is the political will for doing so.[220]

It is important to note that Hommes does not refer at all to the first CLR, established in decree 2061 of 1955, nor to the decisions issued by the competition law enforcers before the 1990s. This view is not supported by any empirically based study of the decisions found in the national repositories. Instead of offering any support of this sort, he offers a series of reasons for considering that such enforcement was unlikely, and then proceeds to argue for the importance that granting political support to competition law enforcement. His position as a former cabinet member, directly involved in the changes of the 1990s, grants his views with considerable authority. Perhaps this explains why the idea that there has been little competition law enforcement in Colombia remains such a well-established myth. (In the following chapter we describe briefly a series of decisions issued between 1962 and 1968 that challenge this view.) Later analysis by lawyers and economists will continue this trend.[221] It is only recently that economists have devoted to analyzing particular decisions issued by the enforcer.[222]

IV.C. Mexico: Neoliberal Design, Illiberal Performance

The literature about the development of competition law in Mexico has important similarities with the literatures just discussed concerning Chile and Colombia. Firstly, it is a literature that reflects the regulatory changes that took place during the 1990s, including the

[217] Ibid. Pgs. 135 - 136.
[218] Ibid. Pg. 138.
[219] Ibid. Pgs. 138 - 157.
[220] Ibid. Pgs. 168 - 169.
[221] See for example Cortázar Mora, Javier. "Colombian Competition Law Regime." Institute De Droit De La Concurrence, 2012. Also, by economists, see Bardey, David, Alejandro Becerra, and Pilar Cabrera. "Análisis Económica de la Normativa de Libre Competencia en Colombia", *Cuadernos Fedesarollo* 44, Fedesarrollo, 2013. Pgs. 1 - 2 , 17 - 20.
[222] See for example Harbord, David, and Álvaro Riascos. "The BAT/Protabaco Merger: Unilateral Effects, Tacit Collusion and Multimarket Oligopoly." *European Competition Law Review* 4 (2011)

adoption of a new CLR. Second, it is also a body of literature that evidences a close proximity between practice and academia. However, there also are texts developed by academics and other individuals without direct ties to the events they describe, both local and foreign. Below we will focus on two particular currents of literature. The first is made of texts written by actors involved in the making of the CLR of the 1990s, and focus on both their use of foreign categories and sources to highlight their sophistication. The second, in turn, details how the CLR was incapable of dealing with sheer monopoly power. The contrast between these two currents - the first one is hopeful, while the other is critical and gives the impression of a "failed State" - evidences the parallel between the literature about competition law in this country and the body of literature about competition law in Latin America.

The first current we consider is composed mostly of texts written by lawyers and economists that participated in the drafting of Mexico's competition law statute of 1992, the *Ley Federal de Competencia Económica* (hereinafter LFCE) or that have close professional ties with the enforcement agency. The drafters of this law were officials working for the Pedro Salinas de Gortari government, which negotiated the participation of Mexico in the North America Free Trade Agreement, liberalized regulation and privatized several state-owned enterprises, including *Telmex*. It is against this background that the new law was being crafted. A very interesting article describing the origins of this law, written by Gabriel Castañeda, reveals the interest of the drafting team in making a competition law bill that incorporated the analysis developed by other jurisdictions and international organizations. In particular, he notes, the intellectual thrust of the LFCE was based on Robert Bork's *The Antitrust Paradox*, and the distinction it establishes between absolute monopolistic practices (including most horizontal agreements) and relative monopolistic practices (like vertical agreements and unilateral conducts) was based on texts by Thomas Sullivan and F.M. Scherer.[223] These efforts to come up with what looked like a sophisticated competition law statute paid off, as they were considered as positive by international observers.[224]

However, it is important to note that not all the literature addressing the enactment of the new law present it in positive terms, for there are a few texts that cast a shadow over the politics involved in the adoption of the law in the first place. For example, in a 1997 article James

[223] Castañeda Gallardo, Gabriel. "Orígenes, Avances Y Dificultades De La Política De Competencia Económica En México." In *El Nuevo Milenio Mexicano.* Edited by Pascual García Alba Iduñate, Lucino Gutierrez Herrera and Gabriela Torres Ramirez. 2004. Pgs. 341 - 342.
[224] Newberg, Joshua A. "Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust." *Colum. J. Transnat'l L.* 31 (1993): 587 - 609. Pg. 609.

Crawford argues that the enactment of this law was a way of balancing a series of conflicting political interests that were resulting from Mexico's accelerated liberalization process.[225] On one hand, the Mexican economy needed foreign investment and the dynamism resulting from having free trade, but on the other it also needed to protect its national industry from the competition that their US counterparts could impose. The LFCE is part of such balancing process, Crawford argues, because by forbidding a series of practices considered anticompetitive it is providing a space for local industries to defend their grounds with regard to foreign firms, including those that could be important competitors.[226] From a different perspective, Manuel Palma Rangel argued in a 2007 text that the adoption of the LFCE should be understood in terms of the local political dynamics. The enactment of this law took place in a deteriorated political context for the ruling party, the *Partido Revolucionario Institucional*; the reforms previous to the law favored local Mexican interests, and the LFCE's own design prevented its application to the outcomes of these reforms. Hence, while the law is about protecting competition, its design precludes its application to sources of anticompetitive conduct resulting from close ties between politicians and industry members.[227]

The second current that we consider here addresses the consequences resulting from the capacity of the LFCE to address monopoly power in light of the proceedings conducted against *Telmex*. As we argue in Chapter 7, this strand develops the observations made by some of the authors mentioned before. It is made of texts that focus on the interaction between the CLR and the telecommunications regime, especially in the efforts of the former to tackle the behavior of this company. In particular, these texts comment upon the privatization of *Telmex*, its subsequent behavior as a monopolist, and the consequences this has produced for consumers, the market and the CLR. They reinforce the idea that crony practices dictate policy outcomes and that the fields of law that could address the latter, like competition law, are unable to do so.[228] In doing so, this current reinforces the negative views about policy that are common to the literature on Latin American law in general.

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[225] Crawford, James E. "The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance.?" *Indiana Journal of Global Legal Studies* (1997): 407-433.
[226] Ibig. Pgs. 427 - 431.
[227] Palma Rangel, Manuel. "Reforma Microeconómica Y Arreglos Institucionales: La Política De Competencia Económica En México." *Revista mexicana de sociología* 69, no. 1 (2007): 39-68. Pgs. 54 - 62.
[228] For example Nagle, Luz Estella Ortiz. "Antitrust in the International Telecommunications Sector: The United States Challenges Mexico's Telmex Monopoly." *The University of Miami Inter-American Law Review* (2002): 183-250. Fox, Eleanor M. "The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition." *Journal of International Economic Law* 9, no. 2 (2006): 271-292. Manzetti, Luigi. "Are You Being Served-The Consequences of Telmex Monopolistics Privatization." *Law & Bus. Rev. Am.* 16 (2010): 781. Aceves, Maria Fernanda. "Slim's Playground: Telmex's Monopoly of the Telecommunications Industry in Mexico." *Law & Bus. Rev. Am.* 19 (2013): 217.

When considered together, the literature about competition law that results from Chile, Colombia and Mexico (especially during the 1990s) shows the extent to which it is understood as a local law regime that is shaped by local and international actors. We discuss particular aspects of the processes involved in the following chapters. As to what the literature shows, the adoption of CLRs entailed a promise of modernization that was only partially fulfilled in the best of cases. This promise, especially during the 1990s, came hand-in-hand with new forms of knowledge and discourse, while the factors that prevent its attainment are typically characterized as local - even indigenous - issues like the political system. In doing so, the literature about competition law in the different States here considered parallels the arguments and perspectives of the body of literature about the development of CLRs from a more regional perspective discussed in section III.

V. Conclusions

Throughout this chapter we have commented upon different texts dealing with competition law in Latin America, both at a regional and local (State-based) level. We discussed a few texts addressing competition law before the 1990s, and then focused on those that were published after that. We focused on texts that addressed key issues in each of the jurisdictions we are studying - Chile, Colombia and Mexico - in order to emphasize the connections between the literature and the changes taking place.

A particular set of texts that we have not mentioned, but that are becoming increasingly more important, are the studies of the regimes produced by organizations like UNCTAD or the OECD. The history of these reviews dates to before the 1990s, as the text by Eduardo White for UNCTAD evidences. We will argue in chapter 8 that the more recent versions of these texts, and especially those of the OECD, are developed as part of the strategies that these organizations, and others, have to bring about the convergence of the different Latin American CLRs. We contend that these texts "bridge" local understandings about competition law and the more international views about what competition law should be about in this region. As they become references for both local and international actors, these reviews and reports play an important role in shaping future understandings about competition law in Latin America. We will comment upon these texts in chapter 8.

We wish to highlight that the assessments found in these texts provide considerable support for the reforms that have taken place since the 1990s, and they do so by characterizing competition law practices before then as a non-existent, sporadic or counterproductive. There are texts that, although second-hand sources, provide the elements to challenge such an interpretation of the past. There are also first-hand sources that do so directly (see chapter 4). But, even in the absence of both, it is remarkable that the literature on competition law in Latin America has devoted so little attention and efforts to study competition law enforcement before the 1990s. Except for the texts by White, Furnish and Ortuzar, there is no text based on rigorous archival research that provides any basis for making claims about the levels, adequacy or effects of enforcement in Latin America. Hence, all that we have left are stylized accounts of these CLRs that are of little help for understanding this field of law. Moreover, in doing so, this body of literature reinforces the more negative aspects that typically characterize the body of literature about Latin American law in general.[229]

The shortcomings of the literature about competition law are so serious that it gives place to important examinations about the origins and developments of this field of law. If Latin American governments were against competition between the 1930s and the 1990s, why did they adopt the first competition law regimes during this period? Why did they enforce them? If a State like Mexico was so imbued in economic dirigisme since the early 20th century, how do we explain the adoption a constitutional provision ordering the protection of competition and banning monopolies in 1917? How do we reconcile the different neoliberal views about competition in Chile after the military coup of 1973? We will offer some tentative answers to these and other, related questions in the following chapters of this dissertation.

[229] See section II of this chapter, supra.

4. Competition Law in Latin America 1910s - 1980s

I. Introduction

An important question left unanswered left by the existing literature is why the examined jurisdictions adopted competition law regimes (hereinafter CLRs) in periods of time in which allegedly the promotion of competitive markets did not constitute a priority for their governments. In the previous chapter we argued that this body of literature is unclear as to how it grounds its claims regarding the lack of enforcement of such regimes. Not only the different texts reviewed fail to cite any source to sustain such claim, they also fail to specify what level of enforcement counts as adequate. Identifying these shortcomings opens the possibility of suggesting a different history of the origins and development of competition law in Latin America.

The purpose of this chapter is to address these shortcomings by providing a new account of the first CLRs in Latin America. We argue that the adoption of the first CLRs followed from ideas related with granting the State more tools to address economic phenomenon. Underlying this process were changes in the constitutional politics of the countries just mentioned. The pressures exerted by new radical ideas, industrialization and the consolidation of urban labor, increasingly challenged 19th century constitutions. The result in Chile and Colombia were changes to the constitutional protection to property rights and an expansion of the State's regulatory capacity. In turn, the first CLRs followed from these changes, as they complemented price-control regulations and other economic policies that granted to the State a considerable control over the economy. In the case of México, the result was the 1917 Constitution, the first of its kind establishing a social-oriented and developmental approach to competition law. Hence, the shortcomings noted before can be addressed by considering the enactment of the first CLRs in light of the constitutional changes taking place during the 20th century.

This chapter is divided in the following sections: Section II explains the transformation of Latin American constitutions that enabled the adoption of CLRs. Although this process was different in Chile, Colombia and México, it led to similar outcomes, namely granting the State more powers to regulate economic issues. Section III describes the conditions that led to the enactment, the main features and changes over time of the first CLRs in Chile, Colombia and México. Finally, section IV presents our conclusions.

II. The Constitutional Foundations of Competition Law In Latin America

Our analysis begins with a brief overview of constitutional history and theory in Latin America. The independence movement that swept through Latin America during the first decades of the 19th century uprooted the traditional roots of colonial political power in the newly formed States. In the absence of a strong monarchy supported by the Catholic Church, local elites were confronted with the need to fill a legitimacy gap by building governmental institutions based on whatever sources of legitimacy they could muster. This proved to be extremely difficult. After all, the liberal ideas that fostered the independence movement in the first place – individual liberty, equality, and democracy – pushed against consolidated structures (political and economic) that were privilege-based and hierarchical.[230]

Given the pre-eminence of conservative and liberal forces during the 19th century, it should not be surprising that the above mentioned constitutions were, in general, conservative constitutions with liberal undertones. First, they include similar provisions protecting civil and especially property rights preventing their amendment by future laws, preventing their expropriation without compensation.[231] They also privileged Catholicism over other religious beliefs, establish a strong executive branch among other branches of power, and condition the extension political rights to issues of education and wealth.[232] This is particularly so for the Chilean constitution of 1833, which remained in place until 1925, and that embodied the conservative values of the dominant conservative factions but was amended by liberal governments between the 1860s and the 1880s.[233] It is also the case of the 1886 Colombian constitution, which was adopted as a conservative solution to the political disarray prompted by the liberal and federalist constitution of 1863.[234] Even so, it was a constitution that was also "liberalized" during the 20th century until it was replaced in 1991. However, it was not strictly the case of the 1857 Mexican constitution, which was originally a liberal compact inspired in the 1854 *Plan de Ayutla* and the program of *La Reforma,* and which lasted until 1917. Even so, this

[230] Williamson, Edwin. *The Penguin History of Latin America.* Penguin UK, 2003.Pgs. 233 – 234.
[231] See for example Chile, art. 12, num 5. Colombia, art. 31, México, Art. 27.
[232] On the content of the first constitutions and on Latin American constitutional thought, see Gargarella, Roberto. *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution.* Oxford University Press, 2013. Chapters 2 & 3.
[233] Williamson, Op.cit. Pgs. 255 - 258.
[234] See Bushnell, David. *The Making of Modern Colombia: A Nation in Spite of Itself.* Univ of California Press, 1993. Chapter 6.

constitution shared with its Chilean and Colombian counterparts both the enshrinement of property rights and the establishment of a strong executive branch.[235]

The constitutionalism of the 19th century came under considerable pressure as different economic, social and political factors pushed for change at various levels of governance. As industrialization-related processes and immigration from Europe continued to take place during the early 20th century, the size of the urban population grew considerably. As a result, the political views and interests of this burgeoning population, including their demands for more rights and better working conditions, became politically more salient. The increasing political importance of this population and of its demands also contributed to ascendance of leftist political parties as well as to the inclination to the left of liberal parties. This change in the intellectual and political landscape brought the demise of the traditional conservative and liberal views that prevailed during the 19th century.[236] As a result, these new ideas, as well as prevailing social conflicts, exerted a considerable pressure over the core tenets underlying the 19th century constitutions and the economic order they sustained.[237]

The result of this pressure was the adoption of new constitutional theories that had a more "social" component. This "social" component meant reconsidering the social and economic conditions that had to be assured in order to achieve the purposes established under the constitutional order.[238] However, the demise of 19th century constitutionalism did not imply anything like a new constitutional beginning. The new constitutional "mix" extended some institutional arrangements already in place and altered others. Among the former is the establishment of a strong executive branch, characterized by having a strong president who could enact and enforce legal rules, sometimes by overriding the acts of legislative bodies. Among the latter is the redefinition of the constitutional protection extended to civil and especially property rights, and which enabled the State to intervene further more on economic processes. Although the relationship between presidentialism and the constitutional protection of private property is complex, we assert that the enlargement of the latter could not take place without the former. This is so because as long as property rights could not be amended, regulatory processes would be subject to burdensome processes relating to the compensation property owners expected to receive from their property. From this perspective, a staunch

[235] Williamson, Op.cit. Pg. 265.
[236] Ibid. Pgs. 316 – 319
[237] Ibid. Pgs. 331 – 332.
[238] Gargarella, Op.cit. Chapter 6.

protection of property rights would prevent the State from accomplishing its mandates and presidents from following through with their policies. Hence, only after it became politically acceptable to rearrange or restructure property rights could the State embark in a process of regulatory development that came across as constitutionally legitimate.

An important change in the theory of the constitutional protection of property rights came from European private law theory. The scholarship of authors like León Duguit became influential in Latin America during the first half of the 20th century. Duguit himself presented in Argentina his work *General Transformations of Private Law Since the Code Napoléon* in 1911. It was during the presentations of he famously stated that "property is not a right; it is a social function."[239] Duguit's work was part of a wider current of anti-formalist and solidarity-oriented legal thought that revolted against 19th century legal projects, and especially, against the individualism embedded in the 1804 French Civil Code. This movement saw in law an instrument for social transformation and a manifestation of the culture in which it emerged, as opposed to Universalist or ahistorical theories of law.[240] While this changes in legal thought originated in Europe (and in to similar extent in the US), they acquired a particular significance in Latin America that they didn't have in their original context.[241] Duguit carefully distinguished his work from socialist theories of law, for when he claimed that property rights were a "social function" he argued he was providing framework for understanding the social transformations he witnessed.[242] However, his theory was used in Chile and in Colombia for tempering with the constitutional protection extended to civil rights and then became a justification for the implementation of large-scale reforms regarding the use of land and industrial development.[243]

A consequence of adhering to Duguit's arguments is viewing private property rights as comprising a set of relations originating in social practices. Their "social function" could be modified in different ways and in accordance with the prevailing views and needs of the time. In turn, Duguit's ideas became amalgamated with other strands of public law theory that became

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[239] Duguit, Léon. *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon.* (2d ed. 1920) Pg. 21. Quoted in: Mirow, Matthew C. "Social-Obligation Norm of Property: Duguit, Hayem, and Others, the." *Fla. J. Int'l L.* 22 (2010): 191. (Hereinafter The Social-Obligation Norm of Property)

[240] See Kennedy, Duncan. "Three Globalizations of Law and Legal Thought: 1850 - 2000." In *The New Law and Economic Development: A Critical Appraisal.* Edited by David M Trubek and Alvaro Santos. Cambridge University Press, 2006.

[241] An excellent explanation of this phenomenon can be found in López Medina, Diego Eduardo. *Teoría Impura Del Derecho. La Transformación De La Cultura Jurídica Latinoamericana*. Universidad de los Andes, Legis & Universidad Nacional de Colombia (2004)

[242] Mirow, Origins, Op.cit. Pg. 1192.

[243] Regarding Chile, see Mirow, Ibid. Regarding Colombia, see Bonilla, Op.cit.

prevalent at the time, like corporativism.[244] During the late 1920s and after, corporativism became the dominant paradigm of State organization in Europe, and was briefly developed in the US.[245] Under corporativism, the State should aspire to become the embodiment of national sentiment. To that extent, it should incorporate different social groups – the military, the Catholic Church, the industrial sector, and labor – into its structure with the purpose of conciliating the conflicts that took place between them. Moreover, the State could direct the different economic processes in ways that would contribute to the general welfare and conciliate the ensuing conflicts that such processes bring about.[246] As Howard Wiarda points out, there is certain affinity between the "social function" theory of property rights and corporativism (as a theory of government).[247] Because the State embodies the interest of the whole society, it can confiscate or limit severely the exercise of an individual's property rights in order to tend the common good. In doing so, the State acts as an arbiter between competing claims to resources posited by actors with different interest, in order to accommodate and prevent conflicts.[248]

The combination of new property rights theories and corporativism was complemented with development economics, that is, economic theories and policies conceived to bring about economic development. As mentioned in chapter 2, in the 1930s Latin American States developed a regulatory apparatus with the purpose of protecting national industries, based on raising import tariffs and subsidies along corporativist lines. By the 1950s this trend was further accentuated by the different strands of development theories developed by authors like Walt W. Rostow, Albert Hirschman, Raul Prebisch or Fernando Henrique Cardoso. The adoption of policies combining the substitution of imports with local products, the fostering of exports, and the devaluation of local currencies became common strategies in the quest for development. The

[244] For our purposes, we will use Philippe Schmitter's definition of corporativism: "Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within the irrespective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and support." (footnote omitted) See Schmitter, Philippe C. *Still the Century of Corporatism?* 36 Rev. of Pol. 85, 93 – 94 (1974).

[245] See Whitman, James Q., *Of Corporatism, Fascism and the First New Deal*. 39 Am. J. Comp. L. 747 (1991)

[246] See on this regard Malloy, James M. "Authoritarianism and Corporatism in Latin America: The Modal Pattern." In *Authoritarianism and Corporatism in Latin America.* Edited by James M Malloy. University of Pitsburg Press, 1976. Pg. 11.

[247] Corporativism can also be a political theory (and not a fact, as Schmitter describes it) according to which the government should incorporate and accommodate different conflicting interest present in society in order to avert unnecessary conflict. See Wiarda, Howard J. "Law and Political Development in Latin America: Toward a Framework for Analysis." *The American Journal of Comparative Law* (1971): 434-463. 446 – 447. (1971)

[248] Wiarda, Ibid. Pg. 446. It seems, however, the in making this connection Wiarda is also assuming that Duguit had an agenda for social change when he presented his concept of social function of property, rather than merely describing the changes of the exercise of these rights.

Latin American State thus became a corporativist "developmental state". The enactment of the first CLRs was a result of these ideas and developments.

II.A. Chile

When compared to its 1833 predecessor, the 1925 Constitution brought important changes regarding the protection of civil and in particular property rights, but continued with the tradition of establishing a relatively strong executive branch. Regarding the first of these traits, section 10 of article 10 of the 1925 constitution began by stating that all forms of property rights were inviolable. Then, this provision established that no individual shall be deprived of their property rights without due process of law, or unless it is required for achieving a public purpose as defined by the law, case in which a the owner is entitled to compensation.[249] Following this it, it states that the exercise of property rights are subject to "public utility" limitations required for maintaining and achieving social order, and therefore the law may impose restrictions "in favor of the interests of the State, the health of the citizens and the public well-being".[250]

The notion of subduing private property to "public utility" resulted from the discussions that took place in the 1925 constitutional assembly, led by President Alessandri. Within the assembly, members of the Radical Party argued that property rights could not be absolute, and that they should fulfill a "social function", while members of the liberal-moderate and conservative parties defended notions of property rights that were closer to the liberal tradition and of an individualist inclination.[251] As the discussions ensued, President Alessandri proposed a draft of article 10 that appeased the contending parties. While the liberal formulation of property rights was maintained, the idea of limiting them in the name of "public utility" was also included because doing so was a way of reflecting how the Chilean constitutional regime was keeping up with the social changes that were taking place at the time. Underlying this change, moreover, was the intellectual influence of Leon Duguit, whom Alessandri quoted often while explaining the text he proposed.[252]

As mentioned before, this constitution maintained the figure of a strong executive branch led by a president. The function of the president was given wide discretion to issue the

[249] Constitución Política De La República De Chile (1925). Art. 10
[250] Ibid.
[251] Mirow, Mathew C. "Origins of the Social Function of Property in Chile." *Fordham L. Rev.* 80 (2011): 1183. (Hereinafter "Origins"). Pgs. 1191 - 1196
[252] Ibid. Pgs. 1200 - 1202.

decrees and ordinances necessaries for the enforcement of the laws enacted by Congress.[253] The constitution also enabled the president to issue special decrees during episodes of internal commotion and the declaration of the state of siege.[254] However, these functions were quite limited in the original context, and were amended later on. The elections for president were also direct and universal, and his term in office was established for six years without the possibility of immediate re-election.[255]

Several waves of constitutional amendments increased the prerogatives of the president and granted more powers to the State to regulate the economy. The first wave of amendments came with the *Ley De Reforma Constitucional N° 7.727* in 1943. This amendment established that laws regarding the political and administrative organization of the State and the creation of new public utilities (among other topics) were all matters of presidential discretion.[256] It is within this framework that Chile's first competition law regime was adopted. Further waves of constitutional amendments continued in this direction. The second wave, taking place during the 1960s, enabled the State's control over assets used in the production of goods and services and to determine the conditions under which the expropriation of private property merited compensation.[257] The third wave of amendments, which took place during the 1970s, addressed other provisions of the 1925 Constitution. The 1970 amendment enabled congress to delegate law-making powers to the president addressing various issues, extended the protection of some constitutional rights and nationalized important aspects of the mining industry.[258] Overall, these reforms evidence the increasing role that the State played in the organization of economic life in Chile and are a particular example of the consolidation of the State-centered project. Even so, as we commented before, the 1973 military coup halted dramatically the consolidation of the State-centered project, and sought to counter it with the adoption of neoliberal political and economic foundations.

[253] Constitución Política de la República de Chile (1925). Art. 72, num 2.
[254] Ibid. Art. 72 num. 17.
[255] Ibid, Arts. 62 & 63.
[256] Chile. Ley De Reforma Constitucional N° 7.727 D. O. 23.11 (1943). (Amending article 45 of the constitution)
[257] See Chile, Ley De Reforma Constitucional N° 15.295 D. O. 08.10 (1963). (Amending article 10, num. 10 of the constitution) and Ley De Reforma Constitucional N° 16.615 D. O. 20.01. (1967). (Amending article 10, num 10 of the constitution).
[258] See Chile. Ley De Reforma Constitucional N° 17.284 D. O. 23.01 (1970). (Amending article 44 num. 15 among others of the constitution.) Ley De Reforma Constitucional N° 17.398 D. O. 09.01 (1971), and Chile. Ley De Reforma Constitucional N° 17.450 D. O. 16.07 (1971).

II.B. Colombia

The 1886 Colombian Constitution said little about the intervention of the State in economic affairs, much less about regulation and competition. Like its Chilean counterpart, it entrusted the president with the capacity to issue decrees that enabled the enforcement of the laws passed by congress,[259] and extended a special protection to civil and in particular property rights. Regarding the latter, article 31 states that civil rights could not be disregarded or amended by future laws. However, when a law enacted for the public benefit clashes with civil rights, private interest will be subdued to the public interest. Any expropriation resulting from the enforcement of a law enacted for the public interest entitles the affected parties to compensation. In turn, article 32 stated the conditions for the compensation had to fulfill the requirements established in the law.[260]

The trend to ascertain the "social function" of property rights and to entrust the government with wider powers to address economic issues began in 1936. After the liberal party returned to power in 1934, president Alfonso López hastened to amend the constitution in order to establish the foundations for future economic reforms. The core argument for this amendment was the idea that the constitutional protection awarded to property was too individualistic, and the limited nature of the State prevented the achievement of social reforms.[261] Three aspects of the 1936 amendment are quite noticeable. First, the new text of article 16 of the constitution stated that the Colombian State and its authorities are instituted for protecting the lives and property of the residents in the country, as well as for assuring the compliance of the social duties of both the State and the individuals. This article was meant to introduce both the concept of social solidarity – individuals have duties as well as rights with each other – and to explicitly state that the State has social duties towards the welfare of its citizens.[262] Second, the new text of article 31 introduced the notion that private property has a "social function" that brings about duties, and that while full compensation for expropriation was the general rule, congress could decide in some particular cases not to award it. Notably, this article also contains the general protective clause of the 1886 constitution, according to which civil rights cannot be

[259] Colombia. Constitución Política de Colombia (1886). Art. 120, num. 3.
[260] Ibid. Arts. 31 & 32.
[261] Bonilla, Daniel. *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*. 80 Fordham L. Rev. 1135 (2011).
[262] Chahín Lizcano, Guillermo. "La Cuestión Económica En El Constitucionalismo Colombiano." *Revista de la Universidad Industrial de Santander: Humanidades* 22 (1993).Pg. 90.

modified by laws enacted after their constitution.[263] Thirdly, the new text of article 32 established that the State may intervene through laws ("*por medio de leyes*") in the activities undergone by public and private industries with the purpose of rationalize the production, distribution and consumption of riches, and extend to workers the fair protection that they are entitled to.[264] The Colombian congress promulgated the proposed amendment in 1936, and it became the cornerstone of the reforms that President López began to implement.[265]

Later amendments to the Constitution continued to expand the government's capacity to intervene in economic processes. Article 4 of the 1945 constitutional amendment expanded the content of article 32. The new text stated that economic intervention had to follow from a mandate established in the law, thus enabling both congress to enact general laws and administrative bodies to fill in the details.[266] In turn, the new text of article 69 allowed the legislative branch to delegate its powers to the president when special circumstances arose or became convenient under certain conditions, thus leading to a Colombian version of the *decretos con fuerza de ley.*[267] The increasing trend towards granting further powers to the government continued with the constitutional amendment of 1968.

Two particular aspects of this 1945 amendment are noteworthy. First, it amended once more the content of article 32. Its new text stated that freedom of enterprise and economic activity were protected within the limits of the common good, and that the general direction of the economic activity was reserved for the State. It also stated that it could intervene according to the law in the production and distribution of goods and services (private and public) in order to rationalize the economy and achieve an integral development.[268] Second, the amendment also relaxed the conditions in which the president could issue *decretos con fuerza de ley* to some extent by not mentioning that these decrees could not address particular issues or topics reserved only for the law.[269] Overall, these reforms showed that the Colombian State had changed its constitutional profile and began to resemble "developmental state" increasingly more.

[263] Colombia, Acto Legislativo 01 de 1936. Article 10.
[264] Ibid. Article 11.
[265] Bonilla, Op.cit.
[266] Colombia. Acto Legislativo 01 de 1945. Article 4.
[267] Ibid. Article 7, num. 12.
[268] Colombia. Acto Legislativo 01 de 1968. Articulo 6.

III.C. Mexico: The Public Nature of Private Property

Contrary to its counterparts in Chile and Colombia, Mexican constitutional tradition addressed competition law issues explicitly. However, this tradition would become infused by populist ideas during the process that led to the adoption of the 1917 Constitution. The result was a constitution that addressed competition law issues from a new perspective based upon claims of social justice and economic development.

The road to the 1917 Constitution was the result of a combination of armed struggles and political negotiations between different actors. The Constitution itself was the result of a revolt led mostly by unsatisfied regional elites, peasants and indigenous groups against the regime of *caudillo* Porfirio Díaz. However, what started as a revolt against Diaz became by 1914 a civil war between the central regions, including Mexico City, and the northern and southern regions. Victoriano Carranza emerged as the leader in 1916 and called that same year for a constitutional assembly in the city of Queretaro. This convention led to the drafting and later enactment of the 1917 Constitution. However, this did not put an end to the struggle. Carranza was ousted as his plans to rig the 1920 elections were revealed. Alvaro Obregón was elected president in 1920 and chose to rule under the mandates of the 1917 Constitution.[270]

The process of drafting the constitutional text evidenced the tensions between the interests of the rivaling parties that had participated in the revolution. The proposals made by the different revolution leaders evidenced that they had quite different views about the new political organization of the Mexican State. Both the 1911 *Plan de Ayala* and the *Convención de Aguascalientes* of 1914 evidenced the strength of popular sentiments about political and economic power. They served as a background for the discussion that took place in the Queretaro constitutional assembly. The resulting text used the 1857 Constitution as a thematic template and combined, uneasily, the interests of the different actors, notably the interests of disposed peasants, indigenous groups, workers and the landed gentry.[271]

Even though the entire 1917 Constitution can be characterized as democratic and economically progressive, there are two articles that deserve special attention since they are about private property and competition law. They evidence how social issues permeated

[269] Ibid. Art. 43.
[270] Williamson, Op.cit. Pgs. 381 - 390.
[271] Gargarella, Op.cit. Pg. 98 - 102.

constitutional thinking during this time period. The first is article 27, which establishes a very ambitious formula based on a view closely related with that of Duguit's "social function" of private property opening the path for regulation.[272] The second is article 28, which refers explicitly to competition law issues from a related perspective. The "social" element is evidenced not in the inclusion of a competition law provision in the first place - the 1857 Constitution forbade monopolies and *estancos* - but in how it places competition law at the service of social justice considerations. Its first paragraph states the following:

> In the United States of México there shall be no monopolies or *estancos* of any kind, nor tax exemptions nor prohibitions in the name of industrial protection (…) Consequently, the law will severely punish and the authorities will effectively pursue any concentration or hoarding by one or a few hands of essential consumer goods with the purpose of raising prices; any act or procedure that prevents or tends to prevent free competition in the production, industry or commerce, or services to the public, any agreement or combination, of any form, between producers, manufacturers, traders and businessmen of transport or any other service to avoid competition with each other and force consumers to pay inflated prices and, in general, everything that constitutes an undue exclusive advantage for one or more specific persons and at the expense of the general public or a particular social class.

The text of this article remained unchanged until 1982, when by the end of his term president José López Portillo presented to congress an amendment that nationalized the banking system. In that same year, elected president Miguel de la Madrid presented a new amendment, giving to this article a wording closer to the one currently in place, and which includes monopolistic practices along with the prohibition of monopolies. This proposition was enacted as a constitutional provision in 1983. The new wording of the article also established more clearly the conditions under which the State can intervene in the economy and allowed, although with conditions, the awarding of subsidies.[273] However, this amendment did not change the prohibitions established at the beginning of the text nor changed its "social justice" overtones.

[272] México. Constitución Política de los Estados Unidos Mexicanos de 1917 Art. 27. Translated by Gargarella, Op.cit. Pg. 101.

III. The First Competition Law Regimes

III.A. Chile

The history of Chile's first CLR dates back to the government of Carlos Ibañez (1952 - 1958), who was an independent politician that developed a program characterized by its populist overtones. As inflation spiraled upwards during the mid 1950s, his government attempted several plans to curb it without success. In 1955 the government hired the services of a US consulting team, the *misión* Klein-Saks, which had helped Perú overcome similar problems in the late 1940s. Their plans were originally to propose a series of policies that would curb inflation. Their prescriptions, however, became much more extended. The *misión* considered that the root of Chile's spiraling inflation were the government's macroeconomic policies, and so their advices ranged from addressing labor wages to exchange rates, government spending and, notably, competition law.[274]

While some of the prescriptions of the *mission* found political support in a congress dominated by the opposition to the government, the political climate of the late 1950s prevented a more committed adoption the entire reform program. Several factors contributed to the demise of the *misión* before it achieved all its goals. On one hand, the revolts of 1957 and a new spike in inflation let the government to adopt measures in direct contravention to what the *misión* advocated. On the other, the government itself had problems with the congress, where conservative majorities opposed to Ibañez government made it increasingly harder to enact laws in line with the *misión*'s recommendations. The *misión* was quietly dismissed in 1958.[275] Addressing the daunting economic challenges became a highly important task for the government of moderate conservative Jorge Alessandri (Arturo Alessandri's son).

Shortly after being elected, president Alessandri pushed through the Chilean congress a law that contained some of the recommendations issued by the *misión* Klein-Saks, including the

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[273] See Oropeza Gonzáles, Manuel. "Articulo 28." In *Constitución Política Mexicana Comentada.* 3rd ed. UNAM, 1992. Pg. 133

[274] Lüders, Rolf. "La Misión Klein-Saks, Los Chicago Boys Y La Política Económica". No. 411 Documentos de Trabajo. Instituto de Economia. Pontificia Universidad Católica de Chile., 2012.

[275] Edwards, Sebastian. "Establishing Credibility: The Role of Foreign Advisors in Chile's 1955-1958 Stabilization Program." In *The Decline of Latin American Economies: Growth, Institutions, and Crises.* University of Chicago Press, 2007.

adoption of a CLR.[276] In a 1956 letter addressed to the finance minister of the Ibañez government, the director of the *misión* presented several arguments in favor of the adoption of a CLR. Among these were that the anti-inflation policies would have little effect if monopolies could still determine prices, that free competition facilitated the development of new firms and that the rents received by monopolists were unjustifiable.[277] The congressional record of the law echoed this view by asserting that price controls were ineffective because they allowed the less efficient firms to cover for their production prices, which affected negatively the interests of consumers, the "protected class" of these controls.[278] Hence in title V of law 13.305 of 1959 the Alessandri government adopted the advice given by the *misión* on this topic.

Title V of law 13.305 of 1959 contains ten articles. Articles 172 through 174 contain the core substantive provisions, while article 175 establishes the competition law enforcer - the *comisión antimonopolio* - and the remaining articles address procedure issues. Article 172 forbids granting monopolies to private firms, and establishes that State institutions can only administer monopolies if there is a law that explicitly enables them to do so. Article 173 contains a general prohibition and the sanctions that can be imposed for transgressing it, which include fines, imprisonment and the cancellation of forced dissolution of legal entities. It is important to note that the article combines a broad prohibition and a non-taxative list of forbidden conducts.[279]

Article 174 contains a general exception clause to the prohibition just mentioned. It states that the President may allow forbidden acts or contracts to preserve the stability of national firms facing foreign competition, or if they take place between a third party and State-controlled entity "as long as the national interest so requires it". Similarly, article 181 states that the notwithstanding article 173, all regulations regarding mining, public utility corporations, banking, and insurance are legal, as are those granting the authorities the capacity to regulate economic activities, including the capacity to set prices. These articles thus created a strong link between the enforcement agency and the President, as well as between the former and other administrative bodies involved in regulatory affairs.

Article 175 of this law created an administrative agency in charge of enforcing the rules contained throughout this title. This agency, originally called a *comisión* or "Commission", was

[276] Bernedo, Patricio. *Historia De La Libre Competencia En Chile 1959-2010.* Fiscalía Nacional Económica, 2013. Pgs. 35 - 36
[277] Ibid. Pg. 41.
[278] Ibid. Pg. 42.
[279] Chile. Ley 13.305 de 1959. Art. 173.

composed of a judge from the Supreme Court and two superintendencies belonging to the administrative branch. It had two main purposes; first, it should investigate and decide on alleged violations of the law denounced by individuals, corporations or other government bodies.[280] In order to do so, article 180 of the law also empowered this Commission to ask for information from any administrative body. If the Commission decided against the investigated parties, it had to present its findings and conclusions before the courts, which in turn had decide on the sanctions applicable.[281] Second, it was also to study and provide council to individuals, corporations and the government about the legality of particular acts and contracts. Besides this advisory function, the Commission could revise different acts and contracts in order to assess their legality during a three-month term. If the Commission found that these violated the aforementioned article, it could propose different measures that would render them legal, and the official decision of the commission could be challenged before the courts.[282] Notably, the Commission was a legislative addition to the bill proposed by the government; it was thought that the Ministry of Finance was not impartial enough to provide accurate, impartial assessments of whether particular acts were anticompetitive or not.[283]

In 1963 the institution of *Fiscal Económico* was created. The *fiscal* was in charge of investigating the claims of anticompetitive behavior and presenting his findings before the commission.[284] The Commissions most important assignment was to issue decisions based on the findings of the *Fiscal*. The Commissions role was left intact, mostly because it lacked the resources to do more; working in the Commission was a part-time assignment for its members, who continued to work for the Supreme Court and the superintendencies mentioned in law 13.305 of 1959. Just as well, the Commission had no administrative staff besides the *Fiscal* and no budget of its own to conduct its affairs, for it depended on the Superintendence of Insurance Companies, to which it was formally ascribed. The first *fiscal* appointed, Waldo Ortuzar, remained in that post for the next three decades.

There is little information about the number of cases decided by the commission between 1959 and 1973, with estimates being around one hundred and twenty.[285] In his classic text on Chile's CLR, Dale Furnish argues that between 1959 and 1970 more than one hundred

[280] Ibid. Arts. 175 & 176.
[281] Ibid. Arts. 177 - 179
[282] Ibid. Art. 182.
[283] Ibid. Pg. 43.
[284] República de Chile, ley 15.142 de 1963. Arts. 13.
[285] Op.cit. Pg. 52.

twenty cases were decided. *Fiscal* Ortuzar offered a similar account.[286] Most of these were decided during the three years that followed the adoption of law 13.305 of 1959, for the workload of the commission diminished considerably, deciding six or so cases per year during the government of Eduardo Frei (1964 – 1970). Moreover, the bulk of the commission's decisions were about approvals of corporate bylaws submitted for review.[287]

The role of the Supreme Court in the development of competition law doctrine in Chile during this period was limited. The court reviewed the decisions of the commission in nine written opinions, of which only six involved controversies, and only one arose from facts that occurred after the enactment of the law.[288] An important issue addressed by the Court in its decisions was the scope of the law with regard to other regulations. In some cases involving flour mills and bakers, the Court upheld the commission's view that competition law trumps other forms of regulation, only to follow the commission once it ruled differently.[289] In other cases involving gasoline providers and retail stations, the commission upheld a market-sharing agreement between three gasoline-distributing companies, one of which was national, but condemned a "tied-in" product promotion agreement between the companies and gasoline retailers.[290]

Competition law litigation became increasingly involved in the political strategies of the Allende government and its opposition. Fearful that the banking nationalization of 1971 would not find support in congress, the Allende government decided to buy directly the stock shares of the banks in the regular market through the State's development bank. Members from the opposition challenged this strategy in congress. In a hearing convened for discussing this strategy, *fiscal* Ortuzar argued that the government's proceeding was illegal because there was no law explicitly authorizing such proceedings. This gave the members of the opposition the legal foundation to file a complaint before the commission. The government, in turn, argued that the commission did not have the powers to decide on this issue, for law 13.305 established considerable exceptions and the law was targeted only towards private firms. Although the commission ruled after the government's opinion, the Court overruled this decision and remanded the file so that the commission could issue a substantive decision. The 1973 military

[286] Ortuzar Latapiat, Waldo. "La Ley Antimonopolios De Chile: Cuatro Años De Experiencia." *Derecho de la integración: Revista jurídica latinoamericana* 11 (1978): 127 – 135.
[287] Furnish, Dale B. "Chilean Antitrust Law" *19 American Jnl. of Comp. L.* 464, 470 - 471 (1971)
[288] Furnish, Op.cit. Pgs. 470 – 473.
[289] Ibid. Pgs. 475 - 477, Bernedo Op.cit. Pg. 47.
[290] Ibid. Pgs. 478 – 480.

coup took place as the commission was studying the case again, which was finally solved by the new competition law enforcer in 1975.[291]

The military coup of September 11, 1973 had a lasting and complex effect in the development of competition law in Chile. On one hand, this effect can arguably be appreciated in the enactment of a new CLR in December of that same year, *Decreto Ley* 211 of 1973 (hereinafter DL 211). Notably, this decree has considerable similarities with its successor but changed in important ways the institutional arrangements related with competition law enforcement. Among these similarities are an enforcement scheme organized around administrative agencies with little independence and the exemption of anticompetitive practices as a discretionary governmental policy. On the other, the shift towards neoliberalism that consolidated with the enactment of the 1980 Constitution led to the idea that this decree was an expression of economic freedom. Below we will describe the content of this decree and its enforcement, and suggest some elements that explain how it came to be seen as an expression of the 1980 Constitution.

Contrary to what has been commonly ascertained, it is hard to identify the distinctive neoliberal ethos DL 211.[292] It is not radically different from that of its 1959 predecessor, and actually continues with some of the arrangements the former CLR had established. This continuity is most likely a consequence of having *fiscal* Waldo Ortuzar among the drafting team of this decree and as its main enforcer thereafter.[293] Article 1 of this decree prohibits in general terms acts and agreements that restrain competition and establishes imprisonment as a punishment.[294] Article 2 details conducts that are considered anticompetitive including agreements about prices, production quotas, distribution and market allocation, exclusive distribution, among others. Notably, this article also prohibits both labor and business unions that impeded collective negotiations and affected the possibility to take part in a labor position.[295] Article 3 establishes corporate dissolution as another sanction that can be applied to firms caught

[291] Bernedo, Op.cit. Pgs. 54 – 58.
[292] See Bauer, Michael David. "Chilean Competition Law and Policy: The Extraterritorial Transplantation of American Antitrust Law and Chicago School of Economics in the Chilean Context." *Chicago-Kent Journal of International and Comparative Law* (2011)
[293] Bernedo, Patricio. *Historia de la Libre Competencia en Chile*. Fiscalía Nacional Económica, 2013. Pgs. 59 – 98.
[294] Chile. Decreto Ley 211 de 1973. Art. 1. A rough translation is the following: "anyone who individually or jointly who incurs in any action, act or agreement that tends to impede free competition of the economic activities that take place in the country, regarding internal activities as well as those pertaining to international commerce, will be fined with a minor prison term."
[295] Ibid. Art. 2.

in these agreements. In turn, article 4 prohibits granting individuals the concession of any monopoly by law, except for contracts that concern private investments recognized by other laws or in which state entities are involved. Moreover, State entities can administer monopolistic enterprises in the terms set by other legal laws.[296] Article 5 states that the provisions that allowed the State to fix the prices of certain goods and services will continue to be valid, including those pertaining to the gas, oil and banking sectors.[297] Also, it is important to note that there were no merger review provisions in this decree, so mergers were analyzed in terms of the prohibitions stated in its first article.

DL 211 changed the institutional setup of competition law enforcement. It upgraded the *fiscal* by establishing the *Fiscalía Nacional Económica* (hereinafter the FNE) and created new enforcement institutions - a *comisión resolutiva* (hereinafter CR), several *comisiones regionales* and a *comisión central preventiva* (hereinafter CP). The FNE is an administrative body that investigates anticompetitive conducts and submitted its findings to the CR, who also had the power to appoint the *fiscal*.[298] Also, the FNE provided the CR and the CP with administrative support.[299] In turn, the CR was also an administrative body, but had a quasi-judicial function. Based on the evidence collected by the FNE, it ruled whether a conduct was anticompetitive or not, and could impose administrative and criminal sanctions.[300] Also, it exercised competition advocacy functions regarding the competitive nature of governmental regulation. The CP was a consultative body and did not have faculties to change any legal arrangement. Its opinions were about the legality of particular arrangements, and it could ask the FNE to undergo investigations and submit cases to the CR for review. The *comisiones regionales* were also consultative bodies located in the different regions, and their decisions could be reviewed by the CP.[301] Notably, several members of the CP, the CR and the *fiscal* were appointed by the executive power, and the FNE aided the CR with administrative tasks since it did not have any staff. This was because the CR and the CP were conceived as extra-curricular bodies; they only functioned occasionally, its members were drawn from (and paid by) other institutions, and had little expertise with competition law issues (with some exceptions). This institutional setup was amended slightly via

[296] Ibid. Art. 4.
[297] Ibid. Art. 5.
[298] Ibid. Arts. 21 -30.
[299] Ibid. Arts. 15 & 16
[300] ibid. Arts. 16 - 20
[301] Ibid. Arts. 7 - 15

Decreto legislativo 2760 of 1979, which among other things, established that the President would appoint the *fiscal*.[302] This setup would remain until the late 1990s.

According to Ricardo Paredes, between 1974 and 1992 the CR issued 367 decisions, while the CP issued 227 decisions.[303] Most of these decisions refer to vertical agreements and unilateral acts, while decisions concerning vertical agreements and cartels are a minority. Between 1974 and 1993, the CR issued 61 decisions involving horizontal agreements, 61 decisions concerning vertical agreements and 156 decisions involving abuse of dominance.[304] In the same period, the CP issued 21 decisions about horizontal agreements, 40 decisions regarding vertical agreements and 57 decisions involving abuse of dominance.[305]

Some these decisions are worth commenting briefly. In 1974, the CR stated that a distribution agreement limiting the sale of magazines and newspapers to certain vendors was illegal according to DL 211. Such restriction, argued this *comisión*, was illegal because it unduly restricted the freedom to participate in a market.[306] In two other cases differential treatment to distributers, the CP stated that selective rebates were lawful only to the extent that the rebates followed objective reasons related with the volume of goods supplied. In the first of these decisions, the CR declared that it was illegal to discriminate by offering different rebates to distributors based on the characteristics of their distribution facilities.[307] In a related decision addressing a similar practice, the CR stated that differential treatment among suppliers had to be based on objective reasons for it to be legal.[308] We observe similar lines of reasoning well into the 1980s. For example, in *resolución* 202 of 1985 the CR fined laboratory *Ricalcine* for discriminating among its distributors by awarding them different rebates. The CR argued that the lab's economies of scale did not justify offering less generous rebates to smaller distributors than to large ones.[309]

The relatively high number of decisions involving vertical restraints and abuse of dominance with regard to decisions involving horizontal agreement is puzzling. National and

[302] Chile, Decreto Legislativo 2.760 de 1979. The compiled version of this amendment and DL 211 can be found in decreto ley 511 de 1980.
[303] Paredes, Ricardo. "Jurisprudencia De Las Comisiones Antimonopolios En Chile." *Estudios Públicos* 128 (1994): 227 - 320.
[304] Ibid. Pg. 237.
[305] Ibid. Pg. 238.
[306] Chile, Comisión Resolutiva, Resolución No. 4. de 1974. In Bernedo, Op.cit. Pg. 76.
[307] Chile, Comisión Preventiva Central. Dictamen No.70 de 1975.
[308] Chile, Comisión Preventiva Central. Dictamen No. 87 de 1975.
[309] Chile, CR, Resolución 202 de 1985. In Paredes, Op.cit. Pgs. 279 - 280.

international authors writing long after these decisions were issued argue that this pattern evidences the importance of economic freedom on Chile's legal system.[310] This is a reasonable explanation, but there still important gaps to fill. It may well be that DL 211 and the 1980 Constitution were part of a wider political project with neoliberal undertones, but the former was enacted at a time in which this project was in its incipiency.

III.B. Colombia

The adoption of the first CLR in Colombia took place in the middle of growing animosity between the military regime of Gustavo Rojas Pinilla and the country's mayor business association, the *Asociación Nacional de Industriales* (hereinafter ANDI). This business association had supported Rojas during the coup against conservative president Laureano Gómez in 1953 to suppress the escalating violence between conservatives and liberals. However, in early 1955 this support turned into opposition. President Rojas and his minister of finance, Carlos Villaveces, announced the adoption of economic reforms that would increase the State's revenues and its control over the economy.[311] It is against this context that decree 2061 of 1955, known as the "*estatuto Villaveces*", was enacted. However, the importance of this decree is not just about the date of its enactment or its historical context, but because it established the basic institutional framework that continues in place today.

Decree 2061 of 1955 has only five articles, and it addresses both substantive and procedural issues. Article 1 establishes a general prohibition forbidding agreements between producers, between distributors or between both that may impede free trade, including agreements about prices, margin sales, price discrimination, or agreements about sales margins or commissions. Later CLRs would continue this combination of general prohibition with a non-taxative list of prohibited conducts. Procedure issues are developed in the remaining articles. Article 2 assigns the Ministry of Economic Development (known then as *Ministerio de Fomento*) the task of investigating potentially anticompetitive conducts that it finds out or that are denounced by third parties. If the Ministry finds that such conducts have taken place, it would issue an administrative pronouncement (known as a *resolución*) approved by the President in declaring their illegality and preventing the parties involved from engaging in further commercial

[310] See for example Winslow, Terry. "*Competition Law and Policy in Chile: A Peer Review*," OECD, 2004. Pgs. 20 - 21. See also Cruz, Elina and Sebastian Zarate. "Building Trust in Antitrust: The Chilean Case"." In *Competition Law and Policy in Latin America.* Edited by Sokol D. Daniel and Eleanor Fox. Hart, 2009. Pg. 165.
[311] Rovner, Eduardo Sáenz. *Colombia Años 50: Industriales, Política Y Diplomacia.* Univ. Nacional de Colombia, 2002. Chapter 10.

practices. Article 4 establishes the possibility of exempting the behaviors investigated by the Ministry. It states that the government may, through a decision by the Ministry approved by the President, allow such conducts when special economic or social conditions merit so. Through a similar procedure the government could also approve forbidden agreements celebrated prior to this decree if doing so is necessary for maintaining the order in markets and only for the time necessary to re-establish free trade. Article 3 states that the decisions mentioned in the previous articles were subject to the review of the highest administrative court, the *Consejo de Estado*. Finally, article 5 states that the decree is applicable since its enactment and suspends any disposition that is contrary to it.[312] The allocation of investigative and decision-making faculties to an administrative body subject to presidential control would also be a defining feature of Colombia's competition law for the decades to come.

There is no record that this decree was enforced by the government of general Rojas Pinilla, nor it is likely that it had much opportunity to do so. The political disagreements between the regime and the business and industrial sector worsened considerably in the months that followed. By early May 1957 a strike called by this business association and other social groups forced his resignation. A military junta assumed the direction of the country in that year while in the meantime the two main political parties conceived a plan for returning to democracy and ending their armed struggle. Such plan came to be known as the *Frente Nacional* and led to the return of democracy to Colombia with the election of Alberto Lleras as president in 1958.[313]

The election of Alberto Lleras also meant the adoption of new economic policies, this time through the regular political process. In 1958 Hernando Agudelo Villa was appointed minister of finance, two years after completing his postgraduate studies at the London School of Economics and after working for *FENALCO*, a trade association.[314] Agudelo Villa presented before Congress a draft bill of a new CLR in November 18, 1958, which led for the first time to open discussions about the importance of competition. Representative Alvaro Posada Campo, who was assigned to present and discuss this bill before the lower chamber of Congress, made important amendments to the original project.[315]

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[312] Colombia. Presidencia de la República. Decreto 2061 de 1955.
[313] Rovner, Op.cit. Also Bushnell, David. *The Making of Modern Colombia: A Nation in Spite of Itself.* Univ of California Press, 1993. Pgs. 218 - 225.
[314] Hernan Agudelo Villa (profile) http://www.banrepcultural.org/blaavirtual/biografias/agudelohernan.htm. (accessed August 26, 2015).
[315] Colombia. Congreso de la República de Colombia. Ley 155 de 1959.

While an analysis of the congressional records of this law merits a lengthier analysis, we wish to highlight three different ideas present in it. First, the content of the bill is supposed to follow from the constitutional mandates pertaining to the State's capacity to intervene in the economy and the competition law bill discussed. Congressman Posada made this argument explicitly in the written introduction to the draft bill.[316] Second, this bill was explicitly presented as a complement to other economic policies in place that were necessary for controlling the development of economic power. Posada Campo characterized competition and monopoly as an issue concerning rivalry among producers within markets, and states that the "cruel truth" is that capitalism necessarily leads to business concentration, and hence to monopolies and oligopolies.[317] Citing US economist Paul Samuelson, he argued that small producers are unable to reach efficient levels of production, and so the response should take this into consideration not by abolishing large industrial considerations but by improving their behavior.[318] Thus he states that the law brings together antagonistic social actors for a common purpose.[319] The congressional record of this law shows that minister Agudelo Villa had similar views regarding the complementarity of competition law and other policies.[320] Third, according to Posada Campo, the protection of competition exhibited in other jurisdictions - and the draft bill overviews several CLRs from other States - have a limited application for a country that, like Colombia, was only beginning to become industrialized. The task at hand was to overcome the "current situation of underdevelopment" and enlarge the economic base, substitute imports, and expand the sources of foreign exchange. This meant not only extending a protection to large national industries, but also to small industries that could become sources of important economic activity in the future. Hence, the bill he presented aimed at protecting national industry, even small producers, in the context of fostering economic development.[321]

[316] See Ibid. (Exposición de motivos) Pg. 486. (Quotes in the original text)
[317] Ibid. Pgs. 481 – 482.
[318] Ibid. Pg. 482. (Citing Samuelson, Paul A. Economics An Introductory Analysis.)
[319] Ibid. Pg. 481. Emphasis added.
[320] Ibid. Pgs. 474 - 475
[321] Ibid. Pg. 482.

The bill was enacted in December 24 as law 155 of 1959.[322] This law is widely considered to be the first CLR in Colombia. It is lengthier than its predecessor, as it includes provisions that different legal issues related with competition law, like unfair competition, and merger review. The main topics of this law can be gathered in three groups. The first group is about the basic elements of competition law enforcement. It includes article 1, considered the single most important provision of this law, which establishes a general prohibition and a paragraph establishing the possibility of an exemption regime. The general prohibition, very much like its Chilean counterpart, combined a general statement with a non-laxative list of forbidden conducts.[323] The exemption, contained in the article's only paragraph, states that the government may nonetheless authorize a prohibited conduct if doing so contributed to the stability of a basic sector of the economy.[324] The definition of what counted as a basic sector was developed later on by decree 1302 of 1964. Other articles belonging to this first group establish authorizations for governmental intervention and prohibitions to particular firms. Among the former are article 2, which states that firms with the capacity to determine market prices because of their control over the quantity of goods and services will be subject to State supervision. Similarly, article 3 states that the government will intervene in the ways that weights and measures are established for the benefit of consumers.[325] Even so, the article belonging to this group that more clearly embodies the ideas from the congressional record is article 17. It states that in order to comply with article 32 of the constitution, the government can intervene to set fixed prices to protect the interests of consumers, producers and traders. Moreover, government price-setting is one of the possible outcomes resulting from investigations of anticompetitive conducts. The other outcomes are the imposition of a compliance term for ending such conducts, and submitting the investigated enterprises to a supervision regime regarding their production and distribution costs as a compliance monitoring mechanism.[326]

The second group of provisions addresses corporate law issues from a competition law perspective. Article 5 forbids board members and managers of banking institutions to take part in the management of firms involved in the production, distribution and consumption of rival goods and services that are worth more than seven million *pesos*.[327] Article 6 also forbids

[322] República de Colombia, Law 155 of 1959.
[323] Ibid. Art.1o.
[324] Ibid. Paragragh.
[325] Ibid. Articles 2& 3.
[326] Ibid. Art. 17.
[327] Ibid. Article 5. This article also has an exemption for insurance companies, which according to the law have a special regime for their operation involving a similar prohibition. The seven million *pesos* threshold corresponds roughly to 2100 USD.

interlocking directories between production and distribution companies organized as limited liability partnerships. This prohibition is extended to relatives and family members of the members of the boards.[328] Article 8 forbids corporations that have their own distribution systems to engage in practices that monopolize the distribution of such goods.[329] Article 9 establishes that when a firm producer of a good or service announces a selling price for final consumers, neither it nor its distributors can modify that price afterwards.[330]

This law is also of interest because it introduced a merger review regime for the first time in Colombian legal history. Inspired by the Clayton Act of the United States, which according to Minister Agudelo was a source of inspiration,[331] article 4 introduces a merger review system. It states that corporations participating in production, distribution or consumption of a good, raw material or service, and whose individual assets amount to more than 20 million *pesos*, should inform the government of their intention to merge.[332] According to paragraph 1 of this article the government has the duty to object a merger if it produces an undue restraint on free competition. The next paragraph provides a term of 30 days for the government to issue a decision, and if a decision were not issued during that period then the merger would be automatically.[333] These provisions remained largely untouched until the early 1990s.

Finally, the third group of provisions of this law addresses the institutional arrangements established for enforcing the mandates of its different provisions. Notably, this law relies considerably on the arrangement established in decree 2061 of 1955, adding a few elements that would define this CLR for the decades to come. Article 12 relies on the Ministry of Economic Development for the investigation of anticompetitive conducts. However, it also states that the ministry's *superintendencies* - a type of politically dependent administrative body in charge of oversight functions - were in charge of conducting investigations. The procedure followed by these agencies was straightforward. Investigations could result from complaints filed by third parties or from suspicions within the Ministry or the *superintendencia* related with the sector in which the allegedly anticompetitive conduct occurred. According to article 13, the investigations should rely on all the available evidence, including information about imports, exports, distribution and sales as well as visits to the investigated parties. After collecting evidence

[328] Ibid. Article 6.
[329] Ibid. Article 8.
[330] Ibid. Article 9.
[331] Ibid (Exposición de motivos). Pg. 479.
[332] Ibid. Art. 4.

collection, the *Superintendencia* had to issue a formal statement of its findings and make them available to the investigated parties so that they could defend themselves against the allegations stated in the claims. Once this has take place, article 14 states that the Ministry would decide the merits of the investigation based on a previous concept given by the Council of Economic Policy and Planning. If the Ministry decided to punish the actors, it could withdraw their shares from the stock market, revoke their functioning permit if they are recidivist, and impose a fine up to half a million *pesos* each.[334] Article 15 the stated that the decision could be challenged before the Ministry for its reconsideration, and article 16 states that filing a claim against the decision before administrative courts suspends the collection of the fine.[335]

This law was amended several times between its enactment and the 1990s, but its structure and content remained untouched. Decree 1653 of 1960 assigned all the investigation proceedings to the Superintendence of Economic Regulation.[336] Later on, decree 3307 of 1963 modified the reference to consumers and producers of raw materials from article 1.[337] Decree 1302 of 1964 modified in turn the paragraph of article 1, stating that fundamental sectors are considered so because of their incidence in the population's welfare, including the food sector, textiles, housing, fuels, banking, transport, public utilities and insurance services. It also clarified other issues regarding mergers, procedures and evidence.[338] This enabled the application of the exception contained in this paragraph to several important sectors of the Colombian economy. During the late 1960s and early 1970s enforcement duties were passed around different administrative agencies involved in the oversight and enforcement of price controls. Through decree 2562 of 1968 the *Superintendencia de Regulación Económica* was transformed into the *Superintendencia de Regulación de Precios* and maintained its duties regarding competition law enforcement.[339] However, in 1976 this *superintendencia* was abolished and its functions, including competition law enforcement, were given to the *Superintendencia de Industria y Comercio* (hereinafter SIC), which had also been created in 1968. This decree is important because it modified the internal structure of this entity. First, it created the figure of the Deputy Superintendent (known as *Superintendente Delegado*) whom was in charge of making the investigations. Second, the creation

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[333] Ibid. Art. 4, Pars. 1& 2. The merger review procedure would be further detailed by ordinances of the Superintendence of Industry and Trade.
[334] Ibid. Art. 14
[335] Ibid. Arts. 15 & 16. According to Colombian administrative law, a decision can be challenged before the agency or authority that authored the decision for its reconsideration, and this is a prerequisite for challenging the application before the administrative judges.
[336] Colombia. Decreto 1653 de 1960.
[337] Colombia. Decreto 3307 de 1963.
[338] Colombia. Decreto 1302 de 1964.
[339] Colombia. Decreto 2562 de 1968

of this figure enabled the chief Superintendent to make the final decision based on the investigation carried by the Deputy Superintendent.[340] This particular aspect was further reaffirmed with decree 2153 of 1992, which eventually gave to SIC its present-day structure.[341]

The enforcement record of the *Superintendencias* in charge of enforcing law 155 of 1959 is unclear, since there has been no systematic archival research and very little publications addressing the issue. As a result, there is a well-established belief that the law was not enforced. For example, the 2009 OECD Peer Review of Colombia's CLR states that the law was seldom applied, and when it was applied it was to impose price controls.[342] Alfonso Miranda states that this law did not lead to important decisions, and only mentions three competition law decisions - two merger decisions and one involving an agreement among leather producers.[343] On the other hand, Javier Cortazar states flatly that the law was never enforced.[344] It is commonly believed that in spite of the enactment of the law, it was not enforced until the 1990s.

Our own research found 22 *resoluciones* issued by the *Superintendencia de Regulación Económica* between 1961 and 1968. Of these, 13 decisions relate to 8 mergers (one particular merger involved 6 decisions), 5 decisions relate to 3 different investigations for price fixing, 3 decisions relate to 2 cases involving abuse of dominance, and 1 decision for a case involving interlocking directorates. They show that law 155 of 1959 was enforcer considerable more than what it is believed, but in the absence of a more systematic review it is not advisable to make claims about its overall level of enforcement. Table 4.1, contained in the annex, summarizes these decisions, organized by date and according to the type of procedure.

While a detailed analysis of these decisions would prove extremely useful for better understanding how competition law was understood in Colombia, doing so would exceed the scope of this chapter. Even so, we wish to highlight the State-centered ethos of competition law enforcement appreciated in some of these decisions. For example, in decision 005 of 1961, the *Superintendencia* decided against an association of leather producers that allocated production quotas among its members and contributed to en-bloc negotiations with corporations devoted to its processing and refinement. It considered that the annual increase in raw leather prices was

[340] República de Colombia. Decreto 149 de 1976.
[341] "Historia" http://www.sic.gov.co/drupal/historia. (accessed August 27, 2015)
[342] Petracola, Diego. "Colombia - Peer Review of Competition Law and Policy ." OECD - IDB, 2009. Pg. 12
[343] Miranda Londoño, Alfonso. "El Derecho De La Competencia Desde La Constitución De 1886 Hasta La Expedición Del Decreto 2153 De 1992." August 2, 2012. Slide 10.
[344] Cortázar Mora, Javier. "Colombian Competition Law Regime." Institute De Droit De La Concurrence, 2012. Pg. 2

due to the operation of this scheme, and condemned the advantage that it provided to the producers. It states "(…) the market for raw leather should be organized in a technical, economic, impartial and effective with the purpose of maintaining a fair balance between all the interested sectors, that are: the production, acquisition and processing [of raw leather]."[345] A similar rhetoric can be found in early merger review decisions. For example, in decision 0008 of 1962, the *Superintendencia* approved a merger between a national producer of glass cups and vases with a foreign-owned corporation that produced different varieties of glass. In this decision, the agency evidences the link between the promotion of competition and economic development as they were understood at the time. According to the decision, the merger would increase the national production of glass-made products, diminish the necessity of importing this good, and transform the country into a potential exporter. This in turn, would enable a new source of foreign currency inflows [thus contributing to maintaining a healthy balance of payments]. Also, it would bring about an increase in local production that would diminish prices for the benefit of consumers, enable Colombia to become a global competitor in related markets, increase the amount of labor involved, substitute imports and thus bring savings to the expenditures in foreign currencies.[346]

III.C. Mexico

Similarly to Colombia, the lack of research about Mexico's CLRs has contributed to the myth that they were seldom enforced. As we will show below, different governments sought to develop the contents of article 28 of the 1917 Constitution through several laws and bylaws. Below we will describe these laws briefly. Unfortunately, the picture is considerable less clear regarding their enforcement; we have found it impossible to identify all the decisions issued by the enforcing agencies or the lower courts before the 1990s. Unfortunately, the limited information available prevents us from presenting a clear picture about the actors and strategies involved in the consolidation of competition law as part of the State-centered project; however this subsection provides useful insights about this situation.

Article 28 of the 1917 Constitution established a series of broad lines for the government to develop a program of economic governance, as opposed to other constitutional provisions that were enforced directly without statutory development (like article 27). Between its enactment and the 1990s, the federal congress – following the initiative of the government –

[345] República de Colombia. Superintendencia de Regulación Económica. Resolución 005 de 1961. Pg. 4.

adopted four laws that developed the substantive content of this article and 15 bylaws that established the conditions and requirements for their enforcement. Table 4.2, also included in the annex, identifies them all.

The above mentioned laws develop the content of article 28 of the 1917 in different ways, emphasizing the importance of preventing monopolies and anticompetitive practices in particular sectors of the economy. A first law dating from 1926 prohibited monopolies and anticompetitive practices without providing any definitions as to what conducts counted as such and focused on the supply of basic staples and consumption goods. This law also established a series of limitations to vertical integration in the milling and credit industry. Finally, it also combined regulatory with adjudicatory functions; while administrative bodies determined the tariffs and applicable to the goods and services mentioned in the law, the actual enforcement of the duties was left to courts; the infringement of the law had criminal consequences.[347] In turn, a second law enacted in 1931 provided clearer definitions of both a monopoly and anticompetitive practices leading to monopolization, including price-fixing and market allocation agreements. While this law also focused on basic staples and consumption goods, it had a wider approach reaching all economic sectors.[348] Finally, both laws established imprisonment and the payment of fines as punishments for trespassing the duties they establish.

A third law, enacted in 1934, evidences a trend towards relying considerably more on price controls than on competition law for the regulation of particular economic activities. This can be appreciated in several of its substantive provisions in which a general prohibition is followed by a series of exemptions based on price controls. Hence, for example, while the first prohibition of article 5 relates to selling below production costs, it is followed by three exceptions allowing such conduct: the introduction of a new good or service, the sale of depreciated goods or the result of an auction. Finally, this law did not enable the judicial enforcement of the substantive provisions, relegating them entirely to administrative agencies.[349] A fourth law enacted in 1950, although not directly connected with article 28, enabled the government to set prices for an important number of goods and services - not just those considered of necessity - thus extending the governmental control of the main economic activities.[350]

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[346] República de Colombia. Superintendencia de Regulación Económica. Resolución 0008 de 1963. Pg. 2.
[347] México. Ley reglamentaria del articulo 28 constitucional (1926).
[348] México. Ley Ley orgánica del articulo 28 constitucional, relativa a monopolios (1931)
[349] México. Ley orgánica del articulo 28 constitucional en materia de monopolios (1934)
[350] México. Ley sobre atribuciones del ejecutivo federal en materia económica (1950)

The enforcement structure of these laws was set originally in a 1926 decree and then amended in 1931. The provisions of the 1931 amendment were complemented throughout the years, until the decree issued on January 10 of 1951 established a new enforcement system. The enforcement system established in the 1931 and 1951 decrees were very similar, as they relied on the same governmental institutions. Enforcement activities were assigned to committees that were part of the *Secretaría de Economía*, which studied the market conditions of different goods and services, and could establish the prices of particular goods. However, there is an important difference between the committees established in 1931 and those established in 1951, and which consists in that the first were transitory while the latter were permanent.[351] We contend that the changing nature of these committees marks the tipping point in which competition law enforcement cedes before direct price controls.

There is no clear record of the number of administrative decisions issued by these enforcement bodies. Some secondary sources mention a few decisions, both administrative and judicial, but do not mention the total number of decisions or how to access them.[352] The current competition law enforcement agency, the *Comisión Federal de Competencia Económica*, does not have in its database decisions prior to 1992, and our search in the online official database (the *Diario Oficial*) for decisions by the administrative enforcers did not produce any results. On the other hand, the database of decisions issued by the Supreme Court produced about 120 decisions regarding the constitutionality of laws and bylaws according to article 28. Of these, 93 decisions contain novel statements, known as *tesis*, about these issues. These decisions show that article 28 was a matter of recurring litigation before courts. Table 4.3, included in the appendix, identifies all the original *tesis*.

Although the decisions reviewed address various issues, there are a series of *tesis* that address common topics. Many of the decisions issued by the Supreme Court issued during the 1920s and 1930s concern regulations that limited the number of mills and bread stores that could be found in a given geographic area. In these, the Court wavered in its position regarding the constitutionality of bylaws that fixed the number of mills and stores dedicated to the production

[351] See México. Reglamento de la ley orgánica del articulo 28 constitucional (1931). Art. 1 with Reglamento de los Artículos 2; 3; 4; 8; 11; 13; 14 y 16 a 20 de la Ley sobre atribuciones del ejecutivo federal en materia económica (1951), Arts. 17 - 23.

[352] See for example Flores Bernés, Miguel. "Ley Federal De Competencia Económica Introducción Antecedentes Históricos." 2011. http://kiobit.net/competenciae/docs/LFCE_Antecedentes_Historicos_2013.pdf

and sale of bread and *nixtamal*.[353] Other decisions from the 1960s onwards address similar issues concerning transport routes, although the Court reaches a different conclusion; if Congress wanted to have free competition in such sector, it would have crafted different regulations to begin with.[354] Overall, the decisions show the extent to which both competition and price-control regulation are the result of political choices, without being clear that one system of economic governance is preferable to the other. In doing so, the Court's decisions seem to follow the flexibility of the laws and bylaws that developed article 28 of the 1917 Constitution.

IV. Conclusions

In order to address the shortcomings of the relevant literature on the history of competition law in Latin America, this chapter offers a new account of the first CLRs enacted in Chile, Colombia and Mexico. We argued first that the adoption of these CLRs followed from a process of constitutional transformation in which 19th century constitutionalism gave way to new ideas about the role of the State in the direction of social and economic processes. This process took place in the guise of constitutional discussions about the "social function" of property rights and governmental capacity to regulate social issues. Then, by looking at the CLRs themselves, we noted how they relate to the different constitutional mandates, described their main features and discussed briefly some aspects of their enforcement. In the case of Chile, we noted how the first CLR followed from an attempt to liberalize the economy, and was followed by a second CLR, with similar provisions, that became inscribed in the neoliberal project. In the case of Colombia and Mexico, besides noting the lack of research on the matter, we noted how the CLRs granted considerable discretion to the enforcement authorities and discussed briefly their enforcement record, which is more ample than what is often conceded. Overall, the different features of the first Chilean CLR and the Colombian and Mexican regimes evidence the influence of the State-centered project.

To be sure, the regimes we have described in this chapter show important similarities, most of which stem from their proximity with constitutional ideas. Among these are the combination of goals, which include issues of social justice, the rational organization of economic activities, and the protection of consumers. The combination of criminal and administrative punishments

[353] Compare for example decision no. 334574 of 1934. 5th period, Vol. XLVII. Pg. 2139, with decision no. 807445 of 1943. 5th period, Vol LXXVIII. Pg. 3598

[354] See for example decision no. 25816 of 1961. 6th period, Vol. LIII, 1st part. Pg. 154. Also decision no. 251033, of 1981. 7th period, SJF vol. 145 - 150 6th part. Pg. 270

in Chile and Mexico is also quite interesting. Consider, moreover, the importance of Duguit's doctrines in the constitutional changes taking place in Chile and Colombia. There are important differences as well. Perhaps the most notable is the early advance of neoliberal ideas into Chilean competition law after the enactment of DL 211 in 1973; not only did this particular issue set it apart from its Colombian and Mexican counterparts, it also set it in a completely different trajectory. Even so, these regimes developed mostly (but not entirely) according to the institutional backgrounds that characterized the social and legal system they were part of.

This state of affairs changed considerably during and after the 1990s. As we will see in the next three chapters, the CLRs of these three countries went through considerable changes resulting from internal and external influences and pressures. And while there are institutional continuities that are often overlooked, the most important development, at a regional level, is the increasing efforts to bring about convergence towards a series of actors, ideas and institutions that were not present before. We will see, for example, how foreign legal and economic doctrines exercised a considerable influence on local discussions about the goals (and roles) that these CLRs were meant to play. We will also see a convergence towards politically autonomous enforcement institutions that rely mostly on neoclassic and neoinstitutional economic analyses to ground their decisions. Finally, we will also see how international actors, ranging from the OECD, investors and foreign advisors, play more prominent roles in the design and enforcement of the CLRs adopted. In sum, these changes signal the demise of the State-centered project and the advance and consolidation of its neoliberal counterpart.

5. Chile 1990 - 2015: Variants of Neoliberalism

I. Introduction

On March 16, 2015 president Michelle Bachelet officially submitted before the Chilean congress a bill amending this country's competition law regime. The bill proposes to subject hard-core cartels to criminal liability, aims to improve the effectiveness of the leniency regime, and suggests the creation of a mandatory merger review regime. The government's bill comes at a period of public indignation following some recent investigations regarding collusive agreements in highly visible markets. As president Bachelet stated during the official ceremony "(i)t is unacceptable that a group of individuals agree to harm others, and that this is not subject to effective criminal punishments."[355] This statement, and the public responses to recent cartel cases, suggests that more socially - oriented perspectives regarding this field of law are finding their way into Chile's competition law community.

In this chapter we unpack the trajectory of Chile's competition law regime (or CLR) between 1990 and 2015 as a field where different actors - politicians, lawyers, economists, international organizations and others - compete and collaborate for the power to determine this field of law. We do so by tracing the different ideas behind the legal changes taking place during this period and the struggles and collaborations between the different actors advancing these ideas. In particular, we focus on the reforms to the different enforcement bodies in place by the 1990s and collusion cases between 1990 and 2015 as a window for identifying how changes take place *within* the neoliberal competition law project.

The following sections of this chapter develop these ideas. In Section II we identify three periods of institutional change guided by the interactions between different social actors and the ideas about how this CLR should be. We argue that what began as a process of institutional change during the late 1990s and early 2000s produced a situation of maladjustment, as evidenced in the low record of price collusion convictions between 2003 and 2009. As further institutional changes were sought to address this maladjustment, new forces began challenging the established perceptions of competition law. Finally, in section III we offer some conclusions.

[355] Sáez, Sergio. "FNE tendrá potestad exclusiva para querellarse en casos de colusión." *Pulso*, March 17, 2015.

II. The Coming of Age of a Neoliberal Competition law Project

In this section we trace the transformation of Chile's CLR resulting from the pressures for change that were mounting in the 1990s. We divide this process in three periods. During the first period, pressures to adapt the CLR according to emerging neoliberal views contributed to the mounting pressure for change. Then, during the second period the new institutions began to produce unexpected results that challenged the overall effectiveness of the regime. In the third period, a different set of unexpected consequences related to enforcement raised the public profile of competition law enforcement and led to changes more in line with a contemporary neoliberal project.

II.A. Updating Neoliberal Competition Law (1990 - 2003)

The transition to democracy in 1990 did not amount to a redefinition of the legal and political order in Chile, but rather led to its continuation. The 1980 Constitution, established by the military regime, aimed to preserve the *status quo*, both political and economic, resulting from the military regime. This was achieved through a combination of highly demanding requirements for obtaining majorities in Congress, their membership and conformation, and rules pertaining to the State's intervention in economic activities, which narrow unduly the space of political action. This hampered the political maneuverability of the forces that participated in Chile's congress after the return to democracy that took place in 1990. The most important political group, *Concertación*, was a coalition of different forces that had previously defeated the military regime in the 1988 plebiscite regarding the continuation of the military regime. Even so, because of the constitutional set-up, the *Concertación* coalition could not adopt laws that would undermine the foundations of the *status quo*. Moreover, *Concertación* governments sought consensus with different political actors – inside and outside of Congress – and were thus limited by the veto power of those opposed to its plans.[356] As a result, we contend that the narrowness embedded in the constitutional order prevented the development of alternative ideas and institutions to those of neoliberal inclination that it harbored. Such narrowness left lawyers, economists and other professionals engaged in the (re)design of the State with a limited ideational space for reinterpreting what competition could be about.

Given this background, the return to democracy posed unique challenges to the reforms of economic policies. The first *Concertación* president, Patricio Aylwin (1990 - 1994) announced the continuity of the economic model,[357] and the *fiscal* appointed by president Aylwin, Gilberto Villablanca, maintained the same position regarding the enforcement of competition law.[358] However, the *Concertación* alliance decided during the term of President Eduardo Frei Ruiz-Tagle (1994 - 2000) to address the uneven regulatory performance that started to become an issue. President Frei commissioned several studies about the state of regulation in Chile - including the *Comisión Jadresic* - that brought forth a stark diagnosis for the different regulatory bodies and regimes. Regarding competition law, these studies pointed to the lack of technical capabilities and other resources of the different enforcement bodies as the root of their inadequacy.[359]

The studies made by these commissions addressed the competition law enforcement bodies that were in place since the early 1970s and which had been established in *Decreto ley* 211 of 1973 (hereinafter DL 211). These consisted of i) the *Fiscalía Nacional Económica* (hereinafter FNE), ii) a *comisión resolutiva* (hereinafter CR) iii) several *comisiones regionales* and iv) a *comisión central preventiva* (hereinafter CP). (All the *comisiones* disappeared in 2003.) The FNE is an administrative body that investigates anticompetitive conducts and had to submit its findings to the CR. This *comisión* was also an administrative body, but had a quasi-judicial function. It decided upon the findings of the FNE whether a conduct was anticompetitive or not, and imposed sanctions both criminal and administrative. The CP was a consultative body and did not have the competence to change any legal arrangement. Its opinions were about the legality of particular arrangements, and it could submit particular cases to the CR for their review. The *comisiones regionales* were also consultative bodies located in the different regions of this country. Notably, several members of the CP, the CR and the *fiscal* were appointed by the executive power, and the FNE aided the CR with bureaucratic tasks since it did not dispose of any staff. This was because the CR and the CP were conceived as non-permanent bodies; they only functioned occasionally, its members were drawn from other State institutions, and they had little expertise with competition law issues (with some exceptions). The administrative nature of this regime - which gave away its mixed origins between State-centered organizations and its original neoliberal objectives - made it prone to the criticisms of the evolving neoliberal views taking place in the 1990s.

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[356] Atria Lemaitre, Fernando et.al. *El otro modelo: Del orden neoliberal al regimen de lo public.* Pinguin Random House Chile (2013). Pgs. 19 – 24.
[357] Bernedo, Patricio. "Historia De La Libre Competencia En Chile 1959-2010." *Fiscalía Nacional Económica (*2013). Pg. 115.
[358] Ibid. Pg. 127.

The findings of these studies were similar to the diagnosis offered by members of the competition law community since the late 1980s. In 1989, *fiscal* Waldo Ortuzar proposed an amendment to DL 211, which redefined the conducts considered anticompetitive and aimed to improve the performance of the enforcement bodies. This included the proposal to pay the members of the *comisiones* for their work.[360] As we already pointed out in chapters 3 and 4, the economist Ricardo Paredes also supported the move towards greater professionalization of the enforcement bodies. He advocated a more economic reading of this CLR, suggesting that "economic theory should be the basis of this regime, and thus should be followed".[361] He also identified three issues that were troublesome with the state of the legislation. First, since the executive branch appointed several members of the CP, the CR and the *fiscal*, it could overcome the independence of these bodies and manipulate their decisions.[362] Second, like Ortuzar, Paredes agreed that the lack of payment to the members of the commission was an issue. However, he argued that remunerating the members of the *comisiones* could have uncertain effects. Working in these bodies merited compensation, but the payment could also incentivize their members to start unmerited investigations.[363] Finally, he observed vagueness of the text of the law, especially regarding the scope of the exemptions established in article 5 of this decree, which reaffirmed the regulation in place regarding several economic activities and the prerogatives of State bodies concerning price controls. The vagueness of this article, Paredes argues, could be addressed by the *comisiones* themselves through the development of doctrines.[364] He concluded by pointing that any changes to the CLR should not affect in any way the decision-making processes of the different *comisiones*.[365]

The arguments presented by Paredes are important because they evidence the growing influence of neoclassical economic analyses and the erosion of the prevailing way of framing competition law issues in Chile. As we argued in Chapter 4, during the 1970s and especially during the 1980s, competition law issues were framed from a distinctive legal perspective. Rather than assessing particular contractual arrangements on their efficiency or other consequences, the

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[359] See Atria, Rodrigo, Oscar Muñoz Gomá, and Carolina Stefoni Espinoza. *El Período Del Presidente Frei Ruiz-Tagle: Reflexiones Sobre El Segundo Gobierno Concertacionista.* Editorial Universitaria, 2002. Pg. 288.
[360] Bernedo, Op.cit. Pg. 144.
[361] Paredes, Ricardo. "Jurisprudencia De Las Comisiones Antimonopolio En Chile." *Estudios Públicos* , no. 58 (1994). Pg. 232. See also See Paredes, Ricardo. *Fundamentos Para Una Política Antimonopolios.* Universidad de Chile, Facultad de Ciencias Económicas y Administrativas, Editorial de Economía y Administración, 1991.
[362] Paredes-Molina, Ricardo D. "Políticas De Competencia En Países Sin Tradición De Mercado: El Caso De Chile." (1996). Pg. 11.
[363] Ibid. Pg. 12
[364] Ibid. Pg. 13.
[365] Ibid. Pgs. 13 - 14.

FNE and the different *comisiones* assessed the extent to which such agreements restricted unduly the commercial freedom of the parties engaged as a matter of principle.[366] By bringing economic analyses into the discussion, Paredes argued for the abandonment of this legalistic perspective and the adoption of perspectives similar to those in use in US antitrust law. We contend that his writings show how the discursive changes taking place *within* the neoliberal project.

Despite the publicity given to the studies and the diagnosis offered by Ortuzar and Paredes, historian Patricio Bernedo argues that the political force that led to first broad amendments of DL 211 was *fiscal* Rodrigo Asenjo. He had experience in public office but was not an expert on competition law issues. Nonetheless, soon after he assumed office he realized that this regime had the limitations diagnosed before and began a campaign to strengthen its capabilities.[367] By the mid 1990s Asenjo had already acquired notoriety because of his stance in some of the investigations conducted by the FNE.[368] Moreover, he renewed the role of the *fiscal* as a proactive actor in legal reform processes; future *fiscales* would take this further by acting as brokers between local politics and international expectations.

Asenjo was able to mobilize the government's support to amend the CLR as established in the DL 211, but not without considerable efforts. On one hand, although he had presented a proposal for discussion within the government in 1996, the actual support for this enterprise came in late 1997, after he complained publicly about the government's lack of commitment. On the other, the draft presented before congress only addressed the FNE. Apparently, the government was more committed to the criminal law reform that was taking place and was not willing to exhaust its political capital with a bill that changed importantly this CLR. Also, this was supposed to be the preferred option of *fiscal* Asenjo, who considered that a more thorough reform would have little chances of being adopted.[369] The government officially submitted before Congress a bill amending title IV of DL 211 in September 17, 1997. The congressional record of this bill somehow challenges these considerations, members of congress stated that they will discuss amending only the FNE because the government agreed to submit a bill

[366] A particular example of the prevailing legal perspective can be found in Prieto, Domingo Valdés. *Libre Competencia Y Monopolio*. Editorial Jurídica de Chile (2006).
[367] Bernedo, Op.cit. Pg. 136.
[368] Ibid. Pgs. 135 - 136.
[369] Ibid. Pg. 145.

containing more thorough changes, like the creation of a specialized tribunal, later on.[370] This bill was enacted, with a few changes, as law 19.610 of 1999.[371]

As expected, the law augmented considerably both the prosecutorial powers of the FNE and its resources. The law replaced the entire title IV of DL 211, which contained the core provisions of the legal nature, composition and duties of this agency. It gave to the FNE more independence from other administrative bodies, although the appointment of the *fiscal* remained a matter of the president.[372] This body was now entrusted with the protection of the "general interest of the collectivity within the economic order".[373] The law also allowed the FNE to commence investigations of allegedly anticompetitive conducts without notifying the investigated parties if cleared to do so by the CR.[374] Also the *fiscal* could now ask any entity, public or private, to provide information and submit documents pertaining to the investigations it underwent. The CR could overturn such requests, but in order to do so the affected parties had to argue that providing such information creates an unnecessary burden for them or for third parties.[375] Finally, the law almost doubled the number of staff position belonging to this agency.[376]

The congressional record of the law foreshadowed the institutional changes that will take place in the future. It shows the extent to which this law combined elements from the doctrines mentioned before with elements from the original neoliberal variant prevalent until then. First, it continues to rely on the "economic constitution" and punitive administrative law doctrines prevailing at the time (see chapters 3 and 4). The presidential message that accompanied the bill as submitted to congress provides evidence of that, as it begins by placing economic freedom in the "public economic order" established by the "economic constitution". It also states that since free competition is a "legally protected good", this CLR is not about the freedom of producers or consumers nor preventing harms to market actors.[377] Second, the law reinforces a system of public enforcement by giving more powers to the FNE and subdues private complaints and actions to the "general interest". This institution serves a "transcendental finality" since it

[370] See for example Chile, Chamber of Representatives, session of May 6, 1998. Remarks by Reps. Tuma, Orpiz, Garcia. Nuñez, Perez and Montes. Also, session of June 2, 1998. Remarks by Rep. Tuma.
[371] Chile Ley 19. 610 de 1999.
[372] Chile, Decreto Ley 211 de 1973 (after ley 19.610 de 1999). Title IV, art. 21.
[373] Ibid. Art. 27b.
[374] Ibid. Art. 27a.
[375] Ibid. Art. 27 g & h.
[376] Ibid. Arts. 23 - 26.
[377] Chile, Mensaje de s.e. el presidente de la república con el que se inicia un proyecto de ley que fortalece la fiscalía nacional economica. (No. 29 - 336/). (Hereinafter Presidential Message 19.610) Pgs. 1 - 7.

protects the collective interests that are part of the economic order. Strengthening this governmental institution improves the protection of such interests and of the economic order as a whole.[378] As a result, the law increases the protection of competition by strengthening the State institution in charge of conducting investigations for such purpose. We contend that this is consistent with neoliberal ideas about having the State participate actively in the protection of competition.[379]

The public reception of law 19.610 of 1999 was mostly critical. According to *El Mercurio*, a well-known local newspaper with an affinity towards conservative ideas, by amending only the rules pertaining to the FNE, the law had altered the balance between this institution and the CR and CP. As mentioned before, the FNE conducted investigations for the CR, managed its bureaucratic tasks, and set the agenda of cases to be tried before it. Hence, with its new legal faculties and resources, the FNE could overcome the capacity of the CR and further determine the outcomes of the cases it decides.[380] This newspaper's note included the opinions of members Waldo Ortuzar and Ricardo Paredes, who argued that the *comisiones* had to be updated in order to counteract the FNE. They proposed the creation of a tribunal, independent of the FNE, composed of full-time appointees, independent of the executive branch, and with expertise on competition law topics.[381] Interestingly, this note also suggested that the creation of the tribunal was a matter of adequate institutional design with emphasis on due process guarantees.[382]

The new powers of the FNE, its resources and its visibility were not easy to manage. President Ricardo Lagos (2000 - 2006) appointed Francisco Fernandez, an expert lawyer in consumer protection as *fiscal*. He had to address several complex issues. First, he had to continue with the efforts to update the CLR after the changes introduced by law 19.610 of 1999. However, more than a year after this law's enactment the government had not been able to consolidate a reform project that could be submitted to congress.[383] Second, he continued with the cases advanced by his predecessor, and imprinted on them a distinctive consumer protection perspective. Members of the competition law community criticized this approach, arguing that it lacked focus.[384] Thirdly, some of the cases he advanced involved other governmental bodies with interests in their outcome. In two cases the *fiscal* clashed with cabinet members that had interests

[378] Op.cit. Presidential Message 19.610. Pgs. 18 - 19.
[379] On the variants of neoliberalism, see chapter 2, section II.
[380] El Mercurio. *El Poder Incontrarrestable.* December 5 1999.
[381] Ibid.
[382] Ibid. Statements of Ricardo Paredes.
[383] Bernedo, Op.cit. Pg. 150.

in the outcomes of the anticompetitive conducts investigated. Feeling he lacked the political support he expected, he resigned in August 2001.[385] *El Mercurio* noted that his resignation did not come as a surprise since his interventionist stance with regard to markets came across as excessive in what was supposed to be an open economy.[386]

The appointment of a new *fiscal*, Pedro Mattar, contributed to creating favorable conditions for amending DL 211 for a second time. The press portrayed him as having a technical profile, since his experience related to competition law issues and with legal reforms.[387] A few months after his appointment, he informed that the government was well ahead in this project. He also professed a view of competition that was more amenable to economic analyses and which thus contrasted to the more legal approach of his predecessors.[388] When considered together, these aspects suggest that *fiscal* Mattar's appointment soothed any worries resulting from the activities underwent by his predecessors and aimed to regain the trust of the private sector. At about the same time that Mattar was appointed, the business association *Sociedad de Fomento Fabril* and the government underwent a large-scale revision of this country's regulation. One of the plans the government agreed was, as mentioned by *fiscal* Mattar, the creation of a specialized competition law tribunal.[389] Moreover, this plan was also congenial to the efforts of *Libertad y Desarrollo*, a conservative think-tank that since the early discussions of law 19.610 argued for similar measures.[390] The alignment of different local actors - ranging from *Concertación* government members to conservative think tanks - suggested that a thorough reform of DL 211 was indeed possible.

Another element that contributed to the reform of DL 211 was the Peer Review prepared by the Organization for Economic Co-Operation (hereinafter OECD) in 2003 and published in 2004.[391] This review is the first of several influential documents elaborated by this organization and its suggestions have been taken into consideration in various legal reforms. This review aimed to bridge the administrative, discretionary regime of the past with a proposal, for future

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[384] Ibid. Pg. 156.
[385] Ibid. Pgs. 155 - 158.
[386] El Mercurio. *Pedro Mattar, nuevo Fiscal Antimonopolio*. Aug. 7, 2001.
[387] Ibid.
[388] El Mercurio. *Un nuevo arbitro a la cancha.* November 10, 2001.
[389] Sociedad de Fomento Fabril. *Agenda Pro Crecimiento.* Available at http://www.sofofa.cl/qsomos/2002_2003/5_AgendaProcrecimiento.pdf. Also Bernedo, Op.cit. Pg. 162.
[390] See Maria de la Luz Domper & Kangiser Gomez, Pablo. *Comisión antimonopolios: reformas pendientes al Decreto Ley 211 y la defensa de la libre competencia en Chile.* Instituto Libertad y Desarrollo - Serie Informe Económico (E95). (1998).
[391] Winslow, Terry. *Competition Law and Policy in Chile: A Peer Review,* OECD. 2004

institutional developments, based on having a specialized tribunal that addresses competition law issues according to the doctrines developed in other jurisdictions. This can be evidenced in several of its aspects. First, the review offered some historical background on the history of the CLR, although it narrated it according to the more US oriented discussion of the goals of competition law.[392] Second, it argued that the application of the substantive framework was unclear, among other things, because of the uncertainty about how the law is applied. It also suggested that the FNE issue guidelines or "policy statements" to address this issue.[393] Thirdly, it suggested the adoption of a merger review regime to treat mergers and anticompetitive conducts differently.[394] Finally, it put forward the proposal of replacing the different *comisiones* with a quasi-judicial tribunal, which suggests a shift from administrative discretion to a form of "Rule-of-law" adjudication.[395]

We highlight two particular developments. To begin with, there are remarkable similarities between the observations and propositions of this review and the criticisms of this CLR made by local actors are quite important. These similarities are twofold. First, the review shares the suggestions made by local actors about replacing the current enforcement bodies with a more specialized enforcement body, like a tribunal.[396] Arguably, this is so because the review included the ideas presented by local actors in order to give them the full sway of being part of an OECD review. Second, this review shares with local neoliberal accounts the idea of reshaping the Chilean CLR as being about economic efficiency without further consideration for other goals.[397] Just as well, the drive for the "internationalization" of this regime is remarkable. (By "internationalization" we refer to the idea that for this regime to become more effective it should develop institutions based on ideas and insights taken from foreign competition law regimes.) The combination of these two elements placed this OECD's review and the local accounts of this regime well within the neoliberal competition law project, although within it they seem to perform different functions. The local accounts became the core inputs for the legal reforms that would be to come; in turn, the review assured that those reforms were in the right direction from the perspective of international actors.

[392] Ibid. Pgs. 18- 24.
[393] Ibid. Pgs. 59 - 60
[394] Ibid. pg. 63.
[395] Ibid. Pg. 59 (Stating how the proposed tribunal would have more time to prepare explanatory decisions.)
[396] See Ibid. and El Mercurio. *El Poder Incontrarrestable.* December 5 1999.
[397] See Ibid. Pgs. 18 - 24 and Paredes, La Jurisprudencia de las Comisiones, Op.cit. Pgs. 232-233.

Given the favorable conditions described, the government submitted a bill before Congress that addressed the issues created by law 19.610 of 1999. This bill was enacted (with few modifications) as law 19.911 of 2003. This law was considerably more ambitious than the previous legislation that it amended, as it redefined important aspects of this regime in light of the more recent neoliberal variants. First, it states explicitly that the goal of this competition law regime is to protect "free competition in markets".[398] In doing so, it aimed to dispel the uncertainty surrounding this regime's goals that has occupied academic discussions until then.[399] In particular, it dispelled the idea that this regime protected consumers *as a class* over other actors in the competitive process.[400] Moreover, the law also introduced more precise definitions of the prohibited conducts. It contains a general prohibition followed by particular prohibitions of agreements and concerted practices, abuses of dominance and predatory prices. The new law also eliminates the criminal liability for anticompetitive conduct, leaving only administrative and civil liabilities in place.[401] To compensate this, it doubles the fines that could be imposed and established as criteria for their application the benefit resulting from the conduct, its seriousness, and whether it is form of recidivism, or not.[402]

Second, this law replaced all the *comisiones* with the *Tribunal de Libre Competencia*, or TDLC, an independent tribunal specialized in competition law issues.[403] Its main purpose is firstly to decide the cases brought before it by the FNE and private individuals. It can also provide advice about non-litigious acts or contracts to be celebrated, issue general guidelines for private parties to follow, and counsel the government about the competitive features of current or proposed regulation.[404] The Tribunal is composed of five, fully paid members - three lawyers and two economists - which should devote exclusively to their work in this institution although they may hold academic posts.[405] The president can choose one lawyer and one economist from two lists made by the Chilean Central Bank of candidates, which are selected from a public list. Two other members - also a lawyer and an economist - are selected from a public list and appointed by the Central Bank. In turn, the president of the TDLC should be a lawyer appointed by the President and selected from a list made by the Supreme Court with candidates that meet a series of requirements. Regarding the FNE, the law did not limit its powers, but presented some of them

[398] Chile. Decreto Ley 211 de 1973 (after amends by Ley 19.911 de 2003). Art. 1. (Hereinafter DL 211)
[399] See, for example, Valdés Prieto, Op.cit. Chapter 3.
[400] Bernedo. Pg. 163.
[401] DL 211 Op.cit. Art. 3.
[402] Ibid. Art. 17. k
[403] Ibid. Art. 5.
[404] Ibid. Arts. 2, 17c & 17e.
[405] Ibid. Arts. 7, 8, 12.

in a more straightforward way.[406] Finally, the new law opened up the possibility that the Supreme Court, through a "recurso de reclamación" could review any decision issued by the TDLC imposing a sanction, thus increasing the opportunities for review.[407]

It is important to identify the elements that enable this law to counterbalance the reforms introduced by the previous law 19.610 of 1999. First, it further opened competition law enforcement to the profession of economics at different levels. At the level of defining the goals of this regime, it established a goal that is more consistent with economic doctrines and less so with legal doctrines. This is also evident in how the different anticompetitive conducts were defined, as well as with the decision to raise the fines. At a more practical level, the new legislation opens competition law decision-making to economists by establishing that two of the five posts in the TDLC are reserved for those professionals. It does something similar for this institution's staff. Both aspects suggest that underlying this law is the view that competition law enforcement cannot be properly understood only as a legal issue - an insight confirmed by the congressional record of this law.[408] Second, the creation of the TDLC was conceived as necessary to counterbalance the stacked process that investigated parties had to face given the FNE's new functions. The idea of having separate (and independent) institutions contrasts with the previous collaborative architecture between the FNE and the different *comisiones*. Thirdly, the idea of establishing a judicial institution, coupled with the redefinition of the goals and anticompetitive conducts, was understood as necessary for making this regime more rule-bound. The congressional record shows that having a politically independent decision-making institution (like a court), and a precise drafting of legal provisions, were the mechanisms used to achieve this aim.[409] This aspect was reinforced by allowing the Supreme Court to review any decision by the TDLC that imposes a sanction, because such review procedure can be understood as an additional guarantee for the investigated parties. Because of all these aspects, this law redefines core aspects of this regime and gives prevalence to a more recent (and international) variant of the neoliberal competition law project

II.B. Price Collusion and the FNE (2003 - 2009)

[406] Ibid. Art. 22 and following.
[407] Ibid. Art. 27. The *recurso de reclamación* is a general action that can be filed before courts against administrative acts. This article conditions filing such actions, stating that decisions issued by the TDLC imposing fines, and not against other acts, can be challenged.
[408] See for example, Chile. Senate, Commission of economic affairs, session of Aug. 13, 2002. Answers by Minister Grossi. Also, general session of Sept. 2, 2002. Remarks by Sen's. Sabag, Viera-Gallo and García.

As mentioned in the previous chapter, collusive agreements were not at the core of the enforcement activities of the FNE or of the *comisiones*. According to Eliana Cruz and Sebastián Zárate, between 1973 and 2003 the different *comisiones* decided a total of 127 collusion cases, which roughly amounts to 6.3 per cent of all the cases decided.[410] DL 211 states that the evidence of collusion, as well as of any anticompetitive conduct, could come from any of the means of evidence stated in the Code of Civil Procedure, and the indications of the TDLC. It also stated that any prior record or indirect evidence that the CR considers relevant could be used to ascertain the established facts.[411] The standard of proof, therefore, was based on the general evidence regime and did not require any specific type of evidence for the proof of anticompetitive conducts. Even though the substantive content of the law did not change, the decisions issued by these bodies evidence a shift towards a more nuanced analysis of the conditions that were part of each investigation, both numerically and substantively, during the second half of the 1980s and unto the 2000s. Before then, collusion decisions were based mostly on price parallelism, where similarities of price levels or other aspects related with price determination were taken as a sign of collusion.[412] The number of convictions for collusion cases was about 3 per year. Beginning in the late 1980s, a change regarding how collusion occurred; price similarities were not considered anymore as a distinctive evidence of collusion. The turning point can be found in decisions like *resolución* 244 of 1987 by of the CR, in which this body stated that, as economic theory indicates, price identity could also indicate strong market competition.[413] Once this change took place, the number of convictions lowered considerably reaching an average of less than one decision per year.[414]

Resolución 432 of 1995 is an illustrative example of how the CR analyzed price collusion during this period. In this decision, the CR fined three retail pharmaceutical stores for engaging in collusive pricing. In 1993 the store *Cruz Verde* decided to incur into the market of Santiago, triggering a response by the other three incumbents in this market that lowered their prices. However, by late 1993 *Cruz Verde* and the other incumbents raised their prices in a coordinated fashion until April 1994. This resulted from an agreement between them, as proved by FNE

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[409] Chile, Mensaje de s.e. el presidente de la república con el que se inicia un proyecto de ley que crea el tribunal de defensa de la libre competencia. (No. 132 -346) May 17, 2002. (Hereinafter Presidential Message 19.911). Pgs. 7 & 12

[410] Cruz, Elina, and Sebastian Zarate. "Building Trust in Antitrust: The Chilean Case"." In *Fox and Sokol (eds.), Competition Law and Policy in Latin America.* 2009. Pgs. 164 - 165.

[411] DL 211, Op.cit. Arts. 1,2.d and 18.f.

[412] Cruz & Zarate, Op.cit. Pg. 166. See for example Chile, Comisión Resolutoria, Resolución 5 de 1974.

[413] Chile, Comisión Resolutiva, Resolución 244 de 1987. Pg. 3

with evidence showing the similarity of the price increase and on the basis of testimonies by employees who had actively exchanged price information. The CR accepted the evidence presented by the FNE and fined all four incumbents, but it did not address the argument, presented by one of the defendants, that price parallelism was not a definitive evidence of collusion.[415]

This decision shows that for the CR it was important to have direct evidence of an agreement to rule against the instigated parties. However, it was unclear at the time whether only direct evidences meets the standard of proof required to punish price collusion, or if indirect evidence, like a presumption following from price parallelism, sufficed. This is so because the CR stated that even in the absence of the direct evidence obtained by the FNE, the existence of an anticompetitive agreement could be inferred from the similarities of the prices and the timely coordination of the conduct.[416] Hence, the evidentiary standard that the CR relied upon to punish price collusion was not altogether clear.

This situation became more complex when the TDLC began deciding the price collusion cases presented by the FNE, and then when the Supreme Court reviewed those decisions. Between 2004 and 2009, the Supreme Court reviewed 6 price collusion cases; it affirmed 4 decisions issued by the TDLC where the tribunal had ruled against the FNE and other parties involved, and revoked 2 decisions where this tribunal ruled after the claims presented by the FNE. During this same period, the TDLC decided 7 cases regarding price collusion. Of these, it ruled against the investigations presented by the FNE or the plaintiffs in 4 decisions and ruled in favor of them in the remaining 3.[417] Table 5.1 relates the outcomes of the decisions issued by the TDLC and the Supreme Court:

[414] Cruz & Zarate, Op.cit. Pg. 166.
[415] Chile, Comisión Resolutiva, Resolución 432 de 1995.
[416] Ibid. Pg. 16.
[417] This analysis is based upon data provided by the FNE in its webpage. It excludes non judicial decisions (resolutions), non-price collusion cases and a settlement. This information can be obtained at http://www.fne.gob.cl/jurisprudencia-en-libre-competencia/

Table 5.1. Price Collusion Decisions Issued by TDLC and Supreme Court

Decision #	Defendant Parties	Decision TDLC (outcome)	FINE TDLC (in USD)[418]	Date	Decision Supreme Court (affirms/revokes)	Date
18/2005	Copec, et.al	Revokes CP decision and FNE's complaint	-	10/06/2005	Affirms	26/10/2005
38/2006	ASOEX	Accepts FNE's complaint; sanctions defendants	433,878.5	7/06/2006	Revokes; evidence insufficient to conclude collusion, nor intent.	28/12/2006
43/2006	AirLiquide	Partially accepts FNE's complaint on charges of collusion	128,695	7/09/2006	Revokes	22/01/2007
57/2007	ISAPRES (various)	Rejects FNE's complaint, insufficient grounds for collusion		18/07/2007	Affirms; details evidence standard for collusion.	28/01/2008
74/2008	AMPatagonia	Partially accepts FNE's complaint	94'506,260.25	02/09/2008	Affirms, but lowers fines to 7'518,496	31/12/2008
79/2008	Asfaltos	Rejects FNE's complaint		10/12/2008	Affirms	16/04/2009
87/2009	Copec et.al	Rejects complaints for lack of evidence of collusion.		13/08/2009	NA	NA

As the voting patterns of the major decisions involved suggests, the TDLC's hostility towards the use of indirect evidence to prove price collusion was the result of the efforts of this tribunal to adapt to the evidentiary standard of the Supreme Court on this matter.[419] In *ASOEX*, all five members of the TDLC ruled against the defendants based on the indirect evidence presented by the FNE.[420] The Supreme Court revoked the TDLC's decision and established that collusion cases require proof that the behavior of the investigated parties is the result of a concerted practice (and not of a lawful alternative) and the existence of an anticompetitive intent by these parties.[421] In *AirLiquide*, the TDLC ruled against the defendants based once more on the evidence presented by the FNE;[422] However, in his dissent minister Menchaca argued that there was not enough evidence to support the occurrence of a collusive agreement, and that to punish

[418] Total fines levied against all firms involved, but not including fines against individuals except for Decision 74/2008. The values are approximations expressed in US dollars based on rates of July 10, 2015.
[419] Cruz & Zarate, Op.cit. Pg. 174.
[420] Chile, Tribunal de Defensa de la Libre Competencia (hereinafter TDLC). Sentencia 38/2006 de 7 de Junio de 2006.
[421] Chile, Corte Suprema de Justicia (hereinafter CSJ), Proceso 38/06, sentencia de 28 de diciembre de 2006.

a collusive agreement it was necessary to prove that the parties involved in such agreement abused of the market power resulting from such agreement in the first place.[423] The Supreme Court also argued that the occurrence of an agreement had not been properly proved and revoked the TDLC's decision.[424] Finally, in *ISAPRES* the TDLC rejected a complaint brought against several health insurers that had simultaneously lowered their coverage rates in similar proportions. This time, the Tribunal ruled in favor of the defendants. It endorsed the elements mentioned in the previous decision for proving collusion and argued that certain conditions like barriers to entry and information exchange between parties were not enough to conclude that collusion had taken place.[425] The Supreme Court confirmed the decision of the TDLC. Besides stating again the elements necessary to prove the occurrence of collusive agreements, the Court added that only direct evidence was satisfactory for proving collusive agreements.[426] In doing so, the Court limited considerably the scope of article 18f of the DL 211, according to which anticompetitive conduct could be proved using any evidence available.[427] The doctrine resulting from these rulings was that if economic theories could provide a lawful explanation of the conduct investigated, then the conduct and its allegedly anticompetitive nature had not been adequately proven.

The increasingly more demanding evidentiary standard that the courts required for proving collusive agreements had impacted the FNE's work. As Francisco Caravia, a member of this institution, casually stated in a presentation, "(w)e were in the worst of all worlds: a demanding evidentiary standard and without any proper means of investigation."[428] This situation came across as unbalanced and unstable because the FNE could not turn investigations into convictions with the limited investigative tools established in the law. Moreover, these outcomes were also unanticipated consequences of having the Supreme Court deciding more competition-related cases than it had before the 2003 amendment.[429]

The response by the government and the FNE to these events was complex and involved action in several fronts, turning this otherwise problematic situation into an opportunity for change. Firstly, *fiscal* Enrique Vergara (who replaced Pedro Mattar in 2006) redirected the efforts

[422] Chile, TDLC, Sentencia 43/2006 de 7 de Septiembre de 2006.
[423] Ibid. Pgs. 127 - 130.
[424] Chile, CSJ, Proceso 43/06, Sentencia de 22 de enero de 2007.
[425] Chile, TDLC, Sentencia 57/07 de 18 de julio de 2007.
[426] Chile, CSJ, Proceso 57/07 de 28 de enero de 2008.
[427] DL 211, Op.cit. Art. 18.f.
[428] Caravia, Francisco. "Evolución En La Lucha Contra Los Carteles En Chile." (2009)
[429] Cruz & Zarate, Op.cit.

of the FNE towards investigations where direct evidence of anticompetitive conduct was available in order to prevent adverse rulings by the courts.[430] This was aligned with the OECD reports that advised that competition law enforcement authorities to prioritize their investigations and channel their resources into those investigations that would bring the highest pay-offs.[431] This strategy paid-off in an investigation involving department stores *Almacenes Paris* and *Falabella* whom colluded to prevent suppliers of household goods from participating in a special event organized by a bank that offered a credit card system that rivaled the system developed by the stores. The FNE obtained direct and indirect evidence of the intent of these stores to sabotage the bank, including emails and other communications. The TDLC ruled against the defendants,[432] and the Supreme Court confirmed the TLDC's decision but lowered the fines imposed to the condemned parties.[433] Secondly, the government submitted before congress a new bill amending DL 211, which eventually was enacted as law 20.361 of 2009. Because of the particular conditions that led to the enactment of this law, we will consider it in more detail in the following Section.

II.C. Legal Reform and Competition Law Decisions (2009-2014).

The year 2009 is of symbolic importance to the Chilean CLR because of two different but related events. First, it was the year in which law 20.361 was enacted. This law introduced important changes in this CLR, like providing the FNE the power to conduct raids and seize documents and information, and the adoption of a leniency regime. As we will show below, these reforms were aimed at strengthening the State's prosecutorial capacities in order to protect competition. Second, in 2009 the investigations conducted by the FNE became the subject of intense coverage by the media. In particular, the price collusion investigations in the *farmacias* ("drugstores") case drew an unanticipated amount of public attention, and contributed to the enactment of law 20.361 of 2009. The FNE's apparent strategy of harvesting public awareness by offering to the media details of the investigations in order to sow public support for its activities paid off. Hence this year marked the beginning of a new period characterized by the consolidation of the a variant of the neoliberal project. Even so, a few limited elements of State-centered project, like the reliance on the State to solve competition-related issues, became noticeable.

[430] Bernedo, Op.cit. Pg. 177
[431] OECD, Peer Reviews of Competition Law and Policy in Latin America:
A Follow-Up Argentina, Brazil, Chile, Mexico, Peru (2007).Pgs. 10 - 11.
[432] Chile, TDLC, Sentencia 63 de 2008 de 10 de Abril de 2008.

Our analysis begins with an overview of law 20.361 of 2009 in congress. The main facets of this law consisted in granting new investigative powers to the FNE like the capacity to seize information obtained through dawn raids,[434] an increase of the applicable fines[435] and the establishment of a leniency regime.[436] The first two elements were considered necessary for the proper functioning of the leniency regime, for higher fines and intrusive investigative powers raise the incentives for denouncing collusive agreements.[437] The congressional record of this law showed that with regard to the adoption of a leniency regime there were two different positions. On one hand, there was a group of politicians and commentators that viewed this institution with skepticism. Their arguments varied, but they generally gravitated towards two ideas. First, that leniency regime was foreign to Chilean commercial law, and was used only in criminal law cases involving illicit drug dealings and terrorism - two types of highly dangerous crimes. Hence, to introduce such a regime, and granting the FNE more intrusive investigative faculties, meant treating collusion cases as if they had the social relevance of the above-mentioned crimes.[438] Second, it was felt that establishing leniency regimes and combining them with more investigative faculties to the FNE endangered individual rights by giving the State almost unchecked powers.[439] On the other, there were other members of congress that were in favor of adopting a leniency regime, as it would contribute to address more effectively the undiscovered anticompetitive conducts that were taking place.[440] Representatives like deputy Burgos went as far as to state that this bill was important in tackling private sector corruption.[441] Even though the majority of representatives were in favor of the changes proposed, its process through Congress became increasingly complicated because of differences on these and other issues.[442]

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[433] Chile, CSJ, Proceso 63 de 2008 de 13 de Agost de 2008.
[434] Chile Decreto Ley 211 de 1973 (after amendments of law 20.361 of 2009). Art.39n.
[435] Ibid. Art. 26c
[436] Ibid. Art. 39ñ
[437] As explicitly stated by Representatives Safirrio and Burgos during the debate of the law. See Chile, Congressional record of law 20.361. Pgs. 102 & 205. The idea that optimal deterrence could be obtained by considering the interplay between the amount of the fines imposed and the probability of detection dates back to a seminal paper by Gary Becker. See "Crime and Punishment: An Economic Approach." *The Journal of Political Economy* 76, no. 2 (1968): 169-217. This idea appeared was reiterated later on in the OECD proposal for amending the Chilean CLR in 2014.
[438] See Congressional Record of law 20.361, statements by Representative Eluchans, pg. 90, Arenas, pg. 101 and Rep. Cardemil, Pgs. 106 - 107.
[439] See for example Ibid, statement by Axel Buchesteir, member of *Libertad y Desarrollo*. Pgs. 57 - 58.
[440] See for example Ibid. statements by Rep. Jaramillo, pg. 92, and Saffirio, pg. 102.
[441] Ibid. See Pg. 205.
[442] Even so the leniency regime was not the most political decisive issue according to the congressional record. Apparently, the changes regarding the independence and pay grade of the TDLC's ministers were more contested.

As the discussion of this bill lingered in congress, the FNE was conducting one of its most publicized price collusion investigations to this day. In April 2006 this institution requested all communications between pharmaceutical laboratories and three retail chain stores (*Salco Brand*, *Cruz Verde* and *Ahumada*) as well as between the personnel of the retail stores. Among the communications requested was information regarding the prices of prescriptions medicines since 2006. With the different pieces of evidence collected, the FNE determined that a collusive agreement was taking place between the chain stores and that the laboratories were also involved in the coordination of their actions (a "hub and spoke" conspiracy). The conduct of these *farmacias* led to an excessive pricing of many medicines, including those for epilepsy and diabetes. The formal complaint was lodged before the TDLC in 2008,[443] but in 2009 the FNE and one of the drugstores reached a settlement agreement that resulted in the FNE disposing of direct evidence about the occurrence of the anticompetitive agreement. The TLDC and the Supreme Court reviewed the settlement and decided in favor of its legality;[444] for all practical matters, this settlement amounted to the exercise of an informal leniency procedure.

The *farmacias* case is highly important because it produced effects well beyond the matters litigated. This was not the first case that the FNE had tried regarding the pharmaceutical sector, for it had conducted investigations against laboratories and pharmacies during the 1990s.[445] However, it was the first of these cases that received massive media coverage and was turned into a "scandal".[446] In the past, the media had commented other cases.[447] However, none of these cases were taken to be so emblematic of abuse from the private sector, nor did they cause much political stir. This investigation gave a major impulse to the enactment of law 20.361 of 2009 and became a rally cry for reformers denouncing private firms' market abuse and the moral failings of Chilean capitalism.[448] This impulse can be appreciated in two different but related instances. First, the settlement between the FNE and one of the participants showed the advantages of having a leniency regime. Minister of Finance Hugo Lavado stated before Congress that the outcome of the *farmacias* case had created a favorable situation for establishing a leniency regime like the one in the bill before congress.[449] Second, the details of this case contributed to a

[443] Chile, Fiscalía Nacional Económica (hereinafter FNE) Requerimiento contra farmacias Ahumada, Cruz Verde y Salcobrand de 10 de Diciembre de 2008.
[444] Chile, CSJ, Sentencia de 31 de Agosto de 2009. (Accepting the settlement approved by the TDLC)
[445] See Chile, Comisión Resolutiva, Resolución 432 de 1995, cited in Bernedo, Op.cit. Pg. 134.
[446] See for example El Mercurio, *El oficio de Fiscalía que desató inquietud en la industria farmacéutica.* Mayo 25 de 2008.
[447] El Mercurio, Op.cit. *El Poder Incontrarrestable.* December 5 1999.
[448] See for example Cárdenas, Juan Pablo. "*Chile agredido por la colusión politico empresarial"*. Diario y Radio Uchile, March 7, 2015.
[449] Chile, Congressional Record of law 20.361, Op.cit. Pg. 510.

collective sense of indignation against the behavior of the investigated parties, which in turn buttressed the importance of punishing more severely anticompetitive conducts. This appears several times in the congressional record of the bill, and was presented as a reason for enacting the law.[450] Furthermore, it led to some manifestations of remorse for eliminating the criminal sanctions established in the original text of DL 211.[451] Senator Allende presented a more social justice approach to the issue as she stated that "[t]his case is the best example of how economic concentration, profiteering and greed lead to situations that, regrettably, as usual, the consequences of are faced by the most vulnerable."[452]

In parallel to these developments, Chile became officially a member of the OECD in 2010. The 2010 accession review (drafted and discussed in 2009, but published in 2011) offers a general overview of the history of the enforcement of this CLR and proposes a series of ideas about its direction over time.[453] Interestingly, the report approves of the new enforcement priority given to investigations regarding collusive agreements, but expresses skepticism on how the TDLC and the Supreme Court addressed vertical agreements and abuses of dominance.[454] In particular, it approves of the more economic oriented jurisprudence issued by the TDLC, as well as the emphasis given to the prosecution of cartels.[455] This is consistent with the OECD's own views, especially with the idea that hard-core cartels are the most damaging of all anticompetitive conducts and their prosecution should be a priority.[456] Secondly, the review approved the voluntary merger review regime, because its voluntary character prevented all actors from incurring in unnecessary costs, thus unnecessary burdening productive arrangements.[457] Overall, the review supports the recent reforms of this CLR.

The leniency regime established in law 20.361 of 2009 was quickly used by the FNE. *Fiscal* Felipe Irarrazabal managed the first case, which involved two manufacturers of compressors for refrigerators and freezing cabinets that were already taking part of a leniency process in Brazil. One of these manufacturers, *Tecumseh do Brasil S.A.*, had asked for leniency in exchange of information regarding an international cartel of freezers in which it had participated between 2005 and 2008. The information presented by this actor included emails and testimonies that

[450] Ibid. see for example statements by reps. Allende and Vallespín. Pgs. 514 & 519.
[451] Ibid. Statement by reps Allende, Pg. 514, and Navarro.Pg. 557.
[452] Ibid. Pg. 513.
[453] De Leon, Ignacio et.al. *Competition Law and Policy in Chile: Accession Review. (*2010)
[454] Ibid. Pg. 50.
[455] Ibid. Pgs. 49 - 50.
[456] See OECD Council, Recommendation Of The Council Concerning Effective Action Against Hard Core Cartels (1998), March 25, 1998.

detail the existence and functioning of the cartel. The TDLC ruled favorably to the FNE in 2012 and granted the leniency to the applicant.[458] Since this case, however, the effectiveness of the leniency regime has been questioned, which perhaps explains why until 2014 there have been only two other cases - one involving a collusion between transport companies and another one involving asphalt vendors.[459] The President of the TDLC stated in his 2013 yearly speech that this was an "ineffective tool" in the fight against collusion because it did not clear firms that came forward from criminal liability. He was referring to the rather surprising decision by the office of the public prosecutors to enforce an arcane article from the Criminal Code to sue all the participants of the *farmacias* case, including the party that benefitted from leniency.[460] This was an unintended, yet not unexpected, consequence of the same public indignation that the government took advantage of for the enactment of law 20.361 of 2009.

The impact of the *farmacias* investigation had not subdued when the FNE unearthed a collusive agreement between three chicken-growing firms that amounted to more than 90 per cent of Chile's market and their business association.[461] As in the *farmacias* case, this investigation touched upon a social fiber because of the widespread consumption of the products involved. The FNE showed that the parties had colluded and maintained prices for a period of 10 years. Because of the duration of the practice, and the widespread consumption of chicken, the FNE argued for the imposition of the highest fines to the producers before the TDLC.[462] This court confirmed entirely the complaint filed by the FNE in a 2014 decision, and proceeded to impose the highest fines possible according to the law;[463] in a decision issued on October 29, 2015, the Supreme Court confirmed the ruling of the TDLC, including the amount of the fine imposed.[464]

Both the *farmacias* and the chicken cases were presented by the media as examples of abuses committed by powerful firms. However, they were not the only cases that amounted to scandals, especially during 2011. Earlier that year, the securities regulator discovered that one of Chile's emblematic retail stores, *La Polar*, had misrepresented its financial situation. The fraud began

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[457] Accession review, Op.cit. Pgs. 52 - 54.
[458] Chile, TDLC, Sentencia 122 de 2012 de 14 de Junio de 2012.
[459] Chile, FNE, Requerimiento contra Pullman Bus Costa Central y otros de Julio 2 de 2001 and La Tercera *FNE requiere por colusión a cuatro grandes proveedoras de asfalto* July 2011.
[460] Menchaca, Tomás. "Novena Cuenta Pública Del Presidente Del Tribunal De Defensa De La Libre Competencia." 2013. Pgs. 10 & 11.
[461] El Mercurio, *Fiscalía Económica acusa de colusión a productores de pollo y pide multas por US$ 100 millones*. Diciembre 1 de 2011.
[462] Chile, FNE, Requerimiento en contra de Agricola Agrosuper S.A. y otros. Noviembre 30 de 2011.
[463] Chile, TDLC, Sentencia 139 de 2014 de Septiembre 25 de 2014.
[464] Chile, CSJ, Sentencia 181 de 2015 de Octubre 29 de 2015.

with the unilateral amendment of the terms and conditions of overdue consumers' contracts; it was unearthed by a consumer defense association when inquiring about the numerous complaints against this retailer. This case also evidenced the inadequate level of supervision exercised by the regulatory authorities.[465] Just as well, that same year the construction of 5 dams in the southern region of Aysén became a politically contested issue.[466] Different actors - including politicians, environmentalists and civil rights activists - opposed to the project arguing that it would lead to irreversible ecological damages, affect minorities and resulted from corrupt practices.[467] Although the Bachelet government decided to discontinue the project in 2014, the media coverage of its different aspects had already cast a shadow over the political and economic establishment.[468] Finally, 2011 was also the year of the massive student protests. The student movement demanded more public expenditure on education institutions, free from charge programs, and the end of the business-like features of this activity; basically, to change the system established during the military regime.[469] Underlying all these events was the notion that the legal, political and economic model established in the 1980 constitution was unable to care for the demands of an active citizenry and the lower income ranks of the population.[470]

The popular indignation surrounding these scandals served as a context against which the reintroduction of criminal liability for anticompetitive conducts was disclosed. In congress, several politicians argued for such a reform.[471] The government of President Piñeira (2010 - 2014) established a committee composed of local members of the competition law community to address this issue. The final report of this commission, published in 2012, shows a division on this topic among its members; while some argued for raising the fines so that they were proportional to the harm caused, others argued for reintroducing criminal liability because it could dissuade anticompetitive conducts more effectively.[472] However, the government did not pursue changes after the publication of this report, even though this discussion continued within the competition law community, including the enforcement institutions. The president of the TDLC, Tomás Menchaca, acknowledged that the eventual reintroduction of criminal liability

[465] Baires, Rodrigo, Jorge Sullivan, and Andrés Chavez. "La Polar: Un Mapa Para Entender Cómo Se Fraguó Y Ejecutó El Lema De "Llegar Y Llevar". Ciper.cl (2011).
[466] The New York Times, *Plan for Hydroelectric Dam in Patagonia Outrages Chileans*. June 16 of 2011.
[467] "Rechazo ciudadano a HidroAysén". *Revista Punto Final,* 25 May, 2011.
[468] El Mundo, *El Gobierno de Chile rechaza el polémico proyecto Hidroaysén*. 21 de Junio de 2014.
[469] BBC Mundo, Las razones de las protestas estudiantiles en Chile. 10 de Agosto de 2011.
[470] See in general Atrial et.al. Op.cit.
[471] Chile, Senado (Press department). Piden sanciones ejemplares para involucrados en colusión de productores avícolas. Diciembre 5 de 2011.
[472] Gonzales T., Aldo. *Informe de la comisión asesora presidencial para la defensa de la libre competencia*. (2012)

resulted from the public indignation that the *farmacias* and chicken cases caused in the Chilean society.[473] In turn, the OECD's Peer Review follow-up report is favorable to the FNE's decision to emphasize prosecuting collusive agreements but did not comment on the possibility of reintroducing criminal fines or on the effectiveness of the leniency regime.[474] In the meantime, the FNE continued with its investigations regarding price collusion. In 2012 it filed a claim against the transporters of the city of Valdivia,[475] and in 2013 it filed a claim against the gynecologists in the region of Ñuble engaging in this conduct.[476] Both claims highlighted the social costs of the anticompetitive practices involved.

A few months after Michelle Bachelet began her second presidential term in 2014, the TDLC confirmed the FNE's assessment of the anticompetitive conduct involved in the chicken case and ruled against the defendant.[477] This decision was followed by an announcement by the government's cabinet that it was seriously considering a new reform to the DL, including the reintroduction of criminal liability.[478] In the meantime, the FNE commissioned a new study, this time to foreign experts, on how to improve the punitive elements of this regime based on the experiences of other jurisdictions.[479] The OECD had also participated in the discussion of how to improve this CLR, but this time from the perspective of the merger regime. Surprisingly, a 2014 report on the matter contradicted the 2010 accession review, and argued that the voluntary notification system created too much uncertainty and was highly inadequate. It therefore proposed the creation of a mandatory pre-merger notification regime guided by the standards based on economic efficiency found in other areas of law and the other OECD member countries.[480] With the inputs provided by these studies and the popular demands to punish more severely the participants in anticompetitive agreements, early 2015 seemed adequate for presenting a new reform.

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[473] Menchaca, Op.cit. Pg. 9.
[474] OECD, *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries: Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru.* (2012) Pgs. 23 - 25.
[475] Chile, FNE, Requerimiento contra empresas de transporte de pasajeros de Valdivia y su Asociación Gremial AGETV. Diciembre 12 de 2012.
[476] Chile, FNE, Requerimiento contra asociación gremial de ginecólogos obstetras de la provincia de Ñuble. Octubre 24 de 2010.
[477] Chile, CSJ, Op.cit. Sentencia de Septiembre 25 de 2014.
[478] DiarioUChile, *Ministro de Economía: "La colusión de pollos es el delito más grande de la competencia en Chile"*. Septiembre 25 de 2014.
[479] Lianos, I., et. al. *An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis* (2014).
[480] OECD, Assessment of Merger Review in Chile (2014). More interesting still is that the document refers to both the accession review report and the annual 2013 report, which say very little about changing the merger review regime.

The bill introduces a variety of issues, but it focuses on collusive agreements and leniency, merger control and market studies. Regarding the collusive agreements, the bill introduces several changes, of which we consider here only the most salient. First, it proposes the criminalization of collusive agreements (thus amending the criminal law code) with a term between 5 and 10 years of prison, among other sanctions. The bill also proposes that the only actor that can file a criminal claim is the FNE.[481] Second, it proposes that the baseline for imposing fines should be that they reflect the economic benefit resulting from collusive agreements. It proposes the imposition of fines amounting to twice as much as the economic benefit, or to 30 per cent of the sales of the actors involved during the period in which the conduct took place.[482] Thirdly, it proposes to widen the scope of this prohibition to all agreements irrespectively of whether they have an effect on a market or not.[483] Finally, regarding to leniency, the bill proposes that beneficiaries should also be absolved from the civil and criminal liabilities associated with their conducts. This would prevent them from being absolved on the administrative dimension and yet be considered by a court as criminally liable and subject to pay damages. It also proposes to offer lesser benefits to actors that file for leniency after the first applicant.[484] Regarding merger control, the bill proposes to incorporate a mandatory pre-merger notification regime administered by the FNE. This change aims to overcome the current state of affairs, which is based on voluntary submissions. The new regime would enable the FNE to rule whether a planned merger would "lessen competition substantially" and thus to approve it or not. Its decision, in turn, could be reviewed by the TDLC.[485] Finally, concerning market studies, the bill proposes two changes. First, to give to the FNE the faculty only to undergo studies of the competition taking place in any market, in order to identify regulatory failures that affect competition, and to initiate competition law investigations. Second, in order to complement this change, to transfer the power to issue non-binding opinions about the adequacy of legal institutions from a competition law perspective currently held by the TDLC to the FNE.[486] Overall, the bill aims to grant to the FNE more control over the different variables that determine the effectiveness of the leniency regime as well as tools and capacities to exercise a better oversight of how competition takes place in markets.

[481] Chile, Mensaje de s.e. la Presidenta de la Republica con el que inicia un proyecto de ley que modifica el decreto con fuerza de ley n° 1 de 2004, del ministerio de economía, fomento y reconstrucción, que fija el texto refundido, coordinado y sistematizado del Decreto Ley nº 211, de 1973. (March 16, 2015). Art. 1.14.a
[482] Ibid. Arts. 1.9.a.1 & 2.2.
[483] Ibid. Art. 1.1.
[484] Ibid. Art. 1.14.d
[485] Ibid. Art.1.17.
[486] Ibid. Art.1.13.h

This bill contributes to the further establishment of the more recent neoliberal competition law project as well as to its convergence towards the standards set by international organizations. First, the bill continues relying on the idea that "hard core" cartels are the most damaging of all anticompetitive conducts. This idea aligns to the economic views of international organizations like the OECD, which suggest precisely focusing on those practices, but also to the social indignation resulting from the *farmacias* and chicken collusion cases. In doing so, it aligns the interests of government members involved in competition law with the interests of other government members that want to show that the government is taking the appropriate measures. Second, the bill furthers the discretion of the FNE to exercise its mandates, as well as grants it with new powers to oversee and control how competition takes place. In particular, it grants the FNE the power to control different elements associated with the leniency regime that until now escaped its control, like the issue of criminal liability. Although doing so may improve the effectiveness of leniency, it also augments the margins of the FNE's discretion as far as the new rules allow it. In doing so, the FNE would be subject to the same rules than the public prosecutor's office and their control by the courts; whether this regime is effective or not in curtailing potential abuses remains to be seen. Just as well, the introduction of a mandatory merger review enables this body to weigh on the structure of the markets in which the merging actors are active, as well as on the transactions that take place in them. Similarly, it grants this body the capacity to detail how competition takes place in any market, and to make recommendations to other governmental bodies to remove or replace particular barriers entrenched in legal rules. It is important to note that there are important similarities in the new, proactive role that this bill awards to the FNE with the one inspiring law 19.610 of 1999.

Thirdly, we note that this bill draws heavily on foreign experiences to justify the changes it suggests. In particular, all the changes that the bill proposes can be traced back to the studies mentioned above about fines and merger review. This reflects the influence of organizations like the OECD have in how this CLR is conceived, as well as the capacity of the members of the Chilean government - especially the FNE - to use the comparative knowledge to further their own reform agenda. It also reflects how both local and international actors collude in order to pursue their own agendas. In particular, the OECD's change of heart regarding merger reviews is quite difficult to explain from a theoretical perspective alone; it comes across as rather blunt, although it can reflect that the government finally ceded to different pressures and accepted to introduce such regime. It also reflects the loss of capacity to influence how competition law is

conceived by local actors that do not have the international connections of their counterparts. Even so, these actors have manifested their doubts about the bill and promised a challenge.[487]

III. Conclusions

At the introduction of this chapter we argued that Chilean competition law was a site of interaction between different actors and their projects competing for the power to determine the content and the structure of the legal rules that make it up. In this section, we evaluate the transformation of the legal rules making up this field and the general trends they suggest in terms of this interaction.

The most notorious issue is that in the time-period here considered shows the opposition that actually took place within the neoliberal competition law project between two variants described in chapter 2, one of which focuses on the constitutional protection of individual freedoms, while the other emphasizes economic efficiency and welfare. The alternative, a full-fledged conflict between different versions of the neoliberal competition law project and its State-centered counterpart has not taken place in Chile as it has in Colombia or in México. What we find in Chile is the reiteration of a common pattern in which the neoliberal project predominates, especially at the level of substantive choices. In the process of doing so, however, it is running the risk of building up the tensions this particular variant has with its older counterpart within the neoliberal competition law project. The tension verges upon a series of instances in which classic liberal rights are relativized in the name of facilitating competition law investigations and prosecutions. We refer, in particular, to the procedural instances in which the FNE can access an individual's mail without his permission, can wiretap communications with a summary judicial order or can withhold evidence from third parties, all in the name of making enforcement more expeditious. These practices have become commonplace; however it is unclear that a "classic" neoliberal thinker like Hayek would agree to give an competition law enforcer the prerogative to do all those things in the name of efficiency. Moreover, this tension could be particularly disruptive if different actors can mobilize their agendas towards a common opposition. It is not hard to imagine adherents to the first variant of neoliberalism joining forces with liberal think tanks to oppose these measures by arguing for government transparency and respect for privacy, the protection of personal information, and due process - all classic liberal

[487] Economía y Negocios, *Presidente del TDLC: En prácticamente todos los temas hay puntos que son discutibles*. Marzo 21 de 2015.

ideals. It may well be that an important challenge to the more recent neoliberal reforms comes from this variant of neoliberalism itself.

Elements associated with the State-centered project were not entirely absent during the period here considered. Even so, in this period there were no efforts to develop such project specifically for competition law, neither at the level of academia, nor of professional practice. We contend that this is because of the lasting heritage of the military regime, and in particular, of the lack of political viability of developing such project in a highly adverse context. As a result, the ideational space of conceiving competition law issues remains considerably narrow, especially more so since the economic neoliberal doctrine that emerged in the 1990s prevailed over the alternatives. Even so, the recent emergence of ideas related to the State-centered project can bring about important changes. We discussed above a few instances in which different ideas relating to this project became noticeable; one example is the political statement that punishing anticompetitive practices like cartels is important because such practices are patently unjust and unfair.[488] As the public opinion turns towards issues of distributive fairness when discussing in anticompetitive practices, we expect that these themes will become more important in the public discussions about the future of Chile's CLR.

[488] Chile, Congressional Record of law 20.361, Op.cit. Remarks of rep. Allende. Pg. 514.

6. The Persistence of State-centered Competition Law in Colombia

(1990 - 2015)

I. Introduction

In June 1 2015, Colombia's competition law enforcement agency, the *Superintendencia de Industria y Comercio* (hereinafter SIC) presented a statement of objections accusing 12 sugar mills and their business associations of operating a cartel.[489] While SIC has fined this firms and associations in the past for similar conducts, what is special of this new proceeding is that this agency linked the behavior of these actors to agricultural policies that have been in place for decades, and therefore is making a case for their curtailment in the name of competition. The backlash against this statement of objections has been considerable, as the investigated parties stated that they would challenge it through all the available means.[490] The outcome of this clash is unclear. The government depends critically on the support of the business and commercial sectors for the successful conclusion of the current peace dialogues with leftist guerrilla FARC. However, following this process through would make clear the government's commitment with competition law before the eyes of the Organisation for Economic Co-operation and Development (hereinafter OECD), an organization the current government aspires to Colombia join. As we pointed in chapter 4, tensions between business associations (hereinafter BA's) and competition law enforcers have been at the heart of Colombia's CLR since the 1950s.[491]

In this chapter we unpack the trajectory of Colombia's competition law regime (or CLR) between 1990 and May 2015 as a field where different actors - politicians, lawyers, economists, international organizations and others - compete and collaborate for the power to determine the content and structure of the law. To do so, we use the interaction between BAs and competition

[489] Revista Semana *Azucareros bajo la lupa* May 30, 2015.
[490] La República *"Hoy los colombianos adquieren el azúcar a un precio menor que hace cuatro años"* June 23, 2015.
[491] We refer to two types of business associations in this chapter. The first type is composed of competing firms from a single economic sector. Most of the decisions issued by SIC we analyse here are addressed against this type of associations. The second type is composed of firms from different economic sectors. Associations of this type have not been sanctioned by SIC. Some of the latter associations are politically very active and provide scenarios for discussing regulatory issues with the government. Regarding the different types of business associations, see Schneider, Ben Ross. *Business Politics and the State in Twentieth-century Latin America.* Cambridge University Press Cambridge, 2004. Chapter 1.

law enforcers as a window for identifying how the interplay between the projects described in chapter 2 occurred, and especially the dominance of the neoliberal project. We also focus on this interaction because it is particularly useful for tracing the interplay between competition law and other regulatory regimes in a setting in which competition law enforcers lack *de jure* political autonomy and are subject to various political pressures.

The following sections of this chapter develop these ideas. Section II shows how SIC, mobilized its resources to challenge anticompetitive conducts by influential BAs, which in turn aimed to defuse SICs efforts by using different political strategies. Although SIC has had setbacks, it is set on a trajectory in which challenging anticompetitive agreements has also become a struggle about its political autonomy, a trajectory that has been reinforced by the efforts of local and international actors. Finally, section III offers some conclusions.

II.A. The Promises and Perils of Constitutional Principles (1990 - 1998)

The first period addresses the constitutional dimension of the tension between the right to free association and the right to competition in Colombia's 1991 Constitution, and its development through different laws and decrees. This development was colored by the political conditions of the moment and led to the erosion of competition as a constitutional right and an organizing principle of economic activity. The constitutional tension between the right to free association and competition would lead to conflicts regarding the proper scope of competition law rules.

II.A.1 Constitutional Promises

The 1991 Constitution embodies uneasy compromises between the different actors involved in it's drafting, ranging from demobilized *guerrilla* groups like M-19, student movements, the two major political parties, and the incumbent administration of president Cesar Gaviria (1990 – 1994).[492] The result is a Constitution that establishes a welfare State based on an ample chapter on human rights, a commitment to free trade, regulated markets and the efficient provision of public goods and utilities. In doing so, it combines elements taken from liberal constitutionalism with more social-oriented elements that result from earlier political movements that developed along the 20th century.

[492] See, for example, Rodríguez Garavito, Op.cit.

One of the rights that the Constitution takes from the liberal tradition is the right to free association, established in article 38. It states the following "(t)he right to free association for the development of the different activities that people realize in society is guaranteed".[493] This right is also acknowledged in article 39, which states that both employees and employers can be part of labor unions and associations, and that both types of associations are subject to the legal order and democratic principles.[494] While in abstract these two articles address any number of valid associations, against the Colombian context they have a very important role in protecting particular associations that can be contentious from the perspective of competition law, like BAs.[495] This is so because they extend a constitutional protection to these associations, and their goals, by relying upon legal rules that structure their existence and functioning in place at the time of the Constitution's enactment. In this sense, it is important to note that the development of these two constitutional articles did not require the adoption of new regimes, for they provide new constitutional validity to already existing legal rules. Moreover, both articles are in the charter of fundamental rights established in the Constitution, and therefore subject to a special protection by the State.

For our purposes, articles 38 and 39 are important because of the history of BAs in Colombia and their role in the corporativist, State-centered institutional arrangements that characterize Colombia's political economy. They are related with other constitutional provisions that contribute to cement such arrangements. For example, article 150.12 of the 1991 Constitution states that Congress can create special destination funds to be managed by sector-specific BAs - the so-called *contribuciones parafiscales*.[496] These are tax-like contributions that the members of the different associations have a legal duty to pay. The constitutional establishment of these funds evidences the role that such associations play in political and economic development of specific sectors. Both sets of constitutional articles are related, for the administration of the funds established in article 150.12 could not be possible without the right to free association established in articles 38 and 39. An example of how they work in practice is the influential *Federación Nacional de Cafeteros*. Based on the *contribuciones* and subsidies, this association manages a coffee grain price-stabilization mechanism and offers affordable credits

[493] Colombia. Constitución Política de 1991. Article 38.
[494] Ibid. Art. 39.
[495] We found Santofimio's work very relevant on this particular issue. See Santofimio, Emilio. "La Aplicación Del Régimen De Libre Competencia Frente a Las Asociaciones Gremiales." Especialización en Derecho Comercial, 2012: Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas.
[496] Constitución Política de Colombia. Articulo 150 num. 12.

for issues related with crop management. The *Federación* became a model for other business associations in the agricultural sector. From this perspective, the different articles here mentioned enable the constitution of these associations and facilitate their management of the funds at their disposal.

In contrast with articles 38 and 39, other constitutional provisions did require the development of new regulatory regimes for their fulfillment. These other provisions resulted from within the assembly, and reflect the ambition to adopt new market-based regulatory regimes geared towards the efficient allocation of resources.[497] The constitutional assembly was divided in commissions, and the members of the fifth commission, who were in charge of discussing economic issues among others, held different views about how to address monopoly power and dominance. Their original position was that the State should put an end to any form of economic concentration and monopolies that harm the community at large. They also considered that free competition is a right that also implies duties, in line with the way private property is conceived. This position was tempered later on, and the commission's members opted for prohibiting abuse of dominance rather than dominance itself, but all the other elements remained. In tempering their position, they acknowledged that national firms could become of considerable size in order to feign off the pressure exercised by their international rivals.[498] The final wording of article 333 reflects this combination of ideas about the duties of the State in protecting competition and the prohibition against abuse of dominance. The text of this article reads as follows:

> "Article 333. Economic activity and private initiative are to be freely pursued within the limits of the public good. For their exercise no one may demand permits or licenses to exercise economic activity except when authorized by law.
>
> Free economic competition is a right of every person that entails duties.

[497] See in general Palacios Mejía, Hugo. La Economía En El Derecho Constitucional Colombiano. Derecho Vigente (2001)
[498] Miranda, Alfonso. El Derecho De La Competencia En La Constitución De 1991. 20 Años de la Constitución Política de Colombia (2011). Pgs. 12 & 13.

> The enterprise, as a basis of development, has a social function that implies duties. The State will strengthen cooperative organizations and stimulate business development.
>
> The State, through the law, will prevent impediments to or restrictions of economic freedom and will curb or control any abuses caused by individuals or enterprises due to their dominant position in the national marketplace.
>
> The law will limit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation require it".[499]

The discussions about efficiency and regulation were not exhausted with the debates within the fifth commission of the constitutional assembly about the role of free competition, but continued throughout those concerning public utilities regulation. Although the members of the this commission had different views on the matter, they all agreed that providing quality public utilities is a way of making the welfare State a reality. Their discussions led to three principles, which were established in articles 365 through 370 of the 1991 Constitution. First, private firms could provide these public utilities, not only the State. Second, their regulation should make their provision be cost-effective and fair. Thirdly, the President has the duty to oversee the provision of these utilities, and he can delegate it to the *Superintendencia de Servicios Públicos Domiciliarios*, an agency created in article 370 for such purpose.[500] In doing so, these articles provide the foundations for the regulation of public utilities and the introduction of market-like regulatory schemes in related sectors. Moreover, they also contributed to the enactment of sector-specific competition law regimes.

The scope of all these constitutional provisions was unclear until this was spelled out in specific legal regimes and until the courts adjudicated disputes involving them. For our purposes, the most important tension is between the right to free association and the right to competition. In its simplest terms, the tension can result in one of several outcomes where one right limits the application of the other. A first outcome is that the right to free association limits the right to free competition in all possible scenarios. This outcome is feasible because of the fundamental character of the right to free association as explicitly stated in the 1991 Constitution. A second possible and opposite outcome is that the right to free competition limits the right to free

[499] Colombia, Constitución Política de 1991. Article 333.

association, perhaps even outlawing associations that restrict competition. This outcome is feasible because of the explicit connection between competition and the public good as established in article 333 and other constitutional provisions. Given this situation, addressing the tension between these rights became a matter for SIC and the courts to address. Notably, a very similar tension takes place *within* article 333 between fostering competition, on one hand, and the State's duty to promote associations and foster industrial development.

II.A.2 Regulating Business Associations and Competition

President Gaviria and his cabinet approached regulatory reforms from a neoliberal perspective, albeit within the limits resulting from the 1991 Constitution and the political landscape at the time.[501] In doing so, the new regulations balanced the interests of BAs and the "general interest" associated with competition.

As mentioned before, articles 38 and 39 of the 1991 Constitution did not require the development of new regulatory regimes for their implementation, for they provided a new constitutional support to preexisting legal regimes. This did not prevent other developments from taking place. In 1991 a new BA that grouped different associations, the *Consejo Gremial Nacional*, was created with the purpose of helping the government in its relations with the private sector especially with regard to opening the economy.[502] Just as well, this administration developed policies that extended the role that some associations had in their respective sectors and which includes, among other things, mechanisms that restricted competition. For instance, law 101 of 1993, includes a price-stabilization mechanisms that was extended to sugar-cane producers, known as *ingenios*, from market fluctuations by fixing the prices that each producer received depending on their production quality and volume. Mechanisms like these, which entail an anticompetitive agreement regarding the prices to be paid, became common in other agricultural sectors in Colombia. The corporativist, State-centered relationships between the government and some business associations continued as the new constitutional regime developed.

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[500] Ibid. Articulo 365 – 370.
[501] See Edwards, Sebastián, and Roberto Steiner. La Revolución Incompleta: Las Reformas De Gaviria. Norma (2008)
[502] See Rettberg, Angelika. "Empresarios Y Política En Colombia: Un Estudio De Caso Del Gobierno Samper (1994-1998)." Revista de Estudios Sociales 12 (2002). Pg. 54.

The constitutional reach of articles 38 and 39 was unclear. Beginning in 1993, the Constitutional Court issued a series of rulings that limited the right to free association. Among these, is the decision C-265 of 1994, in which the Court reviewed the constitutionality of a law that established requirements for the creation of new associations for copyright management and royalties' collection. The Court distinguished between civil and commercial associations, and argued that since commercial associations are for making and managing profits, they can be subject to the regulations that stem from the 1991 Constitution. These regulations are not subject to a strict scrutiny precisely because of the ample room the Constitution grants to the regulation of economic arrangements.[503]

The political viability of the development of article 333 was also unclear. Contrary to articles 38 and 39, this provision did require the development of new regulations, and their enactment was a task that the Gaviria administration assumed after the enactment of the 1991 Constitution. The government received the help of consultant Dr. Shyam Khemani for designing a new CLR. His approach to this task considered issues pertaining to the size of the Colombian economy, taking a consumer welfare perspective.[504] After assessing the different materials, the government discussed the initiative with Congress representatives and was discouraged from submitting a new CLR to Congress. This was so because such a regime would affect negatively the relations with BAs, with whom the government had good relations at the time. This political roadblock posed a considerable difficulty. As an alternative, the government decided to use transitory article 20 of the 1991 Constitution, which gave the President limited powers to enact laws related with the structure and functions of State institutions.[505] It was understood then that this was risky because the new provisions had to be framed as if they were about the functions of SIC. This strategy was embodied in *Decreto Legislativo* 2153 of 1992 (hereinafter DL 2153), which updated the administrative functions of SIC and detailed the substantive provisions enforced by this agency as established in law 155 of 1959.[506] In 1993 the *Consejo de Estado*, Colombia's highest administrative court, ruled that notwithstanding its substantive provisions, DL 2153 was constitutional.[507]

[503] Colombia. Corte Constitucional. Sentencia C-265 de 1994.
[504] Interview with Shyam Khemani, St. Petersburg. June 23, 2015.
[505] Colombia. Constitución Política de Colombia. Articulo 20 Transitorio.
[506] This story is told by one of its participants, Emilio José Archila, in the video "Historial del Derecho de la Competencia Parte 1", made by the Centro de Estudios del Derecho de la Competencia – CEDEC. Available at: https://www.youtube.com/watch?v=3gKyO_QXu4Q.
[507] Colombia. Consejo de Estado. Sentencia de 7 de Diciembre de 1993.

DL 2153 did not introduce major changes to the SIC's administrative structure and extended previous institutional arrangements, including law 155 of 1959.[508] For our purposes, this decree meant the continuation of the State-centered institutional features established in the aforementioned law. SIC continued as an administrative body with little political autonomy and dependent on the executive branch. The separation of investigative and decision-making functions within this body, in place since the 1970s, was maintained. Article 2 of DL 2153 states that the purpose of the activities developed by this agency (including competition law enforcement) is the improvement of Colombian productive sectors. Articles 11 and 12 delimitated the functions of the *Delegatura para la Promoción de la Competencia*, an office in charge of providing support with the investigations, directed by the deputy superintendent for competition law and known as the *delegatura*. Both the director of SIC and the deputy superintendent can be freely appointed and removed by the President.[509] Article 24 created an advisory council, also appointed freely by the President, composed of five experts on issues related with competition law to advise SIC's director during investigations that may involve injunctions, cease and desist orders, or the imposition of fines.[510] Article 52 establishes the procedure of the investigations, which are for the most part conducted by the deputy superintendent. If he obtains adequate evidence, he presents a statement of objections to SIC's director in which he details the reasons that lead him to suggest the imposition of sanctions. SIC's director may refer to this statement, as well as to the advice of the aforementioned counsel, but is not bound by either of them.[511] Once an investigation starts, the investigated parties may ask to end the proceedings through a settlement if SIC accepts their commitments to amend their behavior in ways that strengthen competition. A particularity of these settlements is that no judgment is passed on the legality of the conduct of the investigated parties.[512] Finally, article 51 of this decree also amended the merger review by introducing what is called the "efficiency clause," which works as an exemption to how SIC analyses mergers according to law 155 of 1959. According to this provision, SIC cannot block a merger if the merging parties prove that it brings about efficiencies, through cost savings that cannot be achieved otherwise, without diminishing the supply in the relevant market.[513] The introduction of this "efficiency clause" evidences the inroads of neoliberal ideas in a State-centered institutional context.

[508] Colombia. Decreto Ley 2153 de 1992. Art. 44. (This article states clearly this purpose and explicitly reaffirms the legality of law 155 of 1959.)
[509] For both the SIC's director and the deputy director for competition law see Constitución Política de Colombia, Art. 189 num 13. Also, for the SDC, see Decreto Ley 2153 of 1992, Op.cit. Art. 4, num 19.
[510] Decreto ley 2153 de 1992, art. 24.
[511] Ibid. Art. 51.
[512] Ibid. Art. 4 Nums 11 and 12.
[513] Ibid. Art. 51.

Articles 45 through 50 of DL 2153 introduced important changes regarding anticompetitive agreements and abuse of dominance. All of these articles are supposed to clarify the content of article 1 of law 155 of 1959. Notably, the drafters of the law used articles 101 and 102 of the Treaty of the Functioning of the European Union (hereinafter TFEU) as a template for these provisions. We contend that this evidences an effort to realize neoliberal goals by adopting foreign legal materials to the State-centered institutions in place. Article 45 defines terms and expressions such as agreement, act, control, dominant position and product for enforcement purposes.[514] Control is defined as the possibility to influence directly or indirectly the decision of a firm, including its capacity to begin, terminate or modify its activities, as well as the goods or rights essential to the abovementioned firm's activities.[515] Dominance, in turn, is defined as the capacity to determine, directly or indirectly, the (working) conditions of a market.[516] Article 47 provides a list of nine agreements considered anticompetitive by object and by effect, and which include price fixing, market allocation, fixing production quotas, and others.[517] Article 48 refers to three anticompetitive acts, which are infringing consumer protection rules regarding publicity, influencing a third party so that it raises or desists to lower its prices, and retaliating against a third party's pricing policy by denying to sell a product, perform a service or discriminate against it.[518] Notably, these articles are followed by three exceptions contained in article 49. This provision states that joint ventures (including those for developing new technologies), adhesion to non-mandatory standards and non-exclusionary measurements, and the use of common facilities, are not considered anticompetitive.[519] These exemptions resemble those of article 101.3 TFEU. Article 50 provides a non-exhaustive list of five conducts that are considered to be abuses of dominance, including price predation, tied sales, and discriminating between similar consumers or distributors. In doing so, it resembles article 102 TFEU.[520] Article 46 also establishes that any act, conduct or agreement in violation of the previous articles is void.[521] Table 6.1 summarizes the main similarities between the provisions contained in DL 2153 and articles 101 and 102 TFEU.

[514] Ibid. Art. 45
[515] Ibid. Art. 45.4.
[516] Ibid. Art. 45. 5.
[517] Ibid. Art. 47. A tenth type of forbidden agreement was added by law 590 of 2000 which refers to access to commercialisation channels.
[518] Ibid. Art. 48.
[519] Ibid.Art. 49.
[520] Ibid. Art. 50.
[521] Ibid. Art. 46. This article, which resembles a similar one in law 155 of 1959, explicitly relates to the provisions of the Civil Code pertaining to the nullity of contracts and legal acts.

Table 6.1. Relationship between TFEU y DL 2153

Content	Articles TFEU	Colombian Provisions (DL 2153)
Prohibition of agreements and parallel practices	Article 101(1)	Arts. 45 (definition of acts, agreement and practices) & 47 (list of forbidden agreements)
Nullity	Article 101(2)	Article 46
Exceptions	Article 101(3)	Article 49 (extended to R&D, common standards and common facilities)
Prohibition of Abuse of Dominance	Article 102	Arts. 45 (definition of conducts and dominance) and 50 (list de conducts)
Prohibition of anticompetitive acts	-	Arts. 45 & 48 (list of anticompetitive acts).

The history and content of DL 2153 gives important clues as to the compromise it embodies. On one hand, the enforcement of the substantive provisions remains a task for SIC, which has close ties with the executive branch and concentrates investigatory and adjudicative functions. Moreover, these ties touch upon its capacity to coordinate its activities with those carried by other governmental bodies.[522] Hence we contend that this decree reaffirms SIC's State-centered origins and development. On the other, the substantive provisions suggest an inclination towards the neoliberal competition law project. This is so because they embody a view of competition law based on market rivalry and efficiency that is consistent with such project. Moreover, article 51 hints to these neoliberal traits by establishing an efficiency exemption to the regular merger analysis done by SIC. Hence the compromise embedded in this degree is a paradox; it gives continuity to a State-centered competition law agency (lacking political autonomy) that enforces neoliberal substantive provisions.

The difficulties faced by the Gaviria administration in mustering the support for establishing a new CLR were decisive in later efforts to carry forth the constitutional mandate of protecting competition. In particular, as these difficulties began to unfold, other voices proposed that the protection of competition could be better served through a different strategy. In a 1992 conference about public utilities in Colombia, former finance minister Hugo Palacios Mejía argued that their regulation had to rely on a new framework based on efficiency and competition.

[522] Contrary to similar enforcement bodies like the EU Commission, SIC is a national entity bound by the local politics of the State it is part of, and its director is not part of an independent civil service but can be appointed by the President at will. Moreover, it is not a collegial institution.

On one hand, he argued that there was little will to enforce law 155 of 1959. On the other, the 1991 Constitution placed special emphasis on the efficiency of regulation of public utilities. Hence, this emphasis should be taken as an opportunity to enact sector-specific regulations containing competition law provisions to be enforced by new administrative institutions.[523] Two years later, law 142 of 1994 embodied these ideas. This law created a regulatory framework based on guaranteeing a cost-effective, market-like provision of public utilities. It contains several articles that refer to anticompetitive practices in general, but has a decisive focus on abuse of dominance. It also assigned to the *Superintendencia de Servicios Públicos Domiciliarios*, mentioned before, the duty to investigate and sanction firms for engaging in anticompetitive practices as defined in this law.[524] The pairing of competition law provisions embedded in sector-specific regulations and specialized enforcement agencies became the preferred strategy for the development of competition law in Colombia. Table 6.2 summarizes the main competition law provisions enacted during the Gaviria administration besides DL 2153.

Table 6.2. Sector-specific Competition Law Provisions issued between 1990 and 1994

Sector	Competition law Provisions	Enforcement Authority
Financial services	Decrees 1730 of 1991 and 663 of 1993	Banking Superintendence
Public Utilities (general)	Law 142 of 1994	Superintendence of Public Utilities
Public utilities (electricity)	Law 143 of 1994	Superintendence of Public Utilities
Public utilities (telecoms)	Decrees 1900 of 1990, 1794 of 1991, 2122 of 1992, law 37 of 1993, decree 741 of 1993 and law 142 of 1994	Superintendence of Public Utilities
Healthcare	Law 100 of 1993, decree 1664 of 1994	Healthcare Superintendence
Transportation	Law 105 of 1993	Ministry of Transport/National Police

[523] See Palacios Mejía, Hugo. *Instituciones para la competencia en los servicios públicos domiciliarios*. Departamento Nacional de Planeación. Seminario Internacional Eficiencia en la Prestación de los Servicios Públicos de Agua Potable y Saneamiento Básico. Bogotá, DNP, 1992. (Conference proceedings)
[524] Colombia. Ley 142 de 1994.

By the end of the Gaviria administration, a combination of constitutional and political factors shaped the development of the rights discussed at the beginning of this section. Firstly, the right to free association found an immediate expression in corporate law, and through it, in the continuation of corporativist practices. The influence of BAs continued, as evidenced in the government's reliance on them for the development of sector-specific policies and the management of public funds. Even so, the Constitutional Court issued a series of ruling that diminished the constitutional protection awarded to such associations.[525] Secondly, the development of the constitutional right to competition was limited and the government opted for adding what could be characterized as neoliberal provisions in a State-centered institutional setting. Also, the skepticism surrounding the enforcement of law 155 of 1959 and the more detailed content of articles 365 to 370 led to the development of sector-specific CLR's, which were also enforced by non-independent administrative authorities linked to the government. Politically, the right to free association that enables the development of BAs and their activities prevailed over the right to competition; however, in the absence of an explicit confrontation the extent of the dominance of one over the other remained unclear.

II.A.3 Competition law and Business Associations: The Early Years (1994 - 1998)

The Gaviria administration ended its term after transforming Colombia's legal landscape and developing the mandates contained in the 1991 Constitution. The enforcement of the different legal regimes, including the enforcement of those pertaining to competition law, fell upon the administration of Ernesto Samper (1994 - 1998). As a result of enforcement, the constitutional and political tensions between BAs and competition law enforcers started to build up as concrete confrontations. Enforcement activities led to the judicial reviews of SIC's competition law decisions involving BAs.

The trust placed in the capacity of their CLR to address such conducts contrasts with SIC's enforcement activities during the Samper administration. This was, perhaps, a manifestation of the uneasy relations this government had with the industrial and business sector.[526] Throughout 1994 the government appointed and removed several individuals as directors of SIC, until the

[525] See Colombia. Corte Constitucional. Sentencia C-399 de 1999, Sentencia C-424 de 2005 and Sentencia 354 de 2009.
[526] See Retberg, Op.cit.

final appointment of Marco Aurelio Zuluaga in March 6, 1995. According to the newspaper *El Tiempo*, the changes in appointments were part of the Government's last minute political arrangements.[527] Then SIC embarked in what arguably was a low-resistance enforcement agenda based on public advocacy activities. On one hand, SIC organized different events presenting its functions to different sectors, including those related with competition law enforcement after the amendments introduced by DL 2153.[528] On the other, it also conducted enforcement activities mostly in a non-contentious manner. SIC conducted around 40 investigations that ended in administrative settlements with the investigated parties.[529] As of 1998 SIC had not imposed fines or sanctions resulting from investigations of anticompetitive conducts.[530] Overall, SIC did not aim to assert its independence from the executive branch during this period of time.

The first concrete conflict between the right to free association and the right to competition provides an example of the difficulties lying ahead. One of SIC's first decisions involved *Fedepalma*, a BA organized around an association of palm and palm oil producers. The association facilitated an agreement among its members for the adoption of a minimum commercialization price of palm seeds, a key input in this sector. In spite of its original intent of sanctioning this agreement, SIC ended up accepting its legality. In its final decision, this agency stated that the agricultural sector was covered by the exemption established in paragraph 1 of article 1 of law 155 of 1959.[531] SIC's decision was challenged before the *Consejo de Estado*, and this court ruled that the policy mechanism under dispute was a legitimate manifestation of economic intervention that can take place alternatively to competition law. In doing so, this ruling granted immunity to industrial policies from the application of the principle of free competition established in article 333, a victory for BAs.[532] Other decisions by the Constitutional Court argue similarly that competition-distorting policies can be valid if they attain other constitutional goals, like strengthening agricultural sectors.[533] By the end of the Samper administration, the constitutional promise of having a right to free competition had been displaced by the political

[527] El Tiempo *Desidia por las Superintendencias*. Octubre 16, 1995
[528] See Colombia: Report on Developments and Enforcement of Competition Policy and Laws (1992 - 1996). Area de Libre Comercio de las Americas. (1997). Section VII. Available at http://www.ftaa-alca.org/Wgroups/WGCP/English/dae/daecol3e.asp. Also Revista Dinero *La Superindustria Camina* Published on December 1, 1995.
[529] Miranda, Alfonso. "El Control Jurisdiccional Del Regimen General De Promoción De La Competencia Y Prácticas Comerciales Restrictivas." In: Comisión de libre competencia y asuntos del consumidor Panamá Primer Congreso Internacional sobre Competencia (1998). Pgs. 4 & 5.
[530] Miranda, Op.cit. "El Control Jurisdiccional Del Regimen General De Promoción De La Competencia Y Prácticas Comerciales Restrictivas." Pg.4.
[531] Colombia, SIC, auto del 2 de junio de 1995.
[532] Colombia, Consejo de Estado, Sala Primera, Sentencia de Febrero 20 de 1997.
[533] See for example Corte Constitutional de Colombia. Sentencia C-398 de 1995.

conditions that shaped the development of regulation after the 1991 Constitution. Hence even though the right to free association did not extend a strong constitutional protection to business associations, these continued to have the political capital to shape the development of competition law. However, the prevalence of BAs over competition law would not last long.

II.B. Competition law Fights Back (1999 - 2009)

This second period is concerned with the efforts of competition law enforcers and BAs to shape the scope of provisions regarding anticompetitive agreements and the exemptions to this CLR. Beginning in 1999, SIC would attempt to sanction BAs for infringing competition law provisions regarding anticompetitive agreements. While this agency met with some initial difficulties, it was able to reassert the predominance of competition law over other considerations, and by the mid-2000s it imposed a considerable number of sanctions in this matter. However, the initiative to enact a new statute in line with international recommendations was met with skepticism by the government, which in turn opted for preserving the pre-existing compromise. By the end of this period the tension between freedom of association and competition law had changed considerably in favor of the latter.

II.B.1 Repositioning SIC

Competition law enforcement geared up with the appointment of Emilio José Archila as director of SIC by president Andrés Pastrana (1998 - 2002). Archila studied law in Universidad Externado de Colombia and obtained an LL.M. degree from New York University School of Law. Moreover, he had worked with the Gaviria administration during the enactment of DL 2153.[534] Under his direction, SIC imposed the first sanctions for anticompetitive practices and continued with the practice of closing investigations with settlements. The more demanding approach of SIC can be evidenced in a 2001 decision rejecting a 4 to 3 merger between two airlines with high market shares in Colombia's air transport sector - *Aces* and *Avianca*. The merger was presented as a way of improving the financial health of *Avianca*, which was owned by the business group directed by the Santo Domingo family. SIC's decision argues that because of their routes, their market power and the absence of competitors in the national market the proposed merger would harm consumers.[535] This decision triggered a series of political events that ended with Archila resigning from his post, as the merging parties questioned his

[534] See his profile at http://www.archilaabogados.com/socios/emilio-jose-archila-penalosa

objectivity.[536] Even though the merger decision was cleared later on, Archila's removal highlighted the political frailty of SIC's autonomy. His replacement, Mónica Murcia, a lawyer from Universidad del Rosario, faced some challenges of her own but nonetheless remained in office until April 2003.

Based on SIC's archive and other sources,[537] we found that between 1999 and April 2003 SIC advanced several investigations concerning business associations and anticompetitive agreements, which led to the decisions presented below in table 6.3.

Table 6.3. Decisions Involving Business Associations and Anticompetitive Agreements (1999 - 2003)

Year	**Decision No.**	**Case** (Defendants)	**Product Market**	**Decision**	**Fine (in USD)**[538]
1999	17464	Instituto Colombiano de Productores de Cemento	Cement	Settlement	
1999	22759	Corporación Lonja de Propiedad Raíz de Bogotá & others	Real estate services	Sanction	80,460
1999	22760	Corporación Lonja de Propiedad Raíz de Cali & others	Real estate services	Sanction	60,345
1999	27762	Cooperativa Lechera Colanta Ltda. & Derilac S.A.	Milk	Sanction	80,460
1999	27761	Algarra & others	Milk	Settlement	
2000	25983	ALAICO & others	Airline services	Settlement	
2000	29302	ANDEVIP and others	Security services	Sanction	218,000
2001	25402	Maersk and others	Freight tariffs	Sanction	127,245

[535] SIC, Resolución 19354 de 2001.
[536] El Tiempo, *La integración paso a paso.* December 12, 2001.
[537] In particular Gutiérrez-Rodríguez, Juan David. "Tacit Collusion: Theory and Case Law in Argentima, Brazil, Chile, Colombia and Panama (1985-2008)." Revista de Derecho de la Competencia 5 (2009). Also, OECD "Peer Review of Competition Law and Policy in Colombia ." 2009
[538] Approximation based on the Colombian peso/US dollar rate of May 21, 2015. Includes only the fines levied against firms, not individuals.

2002	10713	ASONAV & others	Freight tariffs	Settlement	
2002	25420	ADICONAR and others	Retail gasoline	Sanction	19,090
2003	03351	Federación Nacional de Cafeteros and other	High quality coffee for exportation	Settlement	
2003	01610	ASOMEDIOS	Media advertisement	Settlement	

It is important to note that the decisions show how the associations could be involved in different ways in the development of anticompetitive practices. In some of them, the association fostered the anticompetitive behavior by requiring its members to abide to certain practices and to acknowledge certain duties. In others, the associations acted as coordinating mechanisms for the member firms, not taking the initiative regarding the anticompetitive behaviors to follow but nonetheless facilitating their occurrence. In all of them, however, the evidence collected portrays the anticompetitive practice investigated as being closely related with the purpose of their respective BA in the first place. Finally, it is also important to note that around 50 per cent of the investigations ended in settlements.

R*esolución* 29302 of 2000 is an interesting example of SIC's assessment of the role of BAs during this period. In this decision, the agency sanctioned a BA (ANDEVIP) and its fourteen members for fixing the prices they charged for their services. The defendants offered a variety of defensive arguments that ranged from their allegiance to a "gentleman's pact" to being bound by a price guide issued by the *Superindentencia de Vigilancia para la Seguridad Privada* in 1995. The latter argument could have some traction because it suggested that the investigated parties were exempted from competition law enforcement because it was a government-induced conduct. However, SIC argued that the parties were not bound to follow the prices established by the government, for the act that established such prices was annulled in 1996, before SIC's investigation began. Therefore, it was clear for SIC that the parties had incurred in a violation of DL 2153 and proceeded to sanction them.[539] The defendants challenged SIC's decision before the administrative courts. They argued that SIC's interpretation of DL 2153 was unconstitutional because it did not take into consideration malice or intent, but simply the factual occurrence of a behavior deemed anticompetitive. At first, an administrative court ruled in favor of the

[539] SIC, resoluciones 29302 de 2000 y 00670 de 2001.

defendants.[540] On appeal, the top administrative court, the *Consejo de Estado* ruled in favor of SIC, stating that this agency did interpret DL 2153 correctly and that it did consider the intent of the actors investigated and other conditions involved in the investigated conduct.[541]

However, SIC soon found out that some BAs were harder to challenge than others when it investigated the role of *Federación Nacional de Cafeteros* in the occurrence of anticompetitive practices in the coffee sector. SIC found that the *Federación* was allocating sale quotas to particular producers and fixing the price of coffee through an export arrangement with private exporters. However, SIC settled with the *Federación* in a rather particular way, for some of the duties that are part of the settlements state that the *Federación* would continue with its practices. Moreover, the core of the settlement seems to be that the government authorized the allegedly anticompetitive conducts, and so they were exempt as per the application of the paragraph of article 1 of law 155 of 1959.[542]

By the end of the Pastrana administration (1998 - 2002) it was clear that competition law was highly susceptible to the political capital of the major business groups and associations in Colombia. However, not all BAs were equally influential, and SIC could measure up against those that lacked the political capital of other, more powerful associations. This suggested that SIC's *de facto* autonomy could be enlarged given the right conditions, and it was only a matter of continuing with investigations and imposing sanctions to gain more ground.

In a certain way, this is what happened during the government of Alvaro Uribe Velez (2002 - 2006, 2006 - 2010). Jairo Rubio Escobar, a lawyer from PUJ who also had worked in SIC during the Gaviria administration, was appointed as director of this agency in 2003 and remained in it until 2007. During his term SIC's activity increased in areas such as price collusion investigations and mergers. His resignation in 2007 did not come as a surprise precisely because of the contentious decisions he made, although he claims that it was because of personal reasons.[543] His successor, Gustavo Valbuena, came directly from the President's office at *Casa de Nariño*, and was SIC's director until the end of the Uribe administration in 2010. Contrary to Rubio, Valbuena did not have any previous experience with competition law issues. Besides continuing with previous investigations for anticompetitive practices and beginning new ones, Valbuena also

[540] Colombia, Tribunal Administrativo de Cundinamarca, Sentencia de Noviembre 27 de 2003.
[541] Colombia, Consejo de Estado, Sentencia de Enero 28 de 2010.
[542] SIC, resolución 3351 de 2003.
[543] El Tiempo, *Gustavo Valbuena fue designado Superintendente de Industria y Comercio* September 17 of 2007

contributed to the enactment of a new law amending this CLR, law 1340 of 2009. Table 6.4 presents the decisions involving BAs and anticompetitive agreements issued between 2003 and 2010, covering the periods of both Rubio and Valbuena as directors of SIC.

Table 6.4. Decisions Involving Business Associations and Anticompetitive Agreements (2003 - 2010)

Year	**Decision No.**	**Case** (Defendants)	**Product Market**	**Decision**	**Fine** (In USD)[544]
2005	06816 and 06817	Redeban Multicolor S.A & Credibanco	Charges for credit and debit network services	Settlement	
2005	22625	Molinos Roa & others	Rice (paddy kind)	Fine	8'880,085.20
2008	39869	Luis Francisco Cardozo & others	Onions (scallions)	Fine	1312.00
2009	4946	Compañía Nacional de Chocolates	Cocoa	Fine	640540.00
2010	6839	Ingenio del Cauca and others	Sugar cane	Fine	4'490000.00

The involvement of BAs in the anticompetitive conducts investigated by SIC is quite similar to the one noted in the previous period. The associations facilitated the anticompetitive conducts proposed by one of the parties, or encouraged their development by all the members involved. Even so, there are important changes that deserve a brief mention. Firstly, the number of decisions is smaller, even though the period of time we consider here (2003-2010) is 2 years longer than the previous one (1998 - 2003). Second, the number of settlements is also smaller. Thirdly, the investigated parties here considered are more influential than the ones investigated by SIC in the previous period (except for the *Federación Nacional de Cafeteros*). SIC's enforcement priorities also evidences some changes. In particular, in 3 of the 5 decisions issued during this period (*resoluciones* 22625 of 2005, 39869 of 2008 and 4946 of 2008) SIC did not address the BAs in spite of evidence that they might have been involved in the practices investigated. Even so, we

interpret these decisions as part of a rather successful continuation of SIC's to assert its *de facto* autonomy.

Resolución 6839 of 2010 is an interesting example of SIC challenging a BA in a sector where the line between competition law enforcement and the exemption granted to industrial policies for the agricultural sector is unclear. SIC found evidence that the largest sugar mills had fixed the buying prices of sugar cane crops, as well as allocated between themselves the different producers of this input. Among the evidence supporting these findings, SIC found important similarities in the prices paid and the conditions for the acquisition of sugar cane, as well as contract clauses the prevented the producers from switching buyers. Also, SIC found a written agreement between the managers of the mills, which could not be used as evidence because of the statute of limitations, that nonetheless constituted a price agreement between the mills.[545] In a follow-up case, *SIC* also found that two business associations, which gathered the mills and the sugar cane growers, contributed to reaching and maintaining the price agreements involved in the previous investigation, [546] and thus imparted them with fines.[547]

II.B.2 Law 1340 of 2009 - A New Compromise?

The notion that the institutional architecture of the Colombian CLR required considerable amendments continued to permeate discussions about this field of law. Several issues were considered problematic by SIC's directors, especially by Jairo Rubio. Among these were the non-dissuasive nature of low fines, the dispersion of related legal provisions and enforcement authorities, and SIC's lack of autonomy. And even though SIC conducted investigations and imposed fines, there continued to be a sense that this regime was only half-developed. As we will show below, the efforts to amend this regime by targeting this particular issues evidences a new alignment between actors.

At the international scene, the OECD and the Inter-American Development Bank established in 2003 the Latin American Competition Forum (hereinafter LACF), a regional platform for the discussion of competition law issues in Latin America. According to Paul Crampton's presentation of the objectives of such forum, Latin American States need a platform

[544] Approximation based on the Colombian peso/US dollar rate of May 21, 2015. Includes only the fines levied against firms, not individuals.
[545] SIC, Resolución 06839 de 2010.
[546] Colombia, SIC, Resolución 33141 de 2011

that enables them to pursue policies that strengthen competition and efficiency as a matter of "first principles". The forum's purpose would be to channel resources for the development of adequate regulatory policies by these States.[548] At about the same time, the United Nations Conference on Trade and Development (hereinafter UNCTAD) developed the program *Competencia y protección al consumidor en America Latina* (hereinafter COMPAL), with the purpose of helping Latin American States with the development of their CLRs.[549] The result of this was that Colombia's CLR became a subject of interest to these international organizations. This interest manifested itself in the preparation of different activities and documents; as an example, we point here to a study about Colombia's CLR that was issued in 2004 during the second annual meeting of the LACF. The study is a 6-page document that offers an overview of this country's CLR, its difficulties and challenges.[550] Regarding the difficulties, the study argues that the most important one is the dispersion of competition law provisions and their enforcement. Hence, the study concludes that the most important challenge this CLR faces is about making SIC the sole enforcer of the different competition law provisions.[551]

In contrast with the clarity of purpose of the aforementioned study, local actors in Colombia had differing views about the priorities involved in competition law. This was made evident through the efforts of several actors that participate in this field. In 2005 liberal senator Alvaro Ashton submitted before Congress a short 6-article bill that made SIC the sole competition law enforcer and suggested to raise the fines applicable to anticompetitive conducts.[552] A modified version of this bill received considerable support during the first of the four debates,[553] but floundered because of lack of governmental support. Even so, Senator Ashton insisted and submitted again a bill, drafted with the help of Rubio, in late 2007. Like its predecessor, this bill aimed to make SIC the only competition law enforcer, to increase its political autonomy, and to make it more effective in the prosecution of anticompetitive practices. The bill contained various provisions addressing these goals. Firstly, it established this agency as the unique competition law enforcer and gave it pre-eminence over other administrative bodies that issued regulations. Second, the bill also granted to this agency judicial functions regarding the investigation of anticompetitive practices, thus making it autonomous as a judge *vis a vis* the government. Finally,

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[547] Ibid.
[548] Crampton, Paul. Competition As An Organising Principle For All Economic and Regulatory Policymaking (2003). Pg. 2.
[549] See http://www.unctadxi.org/templates/Startpage____1529.aspx
[550] OECD/IDB COLOMBIA: Desafíos institucionales para promover la competencia (2004)
[551] Ibd. Pgs. 4 - 6.
[552] Colombia, Proyecto de ley 108 de 2005 Cámara.
[553] Colombia, Cámara de Representantes, Gaceta 205 de 2006.

it also amended the procedures for investigations and merger control, established a general leniency clause, and raised the applicable fines that can be imposed to parties found responsible of engaging in anticompetitive practices.[554]

Rubio notes that this effort to amend Colombia's CLR met with considerable resistance from several ministers and other members of the presidential cabinet.[555] However, rather than simply forcing the neglect of this second bill, the government decided to take advantage of this opportunity by addressing the same issues from a different perspective. Firstly, it made SIC the only competition law enforcer, and proposed the creation of a new institution, the *Consejo Superior de Protección de la Competencia*, composed of different cabinet members, which would preside over SIC and have the last word on competition law issues. Moreover, it also introduced an exemption for policy instruments used in the agricultural sector that restricted competition. Second, the bill did not change SIC's administrative ethos, but rather reaffirmed it and reinforced the administrative nature of its procedures. Thirdly, this bill also amended some of the aspects of merger control, included a leniency clause and raised the fines that could be imposed for anticompetitive practices.[556] Notably, the government's bill and its later amendments are more detailed than the ones of the Ashton/Rubio bill and evidence awareness of the competition law developments in other jurisdictions. Moreover, the differences between the government's bill and the Ashton/Rubio bill on these two issues were minimal when compared to issues such as the autonomy of SIC.

The existence of both bills led to discussions regarding their integration into a single bill. This process led inevitably to the question of which of the bills would prevail.[557] The contention focused mostly on the issues in which both of them had differing views, including the autonomy and exclusivity of SIC as a competition law enforcer. Rubio opposed publicly the creation of the above-mentioned *Consejo Superior*. As he stated in a newspaper article, it meant politicizing competition law enforcement by giving to cabinet members subject to different pressures a say on competition issues. In doing so, Rubio referred to the recommendations given by the IDB, the World Bank and other institutions regarding the importance of making competition law enforcers autonomous.[558] Rubio's argument was partially accepted as Congress rejected the

[554] Colombia, Senado de la República, Proyecto de Ley 195 de 2007 Senado.
[555] See Escobar, Jairo Rubio. "La Experiencia, Efectividad E Independencia De La Autoridad De Competencia En Colombia." Revista de derecho de la competencia CEDEC, No. 9 (2013): 357-370. Pg. 362.
[556] Colombia, Senado de la Republica, Proyecto de Ley 277 de 2008 Senado.
[557] See Colombia, Senado de la Republica, Gaceta 340 de 2008.
[558] Rubio Escobar, Jairo. *La modificación de la ley de competencia.* In Portafolio, May 12, 2008.

creation of such *Consejo Superior*; however, in almost every other matter the government's bill prevailed in congress. The resulting law reaffirmed SIC's administrative ethos (and hence the President's control over it), and although it made it the only competition law enforcer, it also established considerable exemptions for various sectors. Moreover, the law amended provisions in law 155 of 1959 and DL 2153 rather than constituting a new regime all by itself (even though several other additions were made). The result then is an uneven compromise between strengthening SIC and preserving the *status quo* embedded in the administrative structure and functions of the State's executive branch.

The different provisions that make up law 1340 of 2009 reflect this uneasy compromise. They address three general topics: the functions of SIC and the reach of competition law provisions, amendments to the merger review regime and the establishment of a leniency program. Regarding the first topic, we evidence a tension between the provisions that extend SIC's powers and those that curtail them. Firstly, SIC is made the only competition law enforcer,[559] but at the same time the aeronautical and financial authorities continue to decide the joint exploitation of assets[560] (in the case of the former) and mergers (for the latter) in these sectors.[561] Second, the law states that any competition law provisions bound all actors,[562] independently of the sector they belong to, or how they relate to economic activities.[563] It also states that the goals that should guide competition law enforcement are the free participation of firms in markets, the welfare of consumers, and economic efficiency.[564] However, policy instruments such as price stabilization funds, the *fondos parafiscales* for agricultural development and others are allowed State interventions as per article 333 of the 1991 Constitution.[565] The exemption stated in paragraph 1 of law 155 of 1959 is explicitly extended to the agricultural sector, and this sector's ministry is given the authority to approve anticompetitive agreements for the stability of different sub-sectors.[566] Third, this law also enables the State to intervene when external situations affect internal markets negatively by adopting measures that address market conditions and that guarantee fairness and the competitiveness of national producers.[567] Finally, the law also establishes that SIC should be able to assess the effects on competition of

[559] Colombia, Ley 1340 de 2009. Art. 6
[560] Ibid. Article 8 Paragraph. This exemption was added at the last debate of the law, but was declared constitutional by the Constitutional Court on Sentencia C-277 de 2011.
[561] Ibid. Articles 9 (last paragraph) & 28
[562] Defined in Ibid. Art.4
[563] Ibid. Art. 2.
[564] Ibid. Art. 3.
[565] Ibid. Art. 31.
[566] Ibid. Art. 5
[567] Ibid. Art. 32.

regulations before their enactment, but it also states that SIC's observations are not binding.[568] Overall, the compromise embedded in this law follows to some extent that present in DL 2153; the law follows the distinctive neoliberal focus on economic efficiency while reaffirming the State-centered elements that characterized this regime since its inception.

As to the other topics of the law, the differences between the bills were much less pronounced and contentious. Regarding mergers, the law introduces a two-tier merger regime based on thresholds that were considerable higher than the ones prevailing until then.[569] The law introduces officially the figure of merger remedies - SIC had been declaring them without a clear basis since the 1990s - as well as that of merger reversal, reserved for un-notified mergers and other instances of inattention to legal requirements.[570] Also, the law amended the efficiency exception established in article 51 of DL 2153 and added that a merger can be cleared if external conditions guarantee free competition in local markets.[571] As for leniency, the law creates such figure for parties engaged in anticompetitive activities except for their promoter, and the degree of exoneration depends on the opportunity and quality of the information provided.[572] Finally, the law also amends other aspects of the procedure conducted by this agency. Among other issues, the law also changes the amount of the fines and their application. It raises the maximum amount of fines that can be imposed to 100,000 (one hundred thousand) minimum monthly Colombian wages (about US 25 million dollars) or 150 per cent of the utility resulting from the anticompetitive conduct.[573]

The first OECD Peer Review of Colombia's CLR was presented shortly after the enactment of law 1340 of 2009. This Review offers a general description of this CLR, especially concerning decisions and the overall enforcement activity of SIC.[574] Because it was published after the enactment of the above mentioned law, the possibility to engage in legal reform using its recommendations diminished considerably. The Review praises the new law for concentrating competition law enforcement, raising fines and the introduction of leniency, although it recommends protecting lenient parties from damages claims resulting from civil litigation.[575] Moreover, the Review also recommends explicitly granting the competition law enforcer with

[568] Ibid. Art. 7.
[569] Ibid. Arts. 9 - 11.
[570] Ibid. Art. 13.
[571] Ibid. Art. 12.
[572] Ibid. Art. 15.
[573] Ibid. Art. 26.
[574] Petracola, Diego. "Colombia- Peer Review of Competition Law and Policy in Colombia" OECD-IDB, 2009.
[575] Ibid. Pg. 59.

more political autonomy, and even suggests the creation of a collegiate body for deciding cases.[576] Overall, this Review evidences the distance between what the OECD considered should be Colombia's CLR, and the political, legal and economic *status quo* that can be ascertained from the legal provisions that make this regime. Moreover, it also shows that the process that led to law 1340 of 2009 shortened the distance resulting from the perspectives of the different actors.

II.C. Challenging *Gremios* (2010 - 2015)

Between 1999 and 2009 SIC used competition as a limit to freedom of association, thus sanctioning businesses and their associations for engaging in anticompetitive agreements. During this third period, the influence of both local and international actors (like the OECD) would keep SIC (and the government) from caving to the interests of BAs. As a result, even though the government has curbed SIC, it has not prevented enforcement aimed at BAs from taking place.

II.C.1 Aiming at *Gremios*

The success of SIC in challenging business associations and their members for engaging in anticompetitive practices for the past decade, and the provisions of law 1340 of 2009, empowered this agency. Colombian magazine *Semana* noted that SIC had become a new actor with which business and political actors had to contend with. The days in which SIC could be pushed over seemed to be in the past.[577]

The 2010 election of Juan Manuel Santos (2010 - 2014, 2014 - 2018) as President led to important changes in the structure and ethos of Colombian regulation. One of the most notable changes was the beginning of a program aiming to the admission of Colombia as a formal member of the OECD. This process would become particularly important for the more recent developments of competition law in Colombia. But even before the formal announcement, which took place in 2013, the Santos administration made two appointments with clear international profiles at SIC. The President appointed José Miguel de La Calle as director of this agency and Pablo Marquez as deputy Superintendent for competition law. De La Calle is a

[576] Ibid. Pg. 60.

corporate lawyer from Universidad del Rosario with little background on competition law before joining SIC, since his professional practice until then was mostly on corporate law.[578] In turn, Marquez comes from the ranks of PUJ's Faculty of Law, where he worked closely with Alfonso Miranda and is a professor in this faculty. Moreover, he had previously worked in SIC as an advisor to Rubio and, a few years later, partnered with Miranda in a few investigations where the latter was the attorney for the investigated parties.[579] Notably, they share an interest in policy and regulation. De La Calle published a book about the difficulties of Colombia's judicial system[580] before joining SIC and Marquez has published several papers on regulation.[581] Moreover, both of them have an LL.M. Degree from Harvard Law School, and Marquez obtained his D.Phil in law from Oxford shortly after assuming his deputy position in SIC.

During the two years that De La Calle and Marquez worked together, SIC had an unprecedented surge in decisions regarding anticompetitive agreements, including those pertaining to BAs and their members. As table 6.5 below shows, SIC issued 11 decisions involving anticompetitive agreements between 2010 and 2015. Of these, 8 decisions were issued in 2011. Moreover, some of the decisions issued by this agency during this period address anticompetitive agreements in sectors that before law 1340 of 2009 where under the supervision of other agencies, like healthcare. Also, the number of settlements diminished drastically to zero during this period. However, the number of decisions concerning these agreements drops considerably during 2012 and after. We will argue below that this change was the result of the political conditions that SIC and the government faced at the time.

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[577] Revista Semana *El 'Super-Poderoso'* August 15, 2009.
[578] See José Miguel de la Calle (profile) http://lasillavacia.com/quienesquien/perfilquien/jose-miguel-de-la-calle-restrepo. Accessed on July 3, 2015.
[579] In particular, the cement cases.
[580] De la Calle Restrepo, José Miguel. La reforma judicial que necesita Colombia. Legis. (2010)
[581] See http://www.iicom.org/telecommunications-media-forum/tmf-miami-2014/tmf-miami-2014-regional-irf/151-telecommunications-media-forum/tmf-miami-2014/773-dr-carlos-pablo-marquez-escobar. Retrieved on July 3, 2015.

Table 6.5. Decisions Involving Business Associations and Anticompetitive Agreements (2011 - 2015)

Year	**Decision No.**	**Case** (Defendants)	**Product Market**	**Decision**	**Fine** (In USD)[582]
2011	23890	IBOPE and others	Advertisement research	Fine	1'392,861
2011	33141	PROCANA & AZUCARI	Sugar cane crop	Fine	6,464.14
2011	37033	CDA Cordoba	Car mechanical revisions	Fine	27,902
2011	46111	ACEMI	Healthcare insurance	Fine	6'136,851
2011	41687	ASHORALDA	Medical services	Fine	1,910
2011	70736	CDA Caldas	Car mechanical revisions	Fine	5'4630
2011	71792	Sociedad Colombiana de Pediatría	Paediatric services	Fine	12,274
2011/ 2012	71794/11651	FENDIPETROLEO	Gasoline retail	Fine	1'380,792
2012	12483	AHCS Caldas	General medical services	Fine	1,910
2012	13483	CDA Ibagué	Car mechanical revisions	Fine	49,863
2013	2587	ASOHOSVAL	Medical services	Fine	1,910

The ACEMI decision is interesting because it addresses the role of a business association in thwarting competition in the healthcare sector. According to Colombian law, citizens have to contract their healthcare services through firms called *Empresas Prestadoras de Salúd* (or EPS). In turn, EPS's should offer to their affiliates a variety of services and medications taking as a

reference the minimum coverage duties established in the law and jurisprudence. ACEMI is the BA that groups all EPS. According to SIC, the healthcare sector works like a two-sided market, where healthcare providers broker between the demand for healthcare by affiliates and the government's resources destined to attend such demand given the system's budget. Because of the particular position of healthcare providers, ACEMI could exercise an inordinate influence in the competitive nature of different actors involved. SIC found that ACEMI contributed to three different but related anticompetitive agreements. Firstly, it enabled the EPS to coordinate the offer of medicines and treatments to patients, thus preventing competition between them. Second, it enabled the EPS to share information about their costs, and gave instructions as to the type of cost information that each one of them gave to the regulator (for the purposes of budgeting healthcare attention). Thirdly, it enabled the different EPS to fix the amount of the payments they received from the State because of their activities, thus indirectly fixing the price of the insurance citizens have to acquire.[583] Overall, this decision stands out for its strong stance against BAs and the novel use of industrial organization literature.

The ACEMI decision also evidenced the growing importance that economists were having in SIC. In 2012 the group of economic studies was formally created, although its director, economist Juan Pablo Herrera, had been working as advisor to SIC's directors since 2008. Herrera was hired by Gustavo Valbuena precisely in order to strengthen this agency's economic analyses, and since then he provides advice to both SIC's director and the deputy superintendent for competition law on various issues. As the OECD's follow-up on competition law and market investigations points, the economics group at SIC is an example of a success because of the economic input in SIC's analyses.[584] Moreover, because of the increasing importance of economic analysis in Colombian competition law reasoning, the institution of such group is opening a new space for economists in a field dominated by lawyers.

SIC's activism led to two different reactions. The first reaction was patently political. During the first two years of government, the relationship between the Santos government and the business and industrial sectors was not the best, among other things because of SIC's decisions. In 2012 SIC was preparing a set of guidelines regarding competition law compliance for these associations in which it stated the illicit nature of sharing sensible information and taking part in

[582] Approximation based on the Colombian peso/US dollar rate of July 2, 2015. Includes only the fines levied against firms, not individuals.
[583] SIC, Resolución 46111 de 2011

anticompetitive agreements. The draft of these guidelines was presented by SIC to different *gremios*, which received it coldly. Luis Carlos Villegas, then director of ANDI, complained before the President that SIC aimed to end these associations altogether. Moreover, Villegas was not alone in his criticism of SIC's activities; the director of the Association of Banks (ASOBANCARIA) and of agricultural producers (SAC) also felt that SIC was acting unduly against their interests.[585]

A second reaction involved strategic litigation before Colombia's Constitutional Court. The targets of these challenges were several provisions of law 1340 of 2009. A first challenge involved making SIC the sole competition law enforcer; if the claim against SIC's powers were successful, this agency would lose oversight over various sectors. The challenge against this issue was framed in terms of articles 365 through 370 of the 1991 Constitution, which refer explicitly to the *Superintendencia de Servicios Públicos* as the agency that oversees compliance regarding public utilities. The Constitutional Court ruled that law 1340 of 2009 only removed oversight regarding the application of competition law to public utility companies, while the remaining issues continued to be allocated to the *Superintendencia.*[586]

The pressure that SIC was facing during mid 2012 was defused politically, and we contend that it was part of a strategic move from the government to obtain support for the peace negotiations with the leftist *guerrilla* FARC that began in 2012. The government appointed a negotiation team led by Humberto de La Calle, the father of José Miguel de La Calle, SIC's director.[587] This led to the director of SIC to step down, arguing personal reasons for doing so.[588] Pablo Marquez was considered initially to replace him, but apparently the sugar mills vetoed him because of his participation in the investigations in this sector (when he was an advisor to SIC).[589] These situations raised the question of who would be appointed in these key positions in SIC. The government took advantage of this situation to appoint individuals that were close to its high-ranking members. Pablo Felipe Robledo, a lawyer from Externado university who had worked with the current Vice-President Germán Vargas Lleras when he was minister of Justice, was appointed as director of SIC.

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[584] OECD, Competition and Market Studies in Latin America The case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru (2015)
[585] Revista Semana *Por qué están bravos* February 25, 2012.
[586] Corte Constitucional de Colombia. Sentencia C-172 de 2014.
[587] Revista Semana *Humberto de la Calle, jefe del equipo negociador* September 5, 2012.
[588] El Espectador *José Miguel de la Calle renunció a Superindustria* September 14, 2012.
[589] See "COMPAL- REUNIONES SIC. MISIÓN COLOMBIA Reunión del 5 al 9 de Noviembre, 2012." http://programacompal.org/mision-colombia-reuniones-sic.html (accessed July 3, 2015)

Following this change in SIC's direction, there have been changes in its enforcement priorities. On one hand, SIC began in 2013 an advocacy campaign to "educate" BAs in issues raised by competition law enforcement.[590] We believe that this explains the subsequent drop in the number of decisions concerning business associations. On the other, SIC focused its enforcement activities in two fronts. Firstly, working closely with the *Comisión de Regulación de Telecomunicaciones* (or CRT), where Pablo Márquez was appointed commissioner,[591] SIC fined mobile telecom companies, like *Telmex* (now *Claro*), for infringing their duties to consumers and other telecom operators.[592] While the link between the CRT and SIC dates before these events, their joint efforts began to attract the attention of Colombian media after late 2012.[593] Second, it switched its efforts from competition law enforcement to consumer protection issues, perhaps taking advantage of the fact that law 1480 of 2012 raised the fines and facilitated the procedure for their investigation.[594] The number of competition law decisions involving anticompetitive practices issued per year dropped considerably. According to information provided by SIC, in 2011 this agency made 10 infringement decisions, in 2012 it made 6, in 2013 it made 9, and made 7 in 2014.[595] We contend that these changes evidence the efforts within SIC to come closer to the interests of the government, for it enforced the CLR in a manner that was more lenient with local BAs than before.

Even so, the path ahead was less than clear. By taking a softer approach towards BAs, SIC was distancing itself from the positions of local but also international actors that had played so far an important role in the development of competition law in Colombia and who argued for an increase of the levels of competition law enforcement and its effectiveness. First, local actors - most notably lawyers and economists - became very vocal about certain aspects of this CLR's institutional design that they considered required urgent changes. For example, former Director De La Calle wrote in 2013 a newspaper article that law 1474 of 2011 contributed to the lack of clarity of leniency by making bid-rigging a criminal offence as well as an administrative one

[590] SIC, Superintendencia de Industria y Comercio Capacitará a los afiliados de 21 gremios empresariales de todos los sectores económicos. Available at: http://www.sic.gov.co/drupal/node/6754. Visited on June 2, 2015.
[591] Ministerio de Tecnologías de la Información y las Comunicaciones. *Isabel Fajardo y Carlos Márquez, nuevos comisionados de la CRC*. Octubre 25, 2012.
[592] According to law 1341 of 2009, certain telecoms regulations issued by the CRT can be be enforced by SIC.
[593] See for example Portafolio *'No hemos sido notificados sobre sanción': Telmex* September 24, 2012. Also Revista Semana *Sancionan a Telmex-Claro por no responderles a los usuarios* November 13, 2014.
[594] For an assessment of the increasing importance of consumer protection decisions, see Revista Semana, *La hora del consumidor* December 20, 2014.
[595] Datos Estadísticos Gestión Institucional, Superintendencia de Industria y Comercio, 2015. Estadisticas_DIC_12_2014.pdf (accessed November 12, 2015). Pg. 2.

without sorting the issues resulting from their combination.[596] In a conference organized in August of that year by *Fedesarrollo*, a leading Colombian think-tank, lawyers, economists and members from Congress gathered to discuss the competition law reforms.[597] This event showed that there was a local competition community aware of the issues taking place in other jurisdictions, and bent on replicating them in their own context. This is particularly clear in the economic analysis presented by *Fedesarrollo's* economists regarding the substantive law provisions of Colombia's competition regime and its institutional architecture.[598] Second, one may witness the increasing influence of the "soft power" of international actors in the development of Colombian competition law. The OECD played an important role in this context following the announcement in 2013 that it welcomed Colombia's accession plan to become a member State.[599] Part of the accession plan involved the revision of Colombia's CLR, and the recommendations of the 2009 OECD Peer Review became an issue for the government's accession plan to the OECD as no changes to the existing regime had been made. The distance between these actors and SIC led the latter to adopt a rather defensive attitude. In a newspaper article published in 2013, Director Robledo stated that since the OECD did not provide advice on what counts as the adequate institutional design of competition law authorities, SIC's own design was not a matter of concern.[600] However, in the 2014 Economic Survey the OECD stated that SIC's autonomy should be increased, its effectiveness improved and its policies more transparent, thus ending the discussion about its own recommendations.[601]

The management of the first leniency applications provided SIC an opportunity to show its commitment for competition law to these actors. Acting on information concerning a cartel in the market for baby diapers, SIC conducted an administrative visit in 2013 in order to gather information. Following this visit, one of the firms involved came forward and became the first leniency applicant. In August 2014, SIC publicized the statement of objections against all the cartel members, which made the headlines of all the national media.[602] Moreover, this statement

[596] See De La Calle, José Miguel. La figura de la delación en el derecho a la competencia. Ambito Jurídico. March 27, 2013.
[597] ¿Cómo estamos y qué nos hace falta? – Apuntes del Foro sobre Política de Competencia en Colombia. La Libre Competencia. August 7, 2013.
[598] See Bardey, David, Alejandro Becerra, and Cabrera, Pilar. *Análisis Económico de la Normativa de Libre Competencia en Colombia*, Cuadernos Fedesarrollo 44, FEDESAROLLO, May, 2013
[599] OECD,"OECD formally launches Colombian accession process in Bogotá on 25 October." http://www.oecd.org/countries/colombia/oecd-formally-launches-colombian-accession-process-in-bogota-on-25-october.htm (accessed July 3, 2015)
[600] Robledo, Pablo Felipe. Proceso de adhesión a la OCDE y su posible impacto en la institucionalidad de la libre competencia en Colombia. Ambit Jurídico. October 30, 2013.
[601] OECD, Economic Surveys: Colombia 2015. Pg. 34.
[602] See for example El Espectador *El cartel de los pañales.* August 4, 2014

included direct evidence provided by the whistle-blowers that had not been known or challenged by the other investigated firms, an issue that would raise concerns at the later stage.[603] SIC's announcement appeared a week before ANDI's annual meeting, where it was widely discussed and criticized.[604] However, newspaper *El Tiempo* leaked that because of this administrative visit SIC was now conducting investigations in the adjoining markets of soft tissue paper and notebooks.[605] The statement of objections resulting from these new investigations appeared, without the surprise expected, in November 2014[606] and February 2015.[607]

In spite of the media display that accompanied the announcement of these statements, the procedural management of the leniency investigations proved more difficult than expected. According to magazine *Dinero*, SIC became embroiled with litigation resulting from the poor management of confidential information, which has prevented the adoption of the final decisions. This has made SIC a target of criticisms, while it also constituted one of the drivers of the amendments that SIC's director has been announcing for some time.[608] Moreover, these procedural hassles reaffirm the OECD's diagnoses about SIC's (in)effectiveness.

During the first months of the present year, business associations like ANDI and government officials discussed whether high sugar prices were affecting national industries and driving investors to other countries.[609] This discussion also echoed the recommendations issued by the OECD in 2014 regarding agricultural policies.[610] Amidst this discussion, SIC's director announced that the statement of objections mentioned at the beginning of this chapter was sent to 12 sugar mills and their BAs for using agricultural policies, like price-stabilization funds, for anticompetitive purposes. According to the statement, the sugar mills used this policy to share sensitive information, limit the supply of sugar, fix prices and prevent the importation of sugar for more than a decade. Notably, the statement shows the extent to which such policies can be easily manipulated to cover for anticompetitive practices.[611] The sugar mills and their associations responded through public statements announcing that they will fight these accusations.[612] Even

[603] Portafolio. *Interés Oculto.* August 19. 2014.
[604] Revista P&M, *ANDI se pronuncia sobre el caso del "Cartel de los pañales"* August 6, 2014.
[605] El Tiempo, *'Cartel de los pañales' salpica a 4 países y a otros productos.* August 9, 2014.
[606] SIC, Resolución 69518 de 2014.
[607] SIC, Resolución 7897 de 2015
[608] Revista Dinero *La Superindustria quiere más autonomía y herramientas*. May 14, 2015.
[609] See for context EL Espectador. *El rifirrafe por el precio del azúcar.* June 1, 2015.
[610] OECD Review of Agricultural Policies: Colombia (2015)
[611] Revista Semana *Azucareros bajo la lupa* May 30, 2015
[612] La Republica *"Hoy los colombianos adquieren el azúcar a un precio menor que hace cuatro años"* June 23, 2015.

though SIC has not issued a final ruling, this statement of objections will surely prompt more discussions about competition law in the agricultural sector. The development of this particular investigation shows the extent to which local and international actors exert their influence in shaping competition law enforcement, even preventing SIC from backsliding into a reactive role.

III. Conclusions

Throughout this chapter we have argued that the tension between BAs and competition law shows that Colombia's CLR has developed within the State-centered competition law project, even though it harbors elements that can be traced directly to its rival competition law project.[613] These changes result from and lead to interactions between the different actors involved in this field - lawyers, economists, consultants, politicians - all of whom have stakes in the development of this field of law and attempt to influence its direction.

As suggested above, the trajectory of the development of Colombia's CLR has been characterized by a tension between the right to free association and the right to competition, both of which have relatively equally strong constitutional foundations. At the constitutional level, this tension remained abstract until the Courts stated that BAs may be subjected to duties relating to the preservation of competition, and that policies restricting competition can be valid alternatives to competition law enforcement. Moreover, the duty to preserve competition is extended to all firms, not just to dominant firms as is the case in other jurisdictions like the EU. As new laws were enacted, the tension remained present, reminding us that constitutions provide the background for political negotiations. This is the case of DL 2153 and law 1340 of 2009; in the enactment of both laws the government aimed to maintain a compromise by extending exemptions to competition law rules. Even so, the progression of this tension from the abstract to the concrete, and from the few to the many, did not render the tension unchangeable. We noted an important change around 2003, when SIC began asserting once again the preeminence of competition over freedom of association. Since then, the competition law community had not questioned if competition could limit BAs, but rather how far did the limits go.

It is important to note that this tension has not led to "pendulum swings" regarding the design or application of specific competition law provisions; Colombian competition law remains true to its State-centered origins, even though this may change in the near future. As

[613] For a detailed analysis of these projects, see chapter 2.

suggested above, in the few historical circumstances in which drastic shifts may have taken place, the government - which continues to be the main responsible for the development of this field - preferred to maintain the compromises rather than to adopt drastic changes. All of this points to an underlying continuity regarding Colombia's CLR that, as mentioned in chapter 3, has been misapprehended or simply ignored. The fundamental changes we identify take place in the long run. In particular, SIC seems to be set in a trajectory to further or at least maintain its *de facto* independence that has been reinforced by the efforts of different actors (and perhaps at the expense of the government's own will).

Overall, the pervasiveness of the State-centered project in the development of Colombia's CLR is mostly a result of the close political control that the government has exercised over competition law enforcement for most of its history. From this perspective, the degree of *de facto* autonomy that SIC has exercised in the period here considered is remarkable. The fact that SIC has been able to investigate and fine BAs belonging to different economic sectors is a remarkable feat in an adverse institutional context. It may well be that SIC's experience will tip the balance in favor of institutional changes when conceiving an autonomous competition law enforcer does not seem a far-fetched idea.

7. Plots, Heroes and Villains: Competition Law in México

1990 - 2015

I. Introduction

In 2013 Mexican president Enrique Peña Nieto promoted an amendment to article 28 of the Mexican Constitution that changed this country's competition law and telecommunications regimes. By creating new agencies with extensive powers and delimitating procedural issues, we will argue in this chapter that the amendment is a new step in the confrontation between enforcers and dominant actors in the telecoms sector. The confrontation just mentioned shaped, like few other interactions, the transformation of competition law in Mexico. Beyond first impressions, this amendment contributes to "settle in" a model of competition law enforcement that had been in the making for the last decade or so, and that differs considerably from the CLR that was adopted in the early 1990s. How, then, did the new model emerge?

In this chapter we unpack the trajectory of Mexico's competition law regime (hereinafter CLR) between 1990 and 2015 as a field where different actors - politicians, lawyers, economists, international organizations and others - compete and collaborate for the power to determine the content and structure of this area of law. We do so by focusing on the interactions between competition law enforcers and dominant telecoms corporations as a window for identifying how the interplay between the two projects described in chapter 2 has taken place. We also consider this struggle to be particularly revealing because it shows the extent to which local conditions transformed neoliberal ideas and institutions.

This chapter is divided in the following parts. In section II we argue that originally both the telecoms regime resulting from the privatization process and the CLR were conceived separately, but drawing from the same pool of neoliberal ideas. However, once these regimes were in place, we see a series of conflicts between different actors, all of which involve competition law in different ways. As these conflicts unfold, we trace their impact on legal reforms such as the 2013 constitutional amendments and the enactment of a new competition law statute the year after. All of these changes evidence new compromises resulting from the competition and collaboration of the different actors involved. Finally, in section III we offer some conclusions.

II. Mexican Competition Law at the Crossroads

This section describes the interplay between the neoliberal competition law project and its State-centered counterpart by focusing on the struggle between Mexico's telecommunications enterprise, *Telmex*, and competition law enforcers. First it describes the legal changes that led to the privatization of the aforementioned company in 1990 and to the enactment of a new competition law statute in 1992, the *Ley Federal de Competencia Económica*, or LFC. The development of these processes constitutes the first phase. Although apparently unrelated, both processes were connected because they embody an uneven balance between the two projects here considered. This relation consists, first, of the relative insulation of *Telmex* from competition law enforcement as per the terms of the privatization process, and second, of the relative inability *by design* of the CLR to address sheer monopoly power. However, it was a matter of time before the balance resulting from this institutional arrangement changed. A second phase took place as reactions against the uneven balance embodied in the institutional arrangements unraveled in different scenarios, evidencing the growing influence of the State-centered competition law project. We will show how certain key decisions made the background political agreements supporting the aforementioned balance politically untenable and led to a activist enforcement agenda. Finally, this section ends in a description of a third phase. During this phase, a realignment between the actors, strategies and ideas making up each project, which led to a new compromise - not the abandoning of one project or the other. This compromise was embodied in legal provisions, like the 2013 constitutional amendment and the 2014 competition law statute

II.A. Neoliberalism *a la Mexicana*

The first phase of our analysis concerns the initial positions of competition law enforcers in the *Comisión Federal de Competencia Económica*, or CFC, and *Telmex*. The confrontations that followed between them were the result of deliberate choices and could have been solved in favor of one or the other. As mentioned above, the initial stage was characterized by the relative insulation of *Telmex* from competition law enforcement as per the terms of its privatization, and the relative inability *by design* of the CLR to address sheer monopoly power. However, it was a matter of time before the balance resulting from this institutional arrangement changed, leading to confrontations.

II.A.1 The Privatization of *Telmex*

Our analysis begins with the privatization of *Telmex*. This operation took place during the presidential term of Carlos Salinas de Gortari (1988 - 1994) and is considered a high point in the deployment of Mexican neoliberalism. The Salinas government decided to offer *Telmex* as an unregulated, vertically structured dominant enterprise only to national investors. This was a controversial idea even within the team of government consultants working on the issue, but nonetheless it prevailed.[614] Selling *Telmex* under such conditions was considered necessary to make the enterprise attractive, and therefore for the government to receive a considerable price for it; but also because monopoly rents would enable the acquiring parties to invest in updating its infrastructure and extending services to low-income, under-serviced households. Carrying the privatization under such terms arguably strengthened Salinas' standing *vis a vis* other actors. It could bring financial support for his party (the *Partido Revolucionario Institucional*, or PRI) during future elections, benefit the union members that already had owned company shares, and even party members who were unwilling to let foreign investors control previously owned state institutions.[615] Furthermore, the decision to sell *Telmex* as a monopoly was also supported by the World Bank, which according to Judith Mariscal, cautiously supported this way of proceeding.[616]

The legal framework of *Telmex's* functions was embodied in a *Título de Concesión*, a public contract between the State and the acquirer of the company made public in December 10, 1990.[617] It contains several provisions stating the rights and duties of *Telmex* with regard to customers and third parties that access its network infrastructure relevant to competition (including short distance, long distance - national and international - and cell phone capabilities). Section 2-4 states that during the next six years the government can extend a similar arrangement to a third party only if *Telmex* fails to fulfill its duties regarding network expansion and effectiveness. Section 5-4 states that only after January 1st of 1997 *Telmex* could be forced to grant access to third parties to its network infrastructure. Finally, section 5-5 states that *Telmex* cannot celebrate agreements with international third parties over long distance connections that

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[614] See Noll, Roger. "Priorities for Telecommunications Reform in Mexico." Available at http://siteresources.worldbank.org/INTMEXICOINSPANISH/Resources/noll-paper.pdf.

[615] Manzetti, Luigi. "Are You Being Served-The Consequences of Telmex Monopolistics Privatization." *Law & Bus. Rev. Am.* 16 (2010): 781, 784 - 790

[616] Regarding the World Bank's endorsement of the sale of *Telmex*, see Mariscal, Judith. "Telecommunications Reform In Mexico From A Comparative Perspective." 46 *Latin American Politics and Society* 83, 91 - 92 (2004)

[617] México, Diario Oficial de la Federación. December 10, 1990.

exclude or restrict the access to local enterprises.[618] All three provisions amount to protecting a monopoly, given certain conditions. Section 8-4 states two sanctions for engaging in anticompetitive practices. First, if *Telmex* engages in an anticompetitive practice in a service market where an authorization is required, the authorization itself can be revoked. It also prohibits the company from participating in the service market for a term not shorter than five years.[619] Regarding the duties, section 2-9 states that the company cannot engage in monopoly practices ("prácticas monopólicas") that prevent a fair competition with other enterprises concerning the activities that it undergoes directly or indirectly. It also prohibits acts, agreements or combinations with the purpose of establishing an undue advantage for itself or for third parties, or that it monopolizes markets complementary to the ones offered. Section 2-10 prohibited extending crossed subsidies to its affiliates or subsidiaries, or to cross-subsidize services when competing with other firms.[620] In charge of observing *Telmex's* compliance with these terms was the *Secretaría de Comunicaciones y Transporte*, or SCT, an administrative agency that oversaw the operation of ports, highways and radio operation with little political autonomy.[621]

After the publication of the *Título de Concesión*, a bid for the company followed. The winner of the bid was the *Grupo Carso*, owned by Mr. Carlos Slim - a self-made entrepreneur with close ties to the PRI in spite of not coming from the traditional Mexican business elite. He was a supporter of the economic reforms advanced during the Salinas government and participated in the negotiations of the North American Free Trade Agreement (NAFTA), which took place during Salinas' term.[622] The apparent close ties between Slim and Salinas have been de-mystified by Salinas himself, who in a recent interview stated that Slim took advantage of the lack of effective regulation and turned *Telmex* into a *de facto* monopoly.[623]

The legal framework of *Telmex* would remain confined to the *Título de Concesión* until the mid 1990s. In 1995 the Mexican congress enacted a law, the *Ley Federal de Telecomunicaciones*, or LFT, regulating the telecommunications sector and, in particular, access to public and private infrastructure related with the provision of telecoms. The law has several provisions that address competition issues. For example, it states that one of the goals of telecoms regulation is to

[618] Ibid. Sections 2-4, 5-4 and 5-5.
[619] Ibid. Section 8-4.
[620] Ibid. Sections 2-9 and 2-10.
[621] Ibid. Section 7-1.
[622] Ibid. Pg. 788.
[623] See Salinas de Gortari, Carlos. *Telmex, una privatización exitosa que terminó cuestionada*. Periódico El Financiero, Dic. 15 and 16, 2014. Available at http://www.elfinanciero.com.mx/economia/telmex-una-privatizacion-exitosa-que-termino-cuestionada.html.

ensure the development of prices and quality competition.[624] It states that enterprises administering telecom networks have the duty to grant access to third parties on competitive terms and are forbidden to engage in practices, like cross subsidies, which affect competition.[625] If such enterprises refuse to grant access to third parties, jeopardize their access, or fail to fulfill the duties stated in their contracts for more than three times, they risk losing their rights over the network.[626] As with *Telmex*'s contract, the enforcing agency is the SCT, although the functions of this agency according to the law do not mention anything about competition.[627] On the other hand, the law also states that enterprises aiming to have rights over the network require a positive statement by the CFC.[628] (The CFC was created by the LFC three years before this law). It also states that, in case the CFC finds that an enterprise has dominance in a particular market, the SCT can issue a differential tariff system for that enterprise.[629]

Because the SCT was not a specialized regulator that could keep up with the functions stated in the LFT, in 1996 president Ernesto Zedillo (1994 - 2000) created, through an administrative decree, the *Comisión Federal de Telecomunicaciones*, or CFT, an autonomous administrative body attached to the SCT. Because it was created through an administrative decree and not through a law, the legitimacy of this agency was questioned early on. Moreover, the decree creating this agency did not establish a term-time for its members, which made their appointment and removal an intense political issue.[630] This agency was partially reformed in 2006, and in 2013 another body created in the constitutional amendment to article 28 superseded it.

This brief account of *Telmex's* regulatory framework highlights the main elements that are related to competition. However, it is important to note that under this framework the company was relatively insulated from competition law enforcement. This is so because both the *Título de Concesión* and the LFT established a specific regime for this company. Also, the LFT states that potential telecoms providers need the approval of the CFC to enter a market, but does not state that this competition law enforcer can punish anticompetitive practices in the telecoms sector. Therefore, in order to understand how *Telmex* ended confronting the CFC we need first to describe the enactment of the LFC and the creation of this agency.

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[624] México, Ley Federal de Telecomunicaciones de 7 de Junio de 1995. Article 7.
[625] Ibid. Arts. 41 - 44. The explicit prohibition against cross subsidies is in art. 62.
[626] Ibid. art. 38.
[627] Ibid. art. 7.
[628] Ibid. Arts. 16 & 35.
[629] Ibid. Art. 63.
[630] See Rivera, Eugenio, and Judith Mariscal Avilés. "Regulación Y Competencia En Las Telecomunicaciones Mexicanas." (2007).

II.A.2 (Re) Inventing Mexican Competition Law

The 1917 Mexican Constitution addresses competition issues explicitly in its article 28 (see also chapter 4). This article contains a straightforward prohibition against monopolies and "monopolistic practices" that force consumers to pay "excessive prices", and against any undue advantage for a group of individuals, which could be exercised at the expense of the general public. It also orders the authorities to investigate monopolies without delay and for the law to punish them severely, along with other practices leading to the outcomes just described.[631] The content of this article was developed through several laws over time, notably the 1934 *Ley Orgánica del article 28 constitutional en materia de monopolios*. As argued in chapter 4, the 1934 law both had a distinctive developmental *ethos* that views competition as one among several policy instruments governments dispose to control economic processes.

The drafters of the 1992 *Ley Federal de Competencia* (CFC) were conscious that the adoption of a new CLR would change how competition law was understood in México. In particular, it was an opportunity to incorporate law and economics concepts that were foreign until then to Mexican competition law.[632] The drafting team - which included Gabriel Castañeda and Santiago Levy - were lawyers and economists with graduate studies in the US and Europe working at the *Secretaría de Comercio y Fomento Industrial* (SECOFI) under the direction of Jaime Serra Puche.[633] Gabriel Castañeda is a lawyer from the *Escuela Libre de Derecho* and obtained an LL.M. from the London School of Economics before returning to head the legal services area of SECOFI.[634] In turn, both Levy and Puche are economists with PhD degrees from Boston University and Yale University, respectively.[635] As noted in chapter 3, the drafters aimed to finalize a statute based on rigorous economic concepts that would keep market interventions by the State to the minimum,

[631] México. Constitución Política de los Estados Unidos Méxicanos de 1917. Although article 28 has been modified several times, the prohibitions here quoted have not been amended. See Nava, Liliana. "Reseña Legislativa La Ley Federal De Competencia." UNAM. Reseñas Legislativas UNAM. https://www.google.es/search?hl=en&q=%E2%80%9CLiliana+Nava%22+competencia (accessed January 10, 2015)

[632] See for example Castañeda, Gabriel. *Origenes, Avances y Dificultades De La Política De Competencia En México (1993 - 2003)*. El Nuevo Milenio. Universidad Autónoma Mexicana, 2005. (Referred to as Castañeda). Also Castañeda, Gabriel, Santiago Levy, Gabriel Martínez, and Gustavo Merino. "Antecedentes Económicos Para Una Ley Federal De Competencia Económica." *El Trimestre Económico* (1993): 230-256.

[633] Rangel, Manuel Palma. "Reforma Microeconómica Y Arreglos Institucionales: La Política De Competencia Económica En México/Microeconomic Reform and Institutional Arrangements: Economic Competition Policy in Mexico." *Revista mexicana de sociología* (2007): 39-68. Pg. 48

[634] Regarding Gabriel Castaneda, see http://whoswholegal.com/profiles/59219/0/castaneda/gabriel-castaneda/

[635] Regarding Levy, see http://www.brookings.edu/~/media/experts/l/levys/levys_cv.pdf. Regarding Serra Puche, see http://www.sai.com.mx/es/sai-group/.

and that when these were required the interventionist framework will be kept simple. Robert Bork's *The Antitrust Paradox*[636] constituted one of the sources explicitly considered by the drafters. Before submitting the draft law to the Mexican congress, the drafting team presented the law to various actors, including other government agencies, business associations, and the OECD.[637] Regarding the latter, the reviewers of the draft law commended it, noting that it was very similar to the regimes of other jurisdictions.[638] Since the draft law had the support of the President and was sent with a note of urgency, it is not surprising that congressional approval and enactment took place in one month.[639] Moreover, all the proposals to introduce major amendments during the legislative process were defeated.[640] The law was formally enacted in December 24, 1992 and came into force in June 1993.

The LFC established a *sui generis* regime that combines competition law enforcement and regulation. Regarding the former, this law addressed coordinated practices (like cartels), unilateral practices and mergers. Article 3 of the law states that it is applicable to all markets and their participants, including state-owned enterprises.[641] Article 8 establishes a general prohibition against monopolies and other practices that diminish, affect or prevent competition in the production, distribution and commercialization of goods and services.[642] Article 9 introduces the category of "absolute monopoly practices" (*prácticas monopólicas absolutas*), which are practices that are straightforwardly prohibited without any possibility of showing that they may bring about advantages or benefits. These include price-fixing agreements, fixing production or commercialization quotas or volumes, market allocation and bid rigging. This article also states that these agreements are null and void.[643] In turn, article 10 introduces the category of "relative monopoly practices" (*prácticas monopólicas relativas*) which are practices considered beneficial unless practiced by a dominant enterprise within a relevant market. These practices include exclusive distribution agreements, resale price maintenance, tying, boycotts, refusal to deal and according to its section VII "any act that affects competition in the production, distribution and commercialization of goods and services".[644] The following articles provide the framework for determining when these practices are deemed anticompetitive. Article 11 states the conditions of finding dominance in a relevant market for ascertaining liability, while article 12 refers to the

[636] Op.cit. Castañeda. Pg. 341
[637] Ibid. Pgs. 344 - 353.
[638] Opcit. Palma Rangel Pg. 60.
[639] Ibid. Pg. 48
[640] Ibid. Pg. 52
[641] México. Ley Federal de Competencia Económica (1992). Art. 3.
[642] Ibid. Art. 8
[643] Ibid. Art. 9.

definition of the relevant market and article 13 states the conditions for dominance.[645] Articles 16 to 22 establishes the merger review regime, which is based on ascertaining whether the resulting enterprise from a merger can become dominant in a relevant market in the terms of articles 11 and 12.[646]

Regarding the regulatory provisions, the idea was to position the CFC as an advocate for competition with regard to other state agencies and bodies.[647] Articles 14 and 15 of the law state that acts adopted by federal authorities that limit inter-state commerce are forbidden, and the CFC can declare their nullity.[648] Article 24, which sets out the general functions of this agency, states that it must i) issue statements regarding amendments to federal programs and policies when they may impact competition, ii) issue statements by request of the executive branch on how changes to laws and decrees affect competition and iii) issue, by its own volition, non-binding opinions on that same matter.[649]

The composition of the CFC and the proceedings conducted before it were also an opportunity for shaping competition law enforcement according to neoliberal precepts. Regarding its composition, the idea was to make it politically independent.[650] Article 23 of the LFC defines the legal nature of the CFC as an independent administrative agency.[651] Article 24 sets out its functions, which include both investigating the occurrence of anticompetitive practices and deciding the liability of the parties, and the regulatory functions above mentioned.[652] The main organ of the CFC is the *Pleno*, which is a collegiate body composed of five commissioners appointed by the Mexican President for a period of ten years and who can only be removed if they commit a serious crime or administrative misdemeanor.[653] The *Pleno* is led by a President, whose main duties are to oversee the fulfillment of the functions of the CFC established in the law.[654] Article 29 states that the CFC will dispose of an executive secretary, appointed by the President of this agency, in charge of the operative and administrative tasks involved in its activities.[655]

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[644] Ibid. Art. 10.
[645] Ibid. Arts, 11 - 13.
[646] Ibid. Arts. 16 - 22.
[647] Castañeda, Ibid. Pg. 357
[648] Ibid. Arts. 14 and 15.
[649] Ibid. Art. 24.
[650] Castañeda, Op.cit. Pg. 353.
[651] Ibid. Art. 23.
[652] Ibid. Art. 24.
[653] Ibid. Arts. 25 -27.
[654] Ibid. Art. 28
[655] Ibid. Art. 29.

With regard to its proceedings, Castañeda argues that the LFC meant to foster private enforcement activities by private parties and, correlatively, to rely on the public enforcement powers given to the CFC only under circumstances that merited such interventions.[656] Article 30 of the law established that competition law investigations may begin because of a complain filed by a private actor or by the agency itself; however, only directly affected private actors can file complaints involving relative monopoly practices.[657] Once a complaint has been filed, the CFC proceeded to notify the investigated party, who in turn could present evidence in its favor. After reviewing such evidence, both parties could present final allegations before the *Pleno*, which in turn had to make a decision in the next sixty days.[658] If the CFC found the investigated parties liable, it could order the amendment or cessation of the anticompetitive conduct, the reversal of unapproved or anticompetitive mergers, and the imposition of fines for providing false information or for incurring in absolute or relative monopoly practices.[659] If the conduct is particularly problematic, the CFC may impose instead a fine corresponding to ten per cent of the annual sales of the parties involved.[660] The law also states that the private actors proving harm from the anticompetitive conduct may claim damages before courts. The latter can use the CFC's estimate of the damages when considering the amount of the awards.[661] In turn, according to Castañeda, public enforcement powers should only be used on occasions that merit the unavoidable institutional "wear-and-tear", like high impact decisions and regulatory opinions.[662] Even so, the law is not entirely adequate regarding those instances in which the CFC uses its investigatory powers. Since the law allocated investigative functions to the executive secretary and left adjudicative functions to the *Pleno*, public enforcement turned the agency into an adjudicator of the conducts it investigated.[663]

All things considered, it is important to note a "slippage" between the content of article 28 of the Mexican Constitution and the LFC. While article 28 prohibits monopolies and orders that the law punish them severely, the LFC simply reiterates the prohibition but does establish any punishment mechanism or the possibility of breaking them up. That is, the law punishes absolute and relative monopoly practices, not monopoly in itself. This is consistent with the idea that the

[656] Castañeda, Opcit. Pgs. 356 - 357.
[657] Ibid. Arts. 30 & 32.
[658] Ibid. Art. 33
[659] LFC, Ibid. Art. 35.
[660] Ibid. Art. 37.
[661] Ibid. Art. 38.
[662] Ibid. Pgs. 356 - 357.
[663] Castañeda, Op.cit. Pg. 355.

CLR should meddle as little as possible with markets; it also becomes a way of protecting the entitlements resulting from the privatization process and settling the *status quo*. This brings the privatization of *Telmex* back to our attention. This "slippage" turns out to be highly convenient for monopolies and dominant enterprises because, even in light of an explicit constitutional prohibition, the law does not provide an action or a remedy to challenge such monopoly in the first place. Also, article 14 of the Mexican Constitution prevents the retroactive application of the law to legally relevant facts that occurred before the law's enactment. Because of these factors, at this phase the LFC comes across as being relatively unable, by design, to address the sheer monopoly power of companies like *Telmex*.

The relative insulation of *Telmex* from competition law enforcement and the relative inability by design of the CLR to address sheer monopoly power during this first phase are not coincidental. Manuel P. Rangel argues that the LFC was not meant to unravel the consolidation of the power of Carlos Slim, President Salinas and the PRI resulting from the privatization; but rather is part of the institutional arrangements resulting from Mexico's neoliberal reforms of the 1990s.[664] We complement this by noting that this processes led to the redefinition of Mexican competition law as a field. The "slippage" between the mandate of article 28 and the content of the LFC gives away that there is a change in how competition law is understood and represented - its "common sense". The embodiment of this new understanding in the institutional arrangements, and in particular in the LFC, resulted from the alignment of different actors - entrepreneurs, politicians and technocrats - all participating in the making of this field.

II.A.3 The Unraveling of *Telmex* and Competition Law Enforcement

The alliance between entrepreneurs, politicians and technocrats which characterized of this first phase proved to be short-lived and unraveled during the second half of the 1990s as a result of the enactment and application of both the LFC and the LFT. The unraveling took the shape of administrative and judicial proceedings regarding the applicability of the LFC to *Telmex* as per the terms established in both the *Título de Concesión* and the LFT. At a different level this unraveling was about repositioning technocrats and politicians *against* dominant economic actors, a change that would contribute to the erosion of some of the neoliberal aspects of the LFC and the increasing importance of rival projects. Moreover, they are also of relevance because they

[664] Palma Rangel, Opcit.

show that *Telmex* was ready to mobilize its resources through litigation in order to feign-off the application of the LFC.

The first episode of the above-mentioned unraveling resulted from a legal dispute about the applicability of the LFC to *Telmex*. In 1996 several companies that were part of the *Iusacell* group, which in turn was partially owned then by US corporation Bell Atlantic,[665] accused *Telmex* before the CFC of cross subsidizing its affiliates in direct contravention to the *Título de Concesión* and the LFT. *Telmex*, in turn, argued that this particular claim was beyond this agency's mandate, since its legal framework was composed of the *Título de Concesión* and the LFC. The CFC rejected the argument,[666] and then *Telmex* filed an *amparo* action before the federal judiciary.[667] A first-circuit administrative court settled the *amparo* in favor of the CFC by stating that article 3 of the LFC addresses all economic actors without distinction.[668] This meant that independently of the *Título de Concesión* or the LFT, the company had to acknowledge the authority of the competition enforcement agency.

The second episode involved a legal dispute regarding the capacity of the CFC to issue statements about the dominance of market actors according to the terms of the LFT. In 1998 the CFC issued an opinion according to which *Telmex* was a dominant actor in five related markets, which in turn opened the possibility for the CFT to impose differential tariff regimes according to the telecoms law, the LFT. The company challenged the CFC's opinion, which led to a protracted litigation between the company, on the one hand, and the CFT and the CFC, on the other. An administrative court decision settled both issues in 2000. First, it settled that *Telmex* was bound by the CFC, and second, that issuing an updated assessment of dominance does not amount to an unlawful application of the LFC.[669] The CFC gave a new, updated opinion of the dominance of *Telmex*, but the courts annulled it too in 2006.[670] The process to determine this company's dominance would begin anew in 2007, but the differential tariff regulations would be

[665] Regarding the partial acquisition of Iusacell by Bell Atlantic in 1993, see Revista Semana *Pasos de Gigantes*. November 15, 1993.
[666] See Comisión Federal de Competencia, Expediente RA-01-96.
[667] The *amparo* action is a special action devised in the 1917 Constitution that allows any individual to challenge the decisions of any authority – including laws enacted by Congress – on the grounds that it violates the rights established in the constitution.
[668] A summary of the judicial decision regarding this action can be found in Sánchez Ugarte, Fernando. "Diez Años De Política De Competencia." In *La Primera Década De La Comisión Federal De Competencia.* 2004. Pgs. 85 - 86.
[669] México, Honorable Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito. Amparo en revisión RA-721 de 2000. Quoted in CFC, Expediente RA-036-2001.
[670] A short summary of this litigation can be found in Del Villar, Rafael. "Competition and Equity in Telecommunications." In *No Growth Without Equity.* World Bank, 2009. Pgs. 333 - 334.

stalled once more in the courts. The incapacity to enforce this regulation would become a matter of concern and lead to changes in both the competition and telecoms regimes.

These early confrontations between *Telmex* and the CFC contributed to erode the institutional arrangement that made the company relatively insulated from competition law enforcement. In doing so, they mark the end of the first phase here considered and prompt the stage for the following phases. In the next phase the CFC assumed a more aggressive role and, correspondingly, tested the permanence of the original model of enforcement behind this agency. The more aggressive stance of the CFC was complemented with an increasing awareness of the government's role in constructing and preserving *Telmex* dominance. On a longer term, they also contributed to raising awareness of the "slippage" between article 28 of the constitution and the LFC, and that addressing dominance required more than what the LFC stipulated. However, all of these processes would take time and, in particular, a realignment of the different actors involved in introducing these realizations into the ways Mexican competition law is understood.

II.B. Competition Law Fights Forward

The second phase involved a series of strategies against the institutional arrangements resulting from the neoliberal policies of the 1980s and 1990s, notably the privatization of *Telmex* in 1990 and the enactment of the LFC in 1992. They were many and varied; we will focus on two of them we consider particularly important. First, we will consider an instance of mobilization of litigious resources by actors to other legal fora to challenge *Telmex's* dominance. Second, we will consider the proceedings directed by the CFC against *Telmex*. We contend that these reactions contributed to the amendments of the LFC of the late 2000s and, in light of political events, to the constitutional and legal changes that occurred in 2013 and 2014. Overall, these reactions suggest that the struggle over competition law has changed, but nonetheless continues to be fought over different legal and political fronts or stages.

II.B.1 The 2004 WTO Panel Report

The first strategy we consider here is the mobilization of litigious resources by *Telmex's* rivals from national to supranational institutions, like the World Trade Organization (WTO) and its dispute settlement mechanism. In 1996 the SCT enacted regulations establishing the conditions

in which third parties can access the telecoms networks for long distance calls, national and international, and which were similar to the conditions established in *Telmex's* original *Título de Concesión.* As a result of these regulations, these third parties had to contract with this company and were subject to the terms and conditions it imposed as part of granting this access. Between 1998 and 2000 *Avantel* and *Alestra*, two Mexican companies owned partially by US companies *MCI* and *AT&T*, complained on different occasions before the CFC that *Telmex* resorted to anticompetitive practices. They alleged that this company prevented these companies from having adequate access to its network, and that this was to its advantage as a provider of the different services it offered. The CFC sided with the complainants in all the decisions it issued except one, but *Telmex* filed several *amparo* actions against them in order to prevent their application and, in some instances, was able to have judges overturn them.[671]

In 2000 AT&T and MCI decided to try a different strategy and challenge the legality of the Mexican International Long Distance (hereinafter ILD) regulations. The US Trade Representative, on behalf of these companies, lodged before the WTO a formal complain against Mexico in 2000. After failing to reach an agreement with Mexico regarding the conditions of access to these companies, the US invoked the creation of a panel to decide on the legality of Mexico's ILD rules according to the WTO's Dispute Settlement Body.[672] The US argued that the ILD and interconnectivity regulations violated the commitments that Mexico had acquired in the Reference Paper included in the 1997 Agreement on Basic Telecommunications, and the GATS Annex on Telecommunications.[673] This was so because the regulations i) established that Mexican companies should negotiate *en bloc* the rates of international calls they received, and ii) appointed *Telmex,* the company with the largest number of receiving calls, as negotiator on behalf of the other Mexican companies with their foreign counterparts companies.[674] These rules established a collusive instrument between Mexican companies to the advantage of *Telmex* and prevented foreign companies from reaching their own agreements on rates in a competitive way. The response of the Mexican government was quite revealing. It asked the panel to rule that Mexico had not violated such legal provisions, on the grounds that i) the Reference Paper had a much less ambitious reach than what was argued by the US, ii) that because of Mexico's regulatory sovereignty, this institutional arrangement provided *Telmex* and the other firms with a

[671] México, CFC, Files DE-007-1998, DE-003-1999, DE-021-1999 (overturned), DE-033-1999 (overturned), DE-017-2000 (closed for insufficient evidence) and DE-045-2000 (overturned).
[672] WTO Panel Report, *Mexico – Measures Affecting Telecommunication Services* WT/DS204/R (April 2, 2004). Pgs. 1 & 2.
[673] Ibid. Section IV (Referring to sections 2 and 1.1 of the Reference Paper and section 5 of the GATS Annex on Telecommunications.)

"state action" defense, and iii) that such arrangement prevented a) large phone call carriers, like the above mentioned company, to take advantage of their dominance and thwart the efforts of lesser companies and b) a price war that would negatively affect Mexican infrastructure.[675] In 2004 the panel ruled for the US, stating among other things that the ILD Rules were incompatible with the Reference Paper and the GATS, and that they enabled *Telmex* to affect international interconnection duties as established in the relevant provisions of these documents.[676] In August of that year CFT issued new ILD rules to comply with the panel's ruling, but connectivity would continue to be a disputed issue in the following years. We contend that the Report had effects beyond Mexican regulation because it contributed to the erosion of the legitimacy of the aforementioned legal foundations by serving as evidence before the global community of crony capitalism in Mexico.

II.B.2 Suing *Telmex* Before the CFC

The second reaction we consider pertains to the role of the CFC as an enforcer of the LFC. It refers to both the proceedings directed by this agency against *Telmex*, as well as how, it used these proceedings in order to start gaining prominence before the media. Underlying these efforts was Eduardo Perez Motta, who as president of this agency was able to muster support for its activities as well as for changes in the LFC. Both the outcomes of the proceedings and the efforts undergone to raise the profile of the CFC contributed to legislative amendments of the LFC strengthening it.

Since *Telmex* was bound by the LFC, the CFC could investigate allegations of anticompetitive conduct by this company. In turn, this company's *Título de Concesión* enabled it to determine the conditions under which other telecoms providers could connect to its network.[677] The first complaints against this company before the CFC took place after third parties began to have access to the *Telmex* network, which occurred in the mid 1990s after the enactment of the LFT. (The litigation involving *Iusacell* is an example of these contentions.) The conditions of the access, the quality of the connections and the strategic responses by this company to the entrance of these third parties would become a common feature in the proceedings before the CFC.

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[674] Ibid. Pgs. 4 & 5.
[675] Ibid, section IV, especially pgs. 79 & 80 (referring to the legality of the ILD rules and the potentially ruinous effects of competition) and pgs. 86 - 90 (referring to anticompetitive practices).
[676] Ibid, Section VIII. (See also pgs. 195 – 199).

Based on data available by the CFC, between 1996 and 2011[678] *Telmex* alone faced 18 investigations, 7 of which resulted in fines against this company or settlements, 4 were overturned by judges, and 8 were closed because of lack of merits. Notably, 7 of all these proceedings began because of complaints filed in by *Telmex*'s rivals *Avantel* and *Alestra*, and only one investigation resulted from the CFC's own enforcement efforts. The following table summarizes these findings:

Table 7.1. CFC Investigations Involving Telmex (1996 – 2011)[679]

Case #	File	Date Initiation	Complainants	Outcome	Documents	Date Finalization CFC	Fine[680]
1	DE-016-1995	29/11/1995	Grupo Iusacell	Sanction	RA-058-2002	22/11/2001	1'717605,75
2	DE-007-1998	27/05/1998	Avantel/Alestra	Sanction	RA-033-2000	7/12/2000	585.875,32
3	DE-003-1999	09/04/1999	Avantel/Alestra/Marcatel	Sanction	RA-112-2002	30/01/2002	2'533897,88
4	DE-021-1999	26/08/1999	Avantel/Marcatel	Sanction overturned	RA-166-2001	015/04/2005	No fine
5	DE-033-1999	17/08/1999	Avantel/Alestra	Sanction overturned	RA-078-2002	15/06/2005	No fine
6	IO-01-2000	03/01/2000	Public enforcement	Sanction overturned	RA-103-2002	22/04/2005	No fine
7	DE-017-2000	16/06/2000	Avantel	Closed	RA-165-2001	06/05/2005	No fine
8	DE-045-2000	13/11/2000	Avantel	Sanction overturned	RA-110-2002	22/05/2005	No fine
9	DE-028-2001	16/07/2001	Videotam/Pegaso/ Iuasacell	Sanction	RA-063-2001	12/12/2002	405423,66
10	DE-022-2003	28/05/2003	Sistema Computarizado de Emergencia (SCE)	Sanction	RA-24-2004	17/11/2004	310817,94
11	DE-037-2006	29/11/2006	Axtel, Alestra, Marcatel,	Settlement	RA-007-2011	07/04/2011	Behavioral commitments

[677] Título de Concesión, Op.cit. Sections 2-4 and 5-4.
[678] According to the CFC database, there are no public records of further investigations after 2011. This may because according to art. 31 bis, sections I and II of the LFC and art. 14, section I of the Federal Law of Transparency and Access to Public Governmental Information, certain documents can be considered classified for up to three years, which can be extended. We believe this is why there is very little information in the database about the last three proceedings.
[679] Based on data taken from https://www.cofece.mx/cofece/index.php/resoluciones-y-opiniones (Jan. 16, 2015). Some of these investigations were consolidated into single proceedings in spite that they began by investigating different claims.
[680] Amount in US dollars. Approximate conversion based on currency exchange of 17/01/2015

			Megacable, Protel y Telefónica				
12	DE-015-2007	NA	NA	Closed		20/04/2007	No fine
13	DE-033-2007	30/11/2007	GTM (Telefónica)	Closed	RA-014-2011	6/11/2011	No fine
14	DE-039-2007	27/02/2008	GTM (Telefónica)	Sanction	RA-015-2011	26/05/2011	6'285066 ,02
15	DE-040-2007	06/03/2008	GTM	Closed	RA-028-2011	27/10/2011	NA
16	DE-016-2010	29/04/2011	Axtel/Avantel	Ongoing	RA-101-2010	29/04/2011	NA
17	DE-005-2011	NA	NA	Closed	RA-006-2011	25/03/2011	No fine
18	DE-014-2011	25/10/2012	NA	Closed	RA-013-2011	18/05/2011	No fine

This information shows several attempts by *Telmex's* rivals to use the LFC to curb this company's dominance in the telecoms sector. It also shows that *Telmex* was able to limit their efforts in several instances. In the four overturned decisions, *Telmex* used a ruling from an unrelated decision by the Mexican Supreme Court regarding the legality of section VII of article 10 of the LFC, the "catch-all" section of this article. The unrelated decision stemmed from the *Warner Lambert* case, in which the CFC used the aforementioned section to challenge this company's predatory pricing strategy (imposing predatory prices was not an offence in the original text of the LFC). Originally, the CFC investigated a complain against this company filed by *Canel*, its rival, for predatory prices, but the agency terminated the proceeding because the latter had not presented evidence of the losses incurred resulting from such pricing strategy.[681] But then the CFC began an investigation on its own based on similar facts and ruled against *Warner-Lambert*.[682] Warner-Lambert filed two *amparo* actions in the wake of these proceedings, one against this decision and a second one against numeral VII of article 10 and other provisions of the LFCE. An administrative court ordered the CFC to reinstate the investigation against the defendant, which it did, and in 2002 it issued a new decision that is very similar to the one of 1998.[683] The second *amparo* action reached the Supreme Court, which ruled in 2003 that numeral VII of article 10 was unconstitutional because it did not afford citizens with a minimum of certainty regarding the scope of administrative actions, and therefore precluded the investigation and the sanctions levied against the defendant.[684] This ruling enabled *Telmex* to feign-off the pressure exercised by the CFC.

[681] México, CFC, DE-11-94 (1996)
[682] México, CFC, RA-04-98 (1998)
[683] México, CFC, RA-97-2002 (2002)
[684] Op.cit., México. Corte Suprema de Justicia. Decision of November 25 of 2003, in review of amparo 2589/96

The CFC's role during these proceedings with *Telmex* and other economic actors met important criticisms. In some investigations - at least three of the investigations against *Telmex*[685] and *Warner Lambert* - the CFC turned a private enforcement initiative into a public enforcement process, thus assuming the roles of prosecutor and judge. According to Gabriel Castañeda, who wrote on this subject after a decade of activities by the CFC, this switch was contrary to the original design of this agency and is highly problematic. This is so because it relegates complainants to mere informants of anticompetitive conducts, and therefore distorts the incentives for filing complaints established in the LFC. In doing so, it replaces the adversarial *ethos* of private competition law enforcement with a public enforcement system where the agency is both prosecutor and judge. At the core of this issue, Castañeda noted, is a confusion regarding the roles the CFC's president and its executive secretary.[686]

The investigations carried forth by the CFC strained the relationship between *Telmex* and the competition law enforcers considerably. However, it was after Eduardo Perez Motta became president of the CFC that the tension turned into a resolute antagonism. At first glance, his professional trajectory does not reveal zealousness for competition law. He is an economist from ITAM, the private university counterpart to UNAM, and obtained a master's degree from the University of California at Los Angeles. Since 1990 he held several positions in the government (including SECOFI) and participated in the negotiations of NAFTA and the Free-trade agreement with the EU taking place during the late 1990s. Moreover, between 2001 and 2004 he was the permanent representative for Mexico to the WTO. He was appointed to the CFC in September 2004.[687] In spite of his rather technocratic profile, Perez Motta defined his endeavors by recurring to different, and often contrasting, figures of speech. In some instances, he stated that to lead the CFC it was necessary to have the high standards of Don Quixote (the famously deranged cavalier that charged against windmills).[688] On others, he completely depersonalized competition law enforcement by referring to it as being about applying the law and economic

[685] For example DE-017-2000, IO-01-2000 and DE-037-2006.
[686] Castañeda, Op.cit. Pg. 41.
[687] "Eduardo Pérez Motta" www.banxico.org.mx%2Fpublicaciones-y-discursos%2Fpublicaciones%2Fseminarios%2Fretos-y-crecimiento-oct-2009%2F%257BE376294B-6AC5-69E2-573B-B9EECEEF9E92%257D.pdf&gbv=2&oq=http%3A%2F%2Fwww.banxico.org.mx%2Fpublicaciones-y-discursos%2Fpublicaciones%2Fseminarios%2Fretos-y-crecimiento-oct-2009%2F%257BE376294B-6AC5-69E2-573B-B9EECEEF9E92%257D.pdf&gs_l=heirloom-hp.3...2146.2146.0.3024.1.1.0.0.0.0.0.0..0.0.msedr...0...1ac.1.34.heirloom-hp..1.0.0.xhO5oSWwo7I (accessed January 14, 2015).
[688] "El Zar de los Reflectores." http://www.cnnexpansion.com/expansion/2013/10/07/gestion-mediatica (accessed January 14, 2015)

efficiency.[689] The result is an eclectic discourse that combined quite different ideas; competition law enforcement is, at the same time, about the public interest *and* economic efficiency, fighting illegitimate economic gains *and* economic growth.

As part of a new advocacy strategy in the CFC, Perez Motta discussed before the media several proceedings undergone by this agency, involved international experts and lobbied before congress different initiatives pertaining to competition.[690] The publicity resulting from these efforts earned him recognition as someone committed to competition even by individuals not directly involved in competition law or regulatory affairs.[691] However, it also led to several confrontations. We consider here one example. In 2006 several of *Telmex's* rivals complained before the CFC that this company's cell phone subsidiary, *Telcel*, was engaging in anticompetitive practices. The agency found out that this company raised its rival's costs by setting an interconnection rate (off-net) considerably higher than the rate it applied to its own network (on-net), thus affecting competition negatively. The initial decision of the CFC was to impose a fine that amounted to one billion US dollars.[692] This decision, however, had various weaknesses. First, one of the commissioners recused himself because he had a relative in one of the complaining companies, thus leaving the final decision to a *Pleno* composed of four commissioners, where a tie could only be resolved by the president's powers. Furthermore, the lawyers of *Telmex* asked Perez Motta to recuse himself for the procedures that followed, arguing that in an interview with Reuters he had already expressed his opinion about the outcome of the proceedings. Two of the remaining commissioners voted in favor of recusing the president, thus limiting his participation in the final decision.[693] As it turned out, the remaining commissioners decided not to continue with the imposition of the fine and instead accepted the plan that *Telcel* presented amending its anticompetitive behavior. The defendant offered to reduce considerably its interconnection rates and to offer plans that included minutes to other companies, in exchange of dropping all the pending trials regarding the 2011 rulings issued by the CFC on interconnection conditions.[694]

[689] See Roundtable Conference with Enforcement Officials, The Antitrust Source, 2011. Pg.16.
[690] These three elements are part of what he defined as competition law advocacy. See Perez Motta, Eduardo. "Intervención estatal y competencia". Presentation delivered in Honduras, 2011.
[691] See, for example, Dresser, Denise. *El País De Uno: Reflexiones Para Entender Y Cambiar a México.* Aguilar, 2011. Pg. 1918.
[692] México, CFC, file DE-037-2006, decision de 7 de Abril de 2011.
[693] México, CFC, Informe Annual 2011. Pgs. 31 – 32.
[694] México, CFC, file RA-007-2011. Decisión de Abril 12 de 2012.

Besides the personal drama involved in this proceeding, the final decision of the CFC evidences a form of competition law enforcement that is closer to regulation than to adversarial dispute resolution. In particular, three of the five commitments offered by *Telcel*, and accepted by this agency address prices and conditions for network access, which are topics usually addressed by the telecoms regulation. These commitments address the rates this company charges for calls terminating in its network,[695] a lowered and universal tariff for connecting to its network,[696] or having calling plans that do not distinguish the network where they are terminating.[697] Independently of the merits of this decision, by accepting these commitments (in exchange of foregoing a hefty fine) the CFC managed to change important aspects of this sector acting more like a regulator than like a classic adjudicator of disputes. This decision stands out as another example of the active role of the CFC that does not fit in its original design.

During this phase the struggle over the content of Mexican competition law was not limited to proceedings before the CFC, as it included the Mexican congress via amendments to the LFC. The first amendment resulted from a draft bill submitted by the CFC to the Mexican congress in 2005 and enacted as law in 2006. Perez Motta argued that this amendment was necessary to further the advocacy efforts undergone by the CFC in the past.[698] It introduced changes regarding the investigation of both absolute and relative monopolistic practices, the amount of the fines imposed, and the agency's proceedings and regulatory powers, among other topics. Regarding absolute monopolistic practices, it established a leniency program in order to facilitate the investigation of collusive practices.[699] Also, it explicitly provided the CFC with powers to conduct inspections and collect copies of documents previously requested, although prior to judicial approval and after notifying the investigated party that such inspections were to take place.[700]

Concerning relative monopoly practices, the amendment introduced five new types of practices considered anticompetitive – predatory prices, discounts subject to rebates, cross-subsidies, price discrimination and raising rival's costs. In doing so, these new types supplemented section VII of article 10 of this law, which was declared unconstitutional by the Supreme Court in the *Warner Lambert* ruling commented before. An "efficiency defense" was

[695] File DE-037-2006, document RA-007-2011 (April 30, 2012) Pg. 25
[696] Ibid. Pg 37
[697] Ibid. Pg. 48.
[698] Sada Correa Heidi Claudia & Eduardo Perez Motta *Competition Policy in México* In: Lewis, David. *Building New Competition Law Regimes: Selected Essays.* Edward Elgar Publishing, 2013. Pg. 15
[699] México, LFC, art. 33 bis 3. (2006)

also introduced, establishing that the legality of the practices addressed in article 10 will depend on their costs and benefits, including their impact on innovation and consumer choice.[701] The amendment allowed investigated parties to settle with the CFC by offering to modify or end an allegedly anticompetitive practice under investigation.[702]

The punitive regime concerning fines was also modified in important ways. The amount of the fines that can be imposed increased considerably. Recidivist defendants can be imposed twice the amount of a regular fine, ten per cent of their assets or ten per cent of their annual sales, whichever fine is the highest, or be forced to sell their assets in order to dissolve their market power.[703] The proceedings before the CFC also changed in ways that reflected the agency's practice at the time; the amendment states that individuals may file complains before the commission, but also that the commission has the leading role in the investigation and punishment of the practices forbidden by the LFC.[704] (Notably, this amendment enabled the CFC to levy a fine of close to one billion US dollars to *Telmex* and, at the same time, allowed this company to settle through commitments in one of the cases considered above.)

Notwithstanding the novelty of the changes introduced in 2006, the government submitted before congress a new bill containing several proposals for reform in 2010 and which was enacted as a law in 2011. As before, Perez Motta argued that these new amendments were necessary to deter anticompetitive conduct effectively.[705] A first group of reforms was about the CFC's capacity to address anticompetitive conducts. Firstly, the amendment introduced the concept of joint dominance.[706] It increased again the administrative fines that may be levied against individuals or corporations liable for committing absolute or relative monopolistic practices.[707] It also introduced criminal punishments – imprisonment – for the individuals working for corporations that have participated in the commission of anticompetitive conducts.[708] The amendment also enabled the CFC to conduct inspection un-notified inspections as well as to seize original documents related to the on-going investigations[709] (and therefore changing the inspections regime of the 2006 amendment). Also, it enabled the CFC to issue

[700] Ibid. art. 24, section II and art. 31, section IV.
[701] Ibid. art. 10.
[702] Ibid, art. 33 bis. 2
[703] Ibid. arts. 35 & 37.
[704] Ibid. arts. 24 num. I, & 32.
[705] This was acknowledged by the CFC itself; see CFC Reporte Anual 2011 (Pgs. 6 – 8)
[706] México, LFC art. 13 bis. (2011 amendments)
[707] Ibid. art. 35.
[708] México, Federal Criminal Code, arts. 253 I.d. & 254 bis.
[709] Op.cit. LFC, arts. 24.II, 31 & 34.

injunctions ordering investigated parties to seize an allegedly anticompetitive conduct before a final decision on its legality was issued.[710] A second group of reforms addressed the procedures before the CFC. The amendments established a new set of oral hearings for defendants to present their arguments before this agency.[711] They also extended the scope of the leniency given to collaborators, which now reached beyond administrative fines to criminal procedures.[712] Finally, the new amendment also modified the structure of the enforcement system within the CLR. It delineated the functions of the general secretary (*secretaría general*) by granting it the responsibility of carrying forth the investigation of anticompetitive conducts, while the *Pleno* of the commissioners was to have the last word based on the findings of the investigation.[713] This separation of functions prevented the possible biases resulting from having the same officials within the CFC coordinate both the investigations and decide upon their findings. Finally, the amendments also stipulated that specialized tribunals should be established to decide upon the legality of the fines and procedures carried out by the CFC.[714]

The enactment of the 2011 amendment to the LFC marks the end of the second phase here considered because, until then, the relation between competition law enforcement and *Telmex* were determined by the rules established in the LFC. This second phase is characterized by how competition law enforcement was turned against *Telmex* by this company's rivals and the CFC. By the end of this phase, competition law became an instrument for addressing, imperfectly, sheer economic power. Championing for competition had become indeed a rallying call against entrenched economic power. This process resulted from the mobilization of different resources by the actors involved. Rivals to this company mobilized their legal resources for establishing investigations that would eventually undermine its dominance, both at a national and an international level. Notably, the process before the WTO Panel involved the mobilization of political resources as well, for the Panel would not have taken place if the Trade Representative of the US had not been involved. In turn, enforcers mobilized their resources as well by developing an agenda of their own within a established institutional framework. Castañeda's complains regarding the CFC tell away the development of a public enforcement model whose purpose is not the resolution of private disputes in a non-intrusive manner. Several of the CFC's decisions reveal these efforts. However, their mobilizations were not limited to the institutional framework of the CFC's proceedings; they also reached to the political system and were able to

[710] Ibid. 24 IV bis & 34 bis 4.
[711] Ibid. art. 32, VI.
[712] Ibid. art. 24 XVIII bis J.
[713] Ibid. arts. 28, 29 & 30.
[714] Ibid. Art. 39.

achieve the reforms considered necessary to increase their standing *vis a vis* companies like *Telmex*. Enforcers like Eduardo Perez Motta acquired prominence as they develop these strategies. Finally, *Telmex* itself also mobilized resources to prevent the full application of the LFC against it. In particular, by mobilizing its legal resources it managed to overturn several decisions against it and averted the imposition of a considerable fine. Competition law rules thus provided the means for challenging, as well as for fending off, the strategies of the different actors here considered. The contest for competition law was, during this second phase, a struggle that took place in different spaces and in different ways.

II.C. Redefining Competition Law

The third and current phase is quite different from the previous two because it continues to unravel. Just like the previous phase, it is made mostly of strategic reactions to previous events and ideas; in particular, it is based on the dominance that *Telmex* was able to preserve in spite of the enforcement activities led against it. It also comprises different strategies by actors engaged in this field aiming to transform it according to their own perspectives. But, contrary to the previous phases, it is very recent and we have little information about how it is unfolding, especially at the level of enforcement. Because of its novelty, our analysis will focus only on the amendments to the Mexican constitution and the drafting of a new competition law statute.[715] We will show that the amendment of article 28 redefined the relation between competition law enforcement and *Telmex*. It did so by using competition law as a template for telecoms regulation and, at the same time, severing the (legal) ties between competition law enforcement and enterprises in the telecoms sector. Then, we will show how the 2014 competition law develops the content of the amended article 28 and, in particular, how it addresses the gap or "slippage" identified before between the prohibition of monopoly and its enforcement. In doing so, we will show how the balance resulting from the second phase was redefined in the new constitutional and legal rules.

[715] According to the information provided publicly by the CFCE, this agency has not concluded any of the investigations began after the enactment of the new LFCE and the courts – including the newly established specialised courts – continue solving claims against decisions by the extinguished CFC. Because of this, there are no decisions that evidence how the new agency interprets and applies the new law in a concrete context. See Mexico, CFCE, Tercer Informe Trimestral (2014). Pg. 22.

II.C.1 Amending Article 28 Of the Constitution

The pervasive role that monopolies and anticompetitive practices had in the Mexican economy was one of the salient topics of the 2012 Mexican presidential campaigns. The elections themselves were highly disputed, and in the end the electoral tribunal awarded the presidency to Enrique Peña Nieto, who had achieved a narrow majority of the votes.[716] Peña Nieto was the candidate of the *Partido Revolucionario Institucional* (PRI), the same political party of Salinas and which had supported the neoliberal policies of the late 1980s and 1990s. On December 2, 2012, a day after assuming office, President Peña Nieto and the representatives of the other four political parties signed the "Pact for México" (*Pacto por México*), in which they detailed the basic agenda of reforms that the parties planned to establish during his six-year term. Among these reforms, the protection of competition has a prominent place; competition itself was viewed as a source of economic growth and as contributing to the reduction of poverty and inequality.[717] Besides this general statement, the Pact contains detailed proposals. Agreement 37 states that the CFC should be given the capacity to break up monopolies, the criminal provisions in the law would be further detailed, and the procedures before this agency will be shortened. Agreement 38 states that specialized tribunals for competition law and telecoms regulatory procedures should be created.[718] Agreement 40 states that the autonomy of CFT will be increased to make it more independent from the interests it regulates. In turn, agreements 43 to 45 state that measures will be taken to increase competition in the provision of radio, television and telephone services.[719] In these agreements competition law and telecommunication issues are bundled together in the different points of the agreements and not as separate subjects.

The agreements contained in the Pact became the template for amending several articles of the Mexican constitution in 2013, including article 28 - the cornerstone of Mexican competition law. Notably, the reform of this article is known as the *Reforma en Telecomunicaciones*, or "Telecoms reform" even though it also modified core aspects of the CLR unrelated to telecoms. The draft bill, later enacted as the new version of article 28, redefined the legal boundaries between competition law enforcement and the telecoms sector and many important

[716] Reuters, *Mexico electoral judges reject challenge to Pena Nieto victory* (Aug. 30, 2012) Available at: http://www.reuters.com/article/2012/08/31/us-mexico-election-tribunal-idUSBRE87U02M20120831 (Nov. 3, 2014).
[717] México, Pacto por México. 2.1. Available at http://pactopormexico.org/PACTO-POR-MEXICO-25.pdf. (Visited on Nov. 3, 2014)
[718] Ibid. Compromisos 37 y 38.
[719] Ibid. Compromisos 40, 43 – 45.

aspects of each of these fields. It did so by addressing three general topics: the structure of the enforcement agencies, the legal standing of their decisions, and their conformation.

Regarding the structure and legal status of the enforcement agencies in each of these sectors, the new version of article 28 established two new independent enforcement agencies, the *Comisisión Federal de Competencia Económica* (CFCE) and the *Instituto Federal de Telecomunicaciones* (IFT). While the first agency will be in charge of competition law enforcement and advocacy in almost all sectors, the second will do so exclusively in the telecoms sector. The CFCE is based largely on the institutional template of the old CFC, but with a key difference: it is endowed with the power to order the removal of barriers to trade, to regulate essential facilities and to order the disinvestment of assets (including shares) of corporations in order to reduce their dominance. In turn, the IFT is designed as a twin institution of the new CFCE. It is given a similar structure and similar mandates, with two important differences. First, it can oversee the corporate control of the corporations that have concessions over the telecoms infrastructure, which entitles it to accept or reject corporate operations that change the owner of the entitlements represented in the concessions. Second, it is the only administrative agency in charge of granting or revoking concessions over the telecoms infrastructure. In doing so, this new agency would replace the CFT and would have higher standing than the SCT.

Just as the CFCE and its twin telecoms agency have special constitutional faculties, their proceedings also have special legal standing. *Amparo* actions can only be filed against decisions that conclude an investigation either by establishing a fine, accepting a settlement or absolving the investigated parties from liability, and filing these actions does not suspend their applicability (as is the case with how the *amparo* generally works). These actions can be challenged before specialized tribunals (also mentioned in the amended version of article 94).

Finally, regarding its conformation, the amendment states that both entities are conformed by seven commissioners (two more than before). The selection of the commissioners is a complex process; an evaluation committee composed of the directors of the central bank and other two independent federal bodies should issue a public call for aspiring commissioners once there is a vacancy. From the submissions to the public call, the committee selects between three and five postulants, and submits their names to the President, who in turn selects one candidate and presents him or her before the federal congress for approval. The commissioners

have nine-year terms, and the president of the commission, also appointed by the congress, has a four-year term that can be renewed only once.[720]

We wish to highlight several aspects of the amendment itself. First, there is some continuity with previous institutional designs. The new CFCE is not drastically different from the old CFC. However, the fact that the CFCE was created by the constitution gives it a special status and prevents it from being modified by future ordinary laws. Second, the amendment extends competition law enforcement unto the telecoms sector by framing telecoms regulation as a matter of competition within the content of article 28, and by creating a new regulator after the CFCE. This meant the end of the struggle between competition law enforcers and *Telmex*, but at the same time places competition law considerations at the heart of telecoms regulation. Thirdly, it does provide both agencies with powers to rearrange private entitlements - regulating barriers to competition, regulating essential facilities and ordering the sale of assets of a company to reduce its dominance - in the name of competition. These functions enable these agencies to close the gap or "slippage" identified before between the prohibition against monopolies established in the Constitution and its enforcement via the legal mechanisms established in the law for such purpose.

II.C.2 A New Competition Law Statute

The enactment of the amended version of article 28 prompted the formal establishment of the new CFCE, which was officially installed on September 10, 2013,[721] and of the specialized courts on issues of competition and telecoms on August 10, 2013.[722] It also prompted the enactment of a new competition law statute, *Ley Federal de Competencia Económica* (LFCE) containing the core aspects of the Mexican CLR. This new law, enacted on May 23, 2014 replaced entirely the LFC, but follows closely some of its aspects. Here we will summarize the content of the law relating to its substantive provisions, the structure of the CFCE, and the new functions regarding the regulation of barriers to competition and essential facilities.

One of the aspects in which the LFCE followed the rules laid down by the 1992 statute is how it addresses anticompetitive practices. The following articles develop more thoroughly such

[720] México, "Se reforman y adicionan diversas disposiciones de los Artículos 6o, 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones." Diario Oficial 11/06/2013.
[721] México, CFCE, Informe Annual 2013. Pg. 3.
[722] México, Consejo Superior de la Judicatura, Acuerdo 22/2013. Diario Oficial 09/08/2013.

prohibition. Article 53 (like its predecessor, article 9 of the *LFC*) establishes a prohibition against absolute monopolistic practices, and adds sharing information with the purpose or effect of leading to collusive agreements as a new type of forbidden act. Article 54 defines relative monopolistic practices as i) the practices detailed in article 56, ii) carried forth by a single dominant actor or jointly with another in a relevant or in a related market, iii) and with the purpose or effect of unduly displacing rivals, prevent their access to a market or an essential facility, or establish exclusive advantages beneficial to a few actors.[723] In turn, article 56 states the conducts that are considered as anticompetitive, which are basically the same ones established in article 10 of the old LFC (after the 2006 amendment), but with two additions; numeral XII, which refers to limiting access to an essential facility, and XIII, which refers to margin squeezes.[724] Finally, article 55 establishes an efficiency defense, according to which the investigated party can prove that the allegedly anticompetitive conduct generates efficiency gains that i) have a positive impact on the process of competition and exceed potential anticompetitive effects, ii) *and* improve consumer welfare. It also contains a list of non-exhaustive examples of what such efficiency gains may be.[725] Articles 58 and 59 address the definition of relevant markets and the identification of dominance.[726] Finally, article 60 provides the conditions for determining whether an asset can be considered an essential facility.[727]

The LFCE also maintains important features of the structure of the enforcement authority. The CFCE, like its predecessor, is an administrative agency in charge of investigating and deciding alleged violations of the substantive provisions. It is divided in two main bodies, the *Pleno* of commissioners, which is very similar to the old *Pleno* of the CFC, and the investigative authority ("*autoridad investigativa*"), which replaces the previous executive secretary of that institution. Moreover, it accentuates the division of function between these two bodies by stating that the *Pleno* of commissioners as the decision making instance, while the investigative authority is solely in charge of investigating alleged violations to the law.[728]

The prohibition against the establishment of barriers to competition is an innovation introduced by the new LFCE. Article 3 defines such barriers as i) any structural characteristic of a market, fact or act of the incumbent economic actors that can by object or effect a) prevent the

[723] Ibid. art. 54.
[724] Ibid. art. 56.
[725] Ibid. art. 55.
[726] Ibid. arts. 58 & 59.
[727] Ibid. art. 60.
[728] Ibid. Titulo II. (arts. 10 – 36).

access of competitors or limit their capacity to compete in markets; b) that prevent or distort the process of competition and free market participation (in Spanish, *libre concurrencia*), ii) as well as the rules proffered by any governmental entity that unduly impede or distort the process of competition and free market participation.[729] The prohibition against the establishment of these barriers is contained in articles 52 and 57 of this law, but only the latter refers to a special procedure to accomplish such task, which is later on developed by article 94. According to this article, the CFCE begins an enquiry about how competition takes place in a given market. Depending on whether it identifies a barrier to entry or an essential facility, it may i) advice the regulators of the sector about appropriate measures, ii) order the incumbent actor(s) to remove a barrier, iii) regulate the terms and condition of access to an essential facility and iv) order the divestiture of assets (including shares) of the incumbent actor that are necessary for removing the obstacles to competition, if the other measures are inadequate. Notably, this article also has an efficiency defense; the incumbent actor(s) may prove before the CFCE that the identified barrier brings about efficiency gains that overcome the costs to competition it produces. Finally, the actor(s) may also argue that the competitive conditions of a market have changed and hence the conditions or limitations ordered previously for granting access to the market or an essentially facility are no longer necessary.[730] As such, this provision would enable the CFCE to address what identifies as impediments to competition and free market participation even in the absence of an anticompetitive conduct or behavior by any actors. [731]

During the congressional debates about this law, this prohibition became a beacon of opinions of both local and international competition law lawyers and consultants. Their assessments share a common perspective and reach similar conclusions: although this new institution strengthens the CLR, it is nonetheless inadequate because it is too imprecise and may be used to unduly punish competitive arrangements.[732] We contend that, because of the precedent of the *Warner Lambert* decision regarding the determinacy of competition law

[729] Ibid. art. 3.
[730] Ibid. art. 94. See also article 127, nums. VI and XIV regarding the type of fines the *CFCE* may impose.
[731] According to Perrot & Komninos, this process is somewhat similar to the market investigation mechanism found in the UK, but the characterization of the barriers and the powers granted to the *CFCE* are (erroneously) more substantial than the definitions and powers found in the latter. See Perrot, Anne and Komninos, Assimakis. *Mexico's Proposed Reform of Competition Law A Critique from Europe* (March 3, 2014). Available at SSRN: http://ssrn.com/abstract=2404022 or http://dx.doi.org/10.2139/ssrn.2404022. Pgs. 3 & 10.
[732] See Ibid Also, Ortiz, Aitor, et. al. *Reflexiones a la Iniciativa de Ley de Competencia Económica*. Centro de Investigación para el Desarrollo, A.C. (CIDAC). (2014). Available at http://reddecompetencia.cidac.org/es/uploads/1/reporte_reflexion_iniciativa_ley__020414_.pdf (Visited on Nov. 3, 2014).

provisions, these assessments foreshadow future proceedings before courts regarding the constitutionality of this prohibition and its enforcement.

Both the new text of article 28 of the Mexican constitution and the LFCE include elements that can hardly be considered part of the Mexican neoliberalism. Although the underlying rationale for some of the elements of the law, like the leniency regime, are clearly inspired by neoliberal ideas, the law as a whole is not as coherent as the 1992 LFC. The elements that make it so are reactions to the entrenched economic power of companies that, like *Telmex,* were dominant in their markets. They are reactions to the relative incapability of the law to address such economic power in ways that come across as definitive. There was a perceived need for a strong enforcement authority that, in the name of public interest, could micro-manage market arrangements and entitlements in order to increase consumer welfare. As a result, the new text of article 28 and the LFCE reinforced a series of practices and new institutions that appeared during the second phase precisely to address these issues. However, they go even further by addressing the gap between the core prohibition of article 28 and the old LFC by enabling the CFCE to deal with barriers to competition. Because of the interventionist *ethos* of these developments, they evidence the erosion that the stronghold of the neoliberal project had over this field of law; even so, such erosion can be quickly reversed by actors working within this field that invest considerable resources in diminishing their effect. If anything, we contend that these developments will exacerbate the tension that developed during the second phase and thus intensify the struggles over the different actors involved.

III. Conclusions

At the introduction of this chapter we argued that Mexican competition law was a site of struggle between different actors (politicians, lawyers, economists, international organizations and others) and their projects (neoliberal competition law project and its State-centered counterpart) competing for the power to determine the content and structure of the legal rules that make it up. In this section we present the transformations of the legal rules making up this field and the general trends they suggest in terms of this struggle.

In México, as in other Latin American countries, neoliberalism was "translated" into particular institutional arrangements. The privatization of *Telmex* and the enactment of the LFC stand out as two different neoliberal processes of institutional transformation in a time in which

the State-centered alternatives were hardly an option. Both processes share premises about the role of the State in economic activities and the importance of protecting markets. Moreover, both are about making markets; the privatization of *Telmex* was precisely about *making* an entitlement, while the enactment of the LFC was originally about protecting markets from certain kinds of anticompetitive behaviors. Moreover, both processes resulted from the strategies of actors involved in these areas and were congenial to them to the extent that it enabled them to strengthen their positions. Regarding competition law, the enactment of the LFC also produced a new way of understanding what this was about - the technocrats in power were able to legitimate their choices before the politicians that enacted the law. This new understanding led to a "slippage" or gap between the content of article 28 of the constitution and the possible remedies established in the law. Overall, both processes suggest an uneasy alliance between entrepreneurs, politicians, academics, and technocrats.

This uneasy alliance between the different actors broke away and led to a re-accommodation of their roles and loyalties. The first sign of change involved determining that *Telmex* was not relatively insulated from the LFC, in spite that an exemption could have been justifiable as per the terms of this company's *Título de Concesión* and the LFT. After this, came a series of efforts by this company's rivals and the CFC to limit the consequences of this company's entitlements, both nationally and internationally. At a national level, this involved first mobilizing legal resources through the CFC in order to have proceedings that achieve such end. However, recurring to an international legal forum like the WTO evidences a capacity to move resources *between* different legal networks that is noteworthy, among other things, because it also involved mobilizing political resources. But the mobilization of resources did not take place only in one direction. *Telmex* was also able to move resources to feign-off the strategies implemented by the CFC and its rivals in successful ways. We therefore see that legal rules enable the development of strategies for attacking and defending entitlements (and the economic power they bring upon).

The re-accommodation was furthered by a change of strategy of the lawyers-economists acting as enforcers of the LFC. This change of strategy consisted in the emergence of the CFC as a public competition law enforcer and the correlative erosion of its role as a forum for private dispute settlement. In part, this was a reaction to the rather meager results obtained from competition law enforcement initially. But it was also an opportunity for enforcers like Eduardo Perez Motta to gain professional pre-eminence by campaigning against anticompetitive practices. The idea that in order to face a company like *Telmex* a tougher, more capable competition law

enforcement agency animated the 2006 and 2011 amendments to the LFC. Notably, the changes introduced by these amendments strengthened the public enforcement functions of the CFCE considerably more than its private enforcement functions.

A new re-accommodation took place in 2012. The political actors that in the previous phases had supported the economic power of companies like *Telmex* decided to support competition law enforcement as part of their efforts to win political support and legitimize their mandates. Thus, the 2013 amendments to article 28 of the Mexican constitution evidence a new, uneasy alliance between politicians and enforcers *against* entrepreneurs like Carlos Slim. Again, there were reactions and opportunities; the meager achievements of the CFC (and the CFT) in the telecoms sector called for an institutional response, but we contend it can also be interpreted as an opportunity for re-aligning political interests with popular dissatisfaction. This alliance was also developed in the new competition law statute, the 2014 LFCE. As the previous amendments, the new article 28 and the LFCE also strengthened the public enforcement functions of the CFCE considerably more than its private enforcement functions. These changes contribute to the consolidations of the CFC as a State-centered enforcer of competition law provisions.

As a result of the re-accommodation of actors and their strategies during the period here considered, the content of Mexican competition law changed considerably. What started mainly as a neoliberal project based on having private actors ventilate their claims in a specialized forum is now a based on the idea of having an administrative agency capable of micro-managing market arrangements in the name of efficiency and consumer welfare. It is less neoliberal because it replaces the initial vision of the LFC, as Castañeda presents it, based on private initiative and reliance on markets with a State-centered view that relies on permanent governmental oversight. The change, we contend, is considerable, and evidences the continuous influence of the ideas we identify with the State-centered competition law project. At the same time, the neoliberal *ethos* of the Mexican CLR has been maintained, even complemented; the cost-benefit analysis underlying the changes in fines and the leniency regime suggest that much. This also evidences the endurance of the neoliberal competition law project. The result is a growing tension within this field of law that mirrors, to some extent, the struggles taking place between the different actors involved. The Mexican CLR wants to protect markets from anticompetitive conducts, and at the same time wants to redesign the type of entitlements and arrangements that make up markets in the first place. As we have shown, this tension was not originally there when the 1992 LFC was

enacted, but actually developed, in different ways, as a response to sheer economic power. We contend that it will continue to develop as the CFCE begins enforcing the law on its own.

8. Competition Law Convergence and Divergence in Latin America: The Case of Leniency Regimes

I. Introduction

In the last four chapters we focused mostly on the development of the competition law regimes (hereinafter CLRs) of Chile, Colombia and Mexico. In chapter 4 we argued that the development of the first regimes in each of these countries was related with a series of changes in constitutional law involving mostly the protection of private property. Then, in the following three chapters, we addressed the trajectory of the CLRs of each of these countries since the 1990s by focusing on certain, quite distinctive interactions. In these chapters we mention briefly certain interactions with organizations like the Organisation for Economic Co-operation and Development (hereinafter OECD), but we have not addressed their roles in shaping CLRs in Latin America. In the following pages we aim to do precisely that.

In this chapter we address the role that organizations like the OECD, the United Nations Conference on Trade and Development (hereinafter UNCTAD) and the International Competition Network (hereinafter ICN) have played in the development of CLRs in Latin America. We will argue that Latin American CLRs are in the process of converging towards institutions that are distinctive of their North-Atlantic counterparts partly because of the plans and activities developed by these organizations. This process is redefining the trajectory of these CLRs by altering the interactions between local actors that shaped these regimes in the past. Moreover, this process has led to rivalries and collaborations between these organizations, for their programs aim to further their own goals and, in doing so, also ascertain their own understandings about what competition law should be about. Importantly, these changes have been taking place in spite of the fact that actual convergence has not been achieved as evidenced by the disparate outcomes produced by the leniency regimes of Chile, Colombia and Mexico.

This chapter is divided in several sections. In section II we briefly explain why organizations like the ones mentioned before have taken upon fostering the convergence of CLRs across the world. As we will show, this is a strategy that resulted in part because of the proliferation of individual CLRs across the world, but also because of the absence of a global CLR. As we argue in section III, it is against this background that the convergence of Latin American CLRs is

taking place and should be assessed. In this section we describe the approaches of these organizations to transform these regimes and how their rivalries have played out in Latin America. In section IV we use the development of leniency regimes in Latin America to illustrate both the role of the OECD in this process of convergence and the effectiveness of such process. We focus on the efforts of this organization because it is the most active of all the organizations involved in competition law reform in Latin America. We will show that in spite of this organization's efforts in promoting these regimes in these three jurisdictions, convergence is not taking place. Finally, in chapter V we offer some conclusions about the issue we have identified and discussed in the previous sections.

II. Convergence via Networks: The Internationalization of Competition Law Regimes

In this section we will address why, in the absence of a global legal regime about competition law, the internationalization of this field of law has been developed by organizations like the OECD, UNCTAD and the ICN.

II.A. The Absence of a Global Competition Law Regime

Our story begins with the International Trade Association (hereinafter ITO). The initiative to establish this organization dates back to 1945, when the United States (hereinafter US) and Great Britain proposed to create an international regime that addressed different trade-related issued, including competition law, and to establish an international organization for its management. The release of this proposal occurred amidst discussions between these two States as to how to deal with anticompetitive practices and cartels. Eventually the more aggressive view against these practices, which was the one the US was advocating for, prevailed. As the preliminary negotiations in 1946 London advanced, the proposal continued to gather support. This changed during the 1947 negotiations taking place in Havana, Cuba. In order to maintain the support for the entire initiative, the US made important concessions to other States on issues like import quotas and the protection of foreign investment. However, this strategy proved to be counterproductive, because by ceding on these issues the proposal failed to acquire the support of the organized business community in the US, which has considerable influence at Capitol Hill. Business associations felt that the proposal failed to grant them the protection they expected when dealing with other States on key issues like foreign investment. Moreover, the interest of

the White House on the proposal was less than enthusiastic, for it preferred to invest in securing support for the Marshall Plan, which was presented as a mechanism for containing the rising power of the Soviet Union.[733] Also, in parallel to the negotiations of the ITO, the US and other 22 States have reached an initial agreement concerning the reduction of tariffs on October 1947 and which entered into force in June 1948; this agreement became the General Agreement on Tariffs and Trade (hereinafter GATT).[734] Given these developments, the ITO no longer seemed that attractive and in 1950 the US government announced that it was no longer looking for its congressional approval. As a result, the proposal establishing the ITO, as per the articles of the 1948 Havana Charter,[735] did not muster the support to secure its approval. An unintended but foreseeable consequence of this development was the strengthening of institutions associated with the Marshall Plan, like the OECD and the GATT.

Even if adopting an entirely new system of international law to address issues of competition law was not feasible, there remained the opportunity to take advantage of previously established organizations. The United Nations (hereinafter UN) offered such possibility via UNCTAD. Originally created in 1964, this organization offered a space for participation to developed and developing States alike. During its first years, developing States were particularly interested in creating an international legal framework governing trade and commodity prices as a policy mechanism that would contribute to their development,[736] very much like they did during the negotiations of the ITO. The first director of this institution was none other than Raul Prebisch, who set the intellectual agenda for the discussions that would take place in the summits organized by this institution for the following decade.[737] The leadership of Prebisch contributed to an affinity between this organization and the other UN institutions, like the Economic Commission for Latin America and the Caribbean, and accentuated an opposition between it and the Bretton Woods system developed under the auspices of the US and Great Britain.[738]

The interest within the UN for issues related with competition law and development dates back from the 1970s, when UNCTAD managed the General Assembly to convene a formal UN

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[733] Wells, Wyatt C. *Antitrust and the Formation of the Postwar World.* Columbia University Press, 2002. Pgs. 116 - 125.
[734] Regarding the origins of GATT in light of the ITO, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed October 23, 2015)
[735] United Nations Conference on Trade and Development, Havana Charter for an International Trade Organization (1948).
[736] Love, Joseph. "Latin America, UNCTAD, and the Postwar Trading System." Conference Proceeding In *Latin America and Global Trade, Social Science History Institute, Stanford University, November.* 2001. Pgs. 2 - 3.
[737] Ibid. Pg. 16.
[738] Ibid. Pg. 17.

Conference on Restrictive Business Practices in 1978.[739] Less than two years after, this Conference adopted a resolution approving the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (hereinafter "The Set").[740] According to Ioannis Lianos, the Set was adopted against a background of growing aspirations by developing States to change international trade conditions that were part of the "new international economic order".[741] The Set, in particular, was directed towards multinational corporations and aspired to be a code of good conduct,[742] but by the time of its adoption - 1980 - the economic strength of the States promoting it had changed and they lost political ground for doing so.[743] The Set is updated regularly and has become a reference point in contemporary discussions about the evolving structure of international competition law.[744] However, important actors in the development of international competition law, like the US, have not taken The Set seriously as a binding legal document competition law,[745] in spite of the fact that it was specifically endorsed by the UN's General Assembly via Resolution 35/63 of 1980.[746] Just as well, this Resolution also created an Intergovernmental Group of Experts on competition law, which produced a "Model Law on Competition" that is updated regularly.[747] Critics of UNCTAD's involvement in competition law argue that its products, like The Set, are a minimum common denominator on competition law issues - too general to be useful.[748] These aspects have not prevented UNCTAD from continuing with its competition law-related activities, even though as we will argue below this organization has been loosing ground *vis a vis* other international organizations in Latin America.

The transformation of the GATT into the World Trade Organization (hereinafter WTO) rekindled once more the interest of promoting a global initiative concerning competition law. As we mentioned before, the GATT was originally about reducing tariffs in order to facilitate trade, but over time it became a platform that included other trade-related issues, such as dumping and

[739] United Nations, General Assembly, Resolution 33/153 of 1978.
[740] United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. 1980.
[741] Lianos, Ioannis. "The Contribution of the United Nations to the Emergence of Global Antitrust Law." *Tulane Journal of International & Comparative Law* 15, no. 2 (2007). Pgs. 7 – 8.
[742] Ibid Pgs. 9 - 10.
[743] Gerber, David. *Global Competition: Law, Markets, and Globalization.* Oxford University Press, 2010. Pgs. 114 - 115.
[744] Lianos, Ibid. Pgs. 2 & 3.
[745] Lianos, Ibid. Pg. 41.
[746] United Nations, General Assembly, Resolution 35/63 of 1980. (G.A. Res. 35/63, pmbl., U.N. Doc. A/RES/35/63)
[747] "Group of Experts" http://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx (accessed October 23, 2015).

non-tariff restrictions to trade. After the 1986 - 1994 Uruguay Round the GATT became the WTO, and the GATT treaty became a sort of umbrella that covered other, more recent agreements involving different trade issues.[749]

The recent transformations of the GATT raised hopes about becoming an adequate institution for promoting the development of a global CLR. The European Commission contributed to put competition law in the agenda of the discussions taking place in the WTO.[750] In the 1996 Singapore Ministerial Conference a special Working Group was created to discuss the nature and content of the competition law provisions that could be feasible annexed to the GATT system. This initiative met with considerable resistance from certain actors; in particular, developing countries were concerned that such rules would be fashioned after the commercial interests of their developed counterparts. Even so, the Working Group continued to produce reports on the subject during the following years, and in the Doha conference of 2001 it received further support. However, the lack of agreement within its members (including the skeptic approach of the US), and the difficulties addressing these issues evidenced in the Cancun conference,[751] led to the abandonment of the initiative after the Cancun meeting of 2003.[752]

II.B. Issues and Responses to the Absence of A Global Competition law Regime

There are some practices regarding competition law that have a distinctive international dimension, and in the absences of a global CLR, they are addressed imperfectly by the regimes of each State. These issues include export cartels as well as the extraterritorial application of a CLR, international cartels and multi-jurisdiction mergers, just to name a few. Using the notion of externalities as a metaphor, the first two practices mentioned above can be characterized as negative and positive externalities. Export cartels internalize the economic benefits resulting from cartels and externalize the restrictions to competition they entail. In turn, the extraterritorial application of a CLR externalizes a prohibition beyond the borders of the jurisdiction where such prohibition was enacted, making the border itself irrelevant (as long as the effects are felt

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[748] See for example Sokol, D Daniel. "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age." *Berkeley Business Law Journal* 4 (2007): 37-122. Pg. 104

[749] Regarding the Uruguay Round, see https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact5_e.htm

[750] Fox, Eleanor M. "Linked-in: Antitrust and the Virtues of a Virtual Network." *The International Lawyer* (2009): 151-174. Pg. 155.

[751] A summary view of the differences can be found in Hollman & Kovacic, Op.cit. Pgs. 300 - 301; Sokol, Op.cit. Pgs. 49 - 51.

[752] This part of the so-called "July Package" announced by the General Council of the WTO in August, 2004. See https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (accessed October 23, 2015).

within such jurisdiction in the first place). International cartels are also imperfectly dissuaded as long as the capacity to detect and punish them severely varies importantly across jurisdictions. This is very important regarding leniency applications; if a cartel member applies for leniency in several jurisdictions but some of these regimes are considerably less effective than others, this impacts the effectiveness of all the regimes. Finally, multi-jurisdiction mergers face similar issues; differing standards and the speed of the proceedings across jurisdictions may lead to different outcomes, such as allowing the merger in some jurisdictions while forbidding it in others.

Given these issues, it becomes easier to understand why there have been efforts to create an international regime of competition law. Such regime could outlaw practices like export cartels independently of the particular laws of the States, address the conflicts resulting from extraterritorial enforcement, and establish common procedures for both international cartels and multi-jurisdictional mergers. In other words, it would provide the means for coordinating the otherwise interdependent, locally driven trajectory of CLRs all over the world. The absence of such formal regime makes evident the problems resulting from lack of coordination, and has generated a series of strategies by States and international organizations to address these issues. The one we are concerned here is the development of networks based on the convergence of different CLRs via programs of technical assistance, policy recommendations and policy diagnostics (including peer reviews), that coexist with other, long-standing efforts. Following Hollman and Kovacic, by convergence we mean "the broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency."[753] Importantly, the organizers of the networks have the privileged position to choose among different substantive elements those around which the convergence should take place. All the above elements suggest that each of these organizations can be understood as a "field" in itself.

The evolution of organizations like UNCTAD and the OECD and the appearance of new ones dedicated exclusively to competition law issues, like the ICN, suggest some interesting dynamics. First, it shows that the transnational field organized around economic policies, where the OECD and UNCTAD are prominent actors,[754] is changing by furthering a new, semi autonomous field dedicated exclusively to competition law issues. Second, it also hints to the

[753] Hollman, Hugh, and William E Kovacic. "The International Competition Network: Its Past, Current, and Future Role." *Minnesota Journal of International Law* 20 (2011): 274. Pg. 278.
[754] See in general Gereffi, Gary. "The Global Economy: Organization, Governance, and Development." In *The Handbook of Economic Sociology*. Princeton University Press Princeton, 2005

possibility that there is growing competition between these different organizations for establishing their own views about what should the CLRs of their member States should be like. We will address this issue below as we discuss the interactions between these organizations in their attempts to shape the CLRs of Latin American States.

We begin our analysis of the field of transnational competition law advice by focusing on the second oldest of the organizations that populate this field, the OECD. The forerunner of this organization, the Organisation for European Economic Cooperation, was established in 1948 as part of the administration of the Marshall Plan by the US and Canada. Encouraged by the success of the plan, the member States decided to join efforts on a more permanent basis, giving birth to the OECD in 1961. Since then, this organization has become one of the foremost advocates of free market reforms in the name of economic development. The process of accession to this rather selective organization involves that the aspiring States amend their policies in order to comply with the standards and guidelines promoted by this organization.[755] However, States that are not members of this organization, like Brazil, interact regularly with it.[756] In the last decades, the scope of attention of this organization broadened and started to address the development issues of other non-European or North Atlantic States.[757] Its main venue of action involves policy advice. Peer reviews sponsored by this institution play an important role in these interactions, as they identify the drawbacks of the policies under study and identifying particular venues for improvement.

The OECD's involvement with competition law dates back to the early 1960s, with the creation of the Competition Law and Policy Committee (CLPC), a body currently lodged in the Directorate for Financial and Enterprise affairs.[758] The committee was conceived as a network in which the representatives from member States could discuss policy issues and propose solutions that eventually became non-binding recommendations.[759] Since its establishment, this committee has issued recommendations on many competition law topics, including cartels, abuse of dominance, mergers and market studies. It has also commissioned the development of peer reviews of the CLRs of both member and non-member States.

[755] http://www.oecd.org/about/membersandpartners/enlargement.htm (accessed October 2, 2015)
[756] http://www.oecd.org/globalrelations/keypartners/ (accessed October 2, 2015)
[757] http://www.oecd.org/about/history/ (accessed October 2, 2015).
[758] http://webnet.oecd.org/OECDGROUPS/Bodies/ListByDirectorateView.aspx (accessed October 2, 2015)
[759] Sokol, D Daniel. "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age." *Berkeley Business Law Journal* 4 (2007): 37-122. Pg. 98.

It is important to note that the OECD played an important role in providing an institutional voice for the preferred approach by the US regarding competition law issues at the time that the WTO efforts were gaining traction. As mentioned before, the European Union played an important role in crafting what became the basis of the competition law initiative established in the 1996 Singapore Conference. As the Working Group deliberated, the skepticism of the US was made evident, for it feared that the approach would conflict with the ideas underlying its competition law regime. As the initiative advanced, the US decided to develop a new strategy. US officials proposed a recommendation against hard-core cartels to the OECD, which eventually enacted it.[760] (As we will argue later, this recommendation has played a central role in the adoption of leniency regimes.) In doing so, the US shifted the emphasis of the nascent international competition law issues from its European perspective to their own, which prioritized cartel prosecution over the prosecution of other anticompetitive practices. This arrangement also assured that if the development of an international CLR continued, it would take place in a forum where no sanctioning powers were involved and along a community of alike-minded States.[761] As the WTO efforts faltered after the Cancun Conference of 2003, the involvement of the OECD increased.

However, the efforts of the US did not remain confined to the OECD. While US officials were unreceptive of the WTO initiative, the government invited in 1997 a group of experts to make part of the International Competition Policy Advisory Committee (hereinafter ICPAC), convened precisely to address the international dimension of the practices mentioned above.[762] The ICPAC Report, issued officially in 2000, recommended the "Global Competition initiative", which was "(…) a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can exchange ideas and work toward common solutions of competition law and policy problems."[763] Noticeably this initiative found support in the US and in other important jurisdictions, especially in the EU. In a meeting organized by the International Bar Association (hereinafter IBA) in Brussels in September, 2000 Joel Klein (who was Assistant Attorney General) addressed the importance of the ICPAC report. After Klein's presentation the initiative received the public support of Mario Monti, who was then EU commissioner. In another IBA meeting held at New York in October of that same year,

[760] OECD Council, Recommendation of the Council concerning Effective Action against Hard Core Cartels, March 25, 1998. http://www.oecd.org/daf/competition/2350130.pdf (accessed October 18, 2015)
[761] Fox, Op.cit. Pg. 156 - 157.
[762] Ibid. Pg. 158.
[763] Final Report to the Attorney General and the Assistant Attorney General for Antitrust. Chapter 6, http://www.justice.gov/atr/chapter-6 (accessed October 17, 2015). Italics in the original text.

this initiative was discussed and supported by various members of the US competition law community, including members of the George W. Bush government.[764] Finally, US and EU competition law enforcers were well aware of the difficulties posed by the differential standards their CLRs had regarding particular fields like mergers and abuse of dominance. A series of high profile cases evidences these difficulties. The first of this was the McDonnell Douglass/Boeing merger in 1997, followed by the General Electric/Honeywell merger in 2001 and by the investigations against Microsoft in the years that followed.[765] While these cases made evident the differences across the Atlantic, they also made evident the relevance of the Global Competition initiative.[766] It is against this background that the ICN was born in 2001.

The organization of the ICN has some particular features that contrast with those of the OECD and UNCTAD. Firstly, this organization is only concerned with competition law-related issues.[767] Second, membership to this organization is extended to competition law enforcement authorities from all over the world (and not to their governments), independently of their development.[768] This is meant to facilitate the interactions between these authorities rather than making them agents of their government's interests.[769] Also, non-governmental advisors are invited to participate and they do so actively (especially law firms from the US).[770] Thirdly, this organization is run as a virtual network; it has no physical site from which its activities are directed. Management duties are rotated among its members every two years, and the agency chairing this organization pays for its costs while the rest of the members pay for their own.[771] Most of the ordinary activities related to running this organization take place via telephone calls and through the Internet.[772] Fourthly, the agenda of the activities developed by the ICN is set by a "steering group" that identifies potentially relevant topics, and which then allocates them to working groups, which in turn develop particular products along the instructions given to them.

For most part of the 20th century the OECD and UNCTAD stood out for different views about competition law and represented different interests; the former represented the views

[764] Djelic, Marie-Laure, and Thibaut Kleiner. "The International Competition Network: Moving Towards Transnational Governance." In *Transnational Governance: Institutional Dynamics of Regulation.* Edited by Marie-Laure Djelic. 2006. Pgs. 297 - 298.
[765] Ibid. Pgs. 294 - 295.
[766] Ibid. Pg. 298.
[767] http://www.internationalcompetitionnetwork.org/about/history.aspx (accessed October 17, 2015)
[768] http://www.internationalcompetitionnetwork.org/members/get-involved.aspx (accessed October 17, 2015).
[769] Hollman & Kovacic, Op.cit. Pg. 304.
[770] Ibid. Pg. 299.
[771] See "International Competition Network Operational Framework" http://www.internationalcompetitionnetwork.org/uploads/library/doc784.pdf (accessed October 14, 2015).
[772] Hollman & Kovacic, Op.cit. Pg. 305.

from its member States, which are mostly industrialized and developed, while the latter represented the interests of all States member to the UN. To some extent this rivalry has withered as the OECD decided to extend its membership to developing States (such as Mexico and Chile), and the latter has adopted views more in line with prevailing views about competition law in the US.[773] The stillbirth of the WTO's efforts on these issues could only buttress the influence of these two organizations. However, the appearance (and apparently quick success) of the ICN was perceived as a threat by these institutions, and especially by the OECD. William Kovacic comments that shortly after the creation of the ICN, officials from the OECD's competition secretariat were concerned that the new organization would deviate resources away from their organization and prevented members from joining ICN activities.[774] In turn, UNCTAD has also much to loose, for the ICN caters to a similar group of members that may in turn devote their resources to this new organization rather than to its counterparts.[775] The OECD's decision to set regional competition centers and to organize the Global Forum on Competition and its Latin American counterpart are, arguably, part of a strategy that responds to the threat embodied by the ICN.[776] The COMPAL projects developed by UNCTAD in Latin America can be viewed under a similar light.

III. Strategies Towards the Organization of Competition law-Related Advice as a Field in Latin America

The strategies resulting from the absence of an international CLR provide an important context for understanding the role of the OECD, UNCTAD and the ICN in the development of CLRs in Latin America. As we will show below, these organizations are developing programs in this region that evidence their growing influence in determining the trajectory of the development of CLRs. Their involvement, which increased since the mid 2000s, has been key in the consolidation of the neoliberal competition law project. Moreover, these interactions have led to rivalries and collaborations between these organizations. In this section we describe briefly the programs of these organizations, and then focus briefly in their interactions in Colombia, the only country of the ones we consider here that partakes in the programs developed by these three organizations.

[773] Regarding changes in UNCTAD's perspective, see Ibid. Pgs. 297 - 298.
[774] Hollman & Kovacic, Op.cit. Pg. 311 footnote 118.
[775] Ibid. Pg. 298.
[776] Ibid. Pgs. 294 - 295.

III.A. Achieving Convergence in Latin America

The adoption of new CLRs and the refashioning of previously existing ones in Latin America during the 1990s created an opportunity for organizations like the ones we have been addressing to reach out to Latin America. As in the previous section, we begin our analysis with the OECD. The activities of this organization in Latin America date from 1994, the year that Mexico joined this organization. Regarding competition law advice, the OECD's first activities is from 1997, when this organization prepared a summary overview of Mexico's CLR and the cases and activities the *Comisión Federal de Competencia* (CFC) was undertaking - including those regarding telecoms regulation.[777] Since then, the OECD has published several documents on Mexico's CLR. In turn, policy analyses pertaining to competition law in Chile, the other Member State in this region since 2010, are considerably more recent. The first official document regarding Chile's CLR is the 2004 OECD Peer Review.[778]

Besides conducting activities in individual States, the OECD has also developed regional activities. In alliance with the Inter-American Development Bank (hereinafter IDB), this organization organized a regional network for competition law enforcers where they could discuss the different issues involved in enforcement in the region. This network was officially established in 2003 as the Latin America Competition Forum (hereinafter LACF). We contend that this alliance has been very successful, prompting the OECD ahead of other international organizations currently involved in providing technical assistance for the development of competition law in this region. The LACF hosts annual meetings in which particular topics are addressed; for example, the 2014 meeting in Uruguay was focused on electricity markets and "mainstreaming" CLRs in this region.[779] This network has provided a platform for local competition law experts and increased the frequency of the interactions between present and former officials from the OECD member States and their counterparts from local competition law enforcement bodies.

The renewed interest of UNCTAD in CLRs in Latin America is largely a result of a redefinition of its strategy. Rather than aiming to generate a sort of convergence towards the Set, since the early 2000s UNCTAD focuses on providing technical assistance to developing countries in different parts of the world on issues pertaining to competition law and consumer

[777] Mexico: Competition Law and Policy in 1997-1998, 1997.
[778] Winslow, Terry. Competition Law and Policy in Chile: A Peer Review, OECD Peer Review, 2004.
[779] "Draft Agenda." *Twelfth Annual Meeting of the Latin American Competition Forum.* September 10, 2014

protection, including Latin America.[780] Two examples of this new focus on technical assistance on a regional basis can be found in the "Competition and Consumer Protection for Latin America" (COMPAL) programs in Latin America.[781] The COMPAL I program started in 2003 and its focus was on providing policy recommendations and training to the beneficiary States, which included Colombia, Peru and other Andean States but not Brazil, Chile or Mexico.[782] COMPAL II, which started in 2009, has focused on the smaller, less developed States in Central America and the Andes.[783] Certain subtleties evidence key elements of their strategy, such as the adoption of Spanish as the official language of the proceedings.[784]

The ICN involves different Latin American States in its activities, and counts 10 of these States as its members, including Venezuela.[785] It is also the only organization that deals explicitly with the Andean Community of Nations.[786] Most of the activities involve the participation of one of these member States in the events organized by the ICN all over the world, including hosting the events themselves. Chile's *Fiscalía Nacional Económica* (hereinafter FNE), for example, announces its participation in ICN events taking place in different places.[787] Colombia's *Superintendencia de Industria y Comercio* (hereinafter SIC) has hosted a few topical meetings and workshops, including one addressing cartels in 2015.[788] Moreover, Latin American States have hosted ICN events of a much higher profile than the event hosted in Latin America by other organizations (perhaps with the exception of the LACF), and in doing so they have had the support of non-governmental advisors. An example of this was the ICN's 2012 Annual Meeting, which was hosted by Brazil.[789] The IBA, in order to take advantage of the meeting, organized a joint event on the first day of the conference addressing precisely issues about the ICN's role *vis a vis* local CLRs and other relevant issues.[790] Overall, the ICN has made considerable inroads in Latin America because it gives importance to States in this region in ways that the OECD does

[780] Ibid. Pgs. 42 - 45.
[781] What is COMPAL?." UNCTAD. http://www.unctadxi.org/templates/Page____1487.aspx (accessed October 2, 2015).
[782] "Impact of Compal I in Latin America." UNCTAD. http://www.unctadxi.org/templates/Page____9169.aspx (accessed October 2, 2015).
[783] "New Beneficiary Countries." UNCTAD. http://www.unctadxi.org/templates/Page____9165.aspx (accessed October 2, 2015)
[784] Op.cit, UNCTAD, What is COMPAL?
[785] Regarding the members of the ICN, see http://www.internationalcompetitionnetwork.org/members/member-directory.aspx (accessed October 18, 2015).
[786] Ibid.
[787] http://www.fne.gob.cl/english/internacional/activities/ (accessed October 18, 2015)
[788] http://www.internationalcompetitionnetwork.org/news-and-events/all-events.aspx (accessed October 18, 2015)
[789] Ibid.
[790] http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3F311256-D890-4F3A-BD08-CEB9C4629A19 (accessed October 18, 2015)

not because of the latter's selective membership policy. Hence, a country like Brazil continues to be a non-membership partner for the OECD, while at the same time it is one of the most active members of the ICN.

We contend that while there is a rivalry between the OECD and the ICN regarding which of these two organizations influences more the CLRs of Latin American States, while UNCTAD's focus on technical assistance suggests a strategy of complementarity. The OECD exerts considerable influence across this region and has focused on States (like Mexico or Chile) where the development of CLRs requires relatively less effort than in others. Having close ties with the IDB facilitates the inclusion of competition law-related policies as part of the structural reforms suggested by this institution. This strategic relation is highly convenient from the policy perspective of adopting CLRs as a complement to liberalization policies; it mirrors the neoliberal/neoinstitutional argument that CLRs are necessary for preventing that private firms raise barriers to trade replacing public barriers recently abolished. This idea, which we identified previously in a 2004 OECD Peer Review of Mexico's CLR,[791] can also be found in documents about the existence of the LACF.[792] The UNCTAD, on the other hand, has focused on technical assistance programs in countries where the neoliberal views of competition law developed in the 1990s are (arguably) harder to sell - countries like Bolivia, Ecuador or Dominican Republic. Its ties with the UN would have facilitated the reception of its recommendations but for the relative advantage acquired by the WTO on trade-related issues. Finally, it is important to note that this complementarity also brings about grey areas; there are countries where both the OECD and UNCTAD invest in policy assistance, like Colombia, as well as countries with a strong OECD and ICN affiliation that recently began to collaborate with UNCTAD, like Mexico.

III.B. Head to Head: Converging Over Colombia

The development of Colombia's CLR is an interesting field for briefly noting how the competition between these organizations takes place. This is so because Colombia is the only of the States studied here that participates in the activities organized by the OECD, the UNCTAD and the ICN. Chile and Mexico are active participant in activities organized by the OECD and the ICN, and the latter has also joined certain activities advances by UNCTAD on a non-permanent basis. The fact that Colombia belongs to these three networks makes the trajectory of

[791] Schaffer, Jay C. *Competition Law and Policy in Mexico.* OECD, 2004. Pg. 11.
[792] *Competition in Latin America and the Caribbean 10 Years of the OECD-IDB Latin American Competition Forum.* OECD - IDB, 2013. Pg. 1. (Statement of Luis Alberto Moreno)

its CLR particularly appealing for understanding the links between the field related to the development of its CLR and the transnational field related with competition law-related advice.

We contend that while Colombia's government (including SIC) participates in activities organized by both UNCTAD and the ICN, its interests of late have tended towards the OECD. Initially Colombia was one of the core beneficiaries of the COMPAL I program, which started in 2003.[793] Arguably, this early involvement gave this organization a head start with regard to the other organizations. However, there is little evidence about the effects of this interaction, and the developmental approach to competition law that characterized this organization cannot be found in SIC's decisions. During the mid 2000s Colombia started to participate in the ICN's activities. The earliest document we have found in the ICN's database dates from 2006 and is about the Colombian merger review notification procedure;[794] later documents address other topics, such as market investigations involved in particular proceedings.[795] Even so, just as with UNCTAD there is little evidence about the effects of this interaction. In turn, the decision to begin a formal accession process to the OECD has made this organization much more visible in Colombian politics. The first steps in this direction date back to a short documents prepared for the second meeting of the Latin American Competition Forum in 2004. The "tipping point" that would give this organization an advantage over the others was the beginning of the formal accession process by Colombia in 2013. This accession process could be motivated by the advantages of belonging to the OECD, as well as by the agenda of the current Colombian President, Juan Manuel Santos, who is close to Angel Gurria, the Secretary General of the OECD, since their days at the International Coffee Association.[796] As a consequence of the accession process, meeting the expectations of the OECD has figured highly among the priorities of the government and SIC. For example, public discussions about the direction of the future changes of SIC are framed in terms of whether they comply with the OECD, leaving aside what other organizations have

[793] http://www.unctadxi.org/templates/Startpage____1529.aspx (accessed October 18, 2015)

[794] Merger Notification and Procedures Template Colombia, April, 2006. http://www.internationalcompetitionnetwork.org/uploads/templates/merger/colombia.pdf (accessed October 18, 2015)

[795] ICN Market Studies Information Store Browse by Jurisdiction, 2009. http://www.internationalcompetitionnetwork.org/uploads/advocacy%20teleseminars/icn%20information%20store%20-%20sorted%20by%20jurisdiction%20final%20searchable.pdf (accessed October 18, 2015)

[796] León, Juanita. "Gobierno celebra pero aún faltan varios años para llegar a la Ocde."*La Silla Vacía. May 30, 2013.* (Accessed October 4, 2015)

recommended on the subject.[797] Correlatively, it would also explain why recent events organized in Colombia by the ICN have little publicity in SIC's web page.[798]

IV. The Local Dimensions of Global Strategies: The Trajectory of Leniency Regimes in Chile, Colombia and Mexico

In the previous section we argued that organizations like the OECD, UNCTAD and the ICN compete and collaborate for furthering their influence across CLRs in Latin America. We mentioned that their goal was to achieve certain level of convergence across these CLRs so that belonging to these organizations benefits its members and attracts new ones. In this section we look at the trajectory of one of the most important policy recommendations given by the OECD, arguably the most influential of these organizations, in Chile, Colombia and Mexico. We begin by commenting briefly on the origins of this figure and then we describe how it has evolved in each of the countries above mentioned. We do so to identify the extent to which convergence has actually happened and its usefulness from the perspective of being (or becoming) part of a network like the OECD.

IV.A. A (Brief) Genealogy of Leniency Regimes and the Global Fight Against Cartels

For the last two decades or so, the OECD has been promoting the idea that cartels are the most egregious form of competition law violations because of their effect on both competition and consumers. This idea is often coupled with the statement that in order to fight cartels, CLRs need to implement the institutions necessary for fighting cartels effectively.[799] Such institutions involve raising the level of fines charged to cartels and leniency regimes. The interaction between these two is complex, but boils down to the idea that high fines become an incentive for cartel members to "blow the whistle" on their counterparts in exchange of total or partial amnesty, regarding both civil and criminal liability.[800]

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[797] See, for example Robledo, Pablo Felipe "Proceso de adhesión a la OCDE y su posible impacto en la institucionalidad de la libre competencia en Colombia." Ambito Jurídico. October 30, 2013. (Accessed October 4, 2015)

[798] http://www.sic.gov.co/drupal/noticias/superindustria-participa-en-el-icn-merger-workshop-2015-en-bruselas (accessed October 18, 2015).

[799] See OECD Council, Recommendation of the Council concerning Effective Action against Hard Core Cartels, March 25, 1998. (Op.cit).

[800] Leniency regimes may contribute to the deterrence of anticompetitive agreements by increasing the opportunities for their detection. Regarding the theory of deterrence upon which these regimes are based, see Becker, Gary S. "Crime and Punishment: An Economic Approach." *The Journal of Political Economy* 76, no. 2

The premise that cartels are the most egregious form of anticompetitive conducts is a policy choice that follows from a particular set of political priorities, and as such it is hard to defend as a universal prescription for all and any CLR. Therefore, we suggest assessing the OECD's views regarding cartels as part of its strategy to promote leniency regimes and increases in fines in order to promote this organizations views as to what competition law should be about. Leniency regimes are a relatively recent set of institutions that involve inter-agency collaboration and their success depends critically upon the actions taken by other competition law enforcement agencies. Their implementation is competition law bureaucracy at its best, and entails the coordination efforts that technical assistance and other programs developed by international organizations aim to achieve. Among these organizations, the experience of the OECD core members places it strategically well to contribute to the transfer of such regimes.

Why did the fight against cartels become part of a global campaign while other enforcement areas did not? We contend that this is so because of the dominance of the neoliberal project over the definition of what competition law should be about in a jurisdiction key for all the organizations here considered, which is the US. In particular, the focus on fighting cartels makes sense not just because their global presence or the harm they cause, but also because since the 1970s there has been a deep skepticism about prosecuting other forms of anticompetitive conducts. This is in part a consequence of the growing influence that the "Chicago School" was acquiring in the US federal agencies in charge of competition law enforcement. As we will argue below, the global expansion of leniency regimes can be understood as an example of the expansion of a neoliberal policy whose transfer across jurisdictions has taken place thanks to the OECD. It is important to note, moreover, the making of a community of interests underlying the expansion of these regimes - the development of a project, of *doxa* in the making. On one hand, the US benefits that other important jurisdictions like the EU adopt a strong leniency policy because it increases the effectiveness of its own; on the other it also benefits from transferring both an institutional template as well as the theory that animates it.

Since the late 1930s the prosecution of cartels has been one of the priorities of competition law enforcers in the US. This continued well after WW II, reaching both national and

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(1968): 169-217. Also, see Stigler, George J. "A Theory of Oligopoly." *The Journal of Political Economy* (1964): 44-61

international cartels.[801] The interest in cartels had also been in the radar of academics, although by the 1960s the appreciation of how they worked began to change, in part because of the growing influence of the so-called "Chicago School". Contrary to their views on resale price maintenance and other practices banned by courts and statutes, "Chicagoans" did not argue that cartels had any redeeming feature, but were much more unstable than what was considered until then.[802] A key author in bringing forth this view was George Stigler. In his 1964 article "A Theory of Oligopoly", Stigler argued that cartels tend to break down because members are tempted to cheat each other by secretly increasing their volume of sales to increasing their revenue. Hence cartels often set up enforcing mechanisms to ensure their success.[803]

Leniency regimes are a way of translating these insights into competition law policy. Cartels are secretive and their members often take measures to avoid detection. However, if they are inclined to cheat to increase their revenue, they can also be inclined to cheat to cut short the potential losses resulting from being discovered and punished by competition law enforcers. From the perspective of enforcers, doing so could come across as being more sensible than focusing on other enforcement policies targeting practices whose harms were unclear; cartels, in turn, continue to have no redeeming features.

The first leniency policy was adopted by the US Department of Justice (hereinafter DOJ) in 1978, just when the impact of the "Chicago School" was beginning to be felt in both the federal courts and competition law enforcement agencies.[804] However, it was not initially successful. During the 1980s there were about one leniency application per year and these did not contribute to the discovery of national or international cartels.[805] Apparently the policy was not transparent enough; even if applicants met the established requirements, the DOJ could still withhold the leniency from the applicants. According to Scott Hammond, former Deputy Assistant at the DOJ, the changes introduced in 1993 improved the effectiveness of this policy. These consisted of granting leniency automatically to applicants that fulfill all the established requirements, making leniency available to members of cartels that the DOJ was already aware

[801] See in general Freyer, Tony A. *Antitrust and Global Capitalism, 1930--2004.* Cambridge University Press, 2006. Chapter 1. Also Wells, Opcit.
[802] Posner, Richard A. "The Chicago School of Antitrust Analysis." *University of Pennsylvania Law Review* (1979): 925-948
[803] Stigler, Op.cit. Pgs. 46 - 48.
[804] Regarding the impact of the "Chicago School" during the late 1970s, see Fox, Eleanor M, and Lawrence A Sullivan. "Antitrust--Retrospective and Prospective: Where Are We Coming From? Where Are We Going ?" *NYUL Rev.* 62 (1987): 936.
[805] Hammond, Scott D. "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades" Speech at the 24th Annual National Institute on White Collar Crime. 2010.

of, and protecting individuals working for the applicant company from criminal liability.[806] As a result of these changes, Hammond argues, leniency application rates have increased twenty-fold and the leniency program itself became the most effective investigative tool for this department. Between the fiscal years 1996 and 2010, companies have been fined about USD 5 billion; of these convictions, about ninety per cent of them are related to leniency investigations. The reach of this policy is also international, for the DOJ has about 50 international cartel investigations, half of which are related with leniency applications.[807] The success of the DOJ's leniency policy after 1993, coupled with the increasing number of international cartels prosecuted, made leniency regimes a suitable candidate for transfer across the Atlantic.

The adoption of a leniency regime in the EU was part of a wider process involving the redefinition of the goals and purposes of EU competition law.[808] Looking in retrospective it seems that this process relied on two fronts that are closely related. First, making cartel prosecution a priority required that the EU Commission could devote the resources necessary for doing so. The 1999 *White Paper on Modernisation of The Rules Implementing Articles 85 and 86 of the EC Treaty*[809] argues that freeing the Commission of the burden of the notification system enables it to focus on competition enforcement. Regulation 1 of 2003 contributed to this by eliminating the notification system and granting more investigatory powers to the Commission. Since then, about half of the investigations done by the Commission are about cartels, which led to a considerably higher number of decisions in this area than before.[810] Second, making cartel prosecution a priority seems to be closely related with the adoption of leniency regimes. The 1996 *Commission Notice on the non-imposition or reduction of fines in cartel cases* states explicitly that "secret cartels (…) are among the most serious restrictions of competition encountered by the Commission" in its first paragraph.[811] The Notices issued on 2002 and 2006 have almost identical statements.[812] Moreover, just like its US counterpart, the EU leniency regime required

[806] Ibid. Pg. 2.
[807] Ibid. Pgs. 2 - 3.
[808] McGowan, Lee. *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy*. Edward Elgar Publishing, 2010. See chapter 7.
[809] European Commission, "White Paper on Modernisation of The Rules Implementing Articles 85 and 86 of the EC Treaty" (1999).
[810] See European Comission. "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf (accessed October 18, 2015).
[811] European Commission. "Commission Notice on the non-imposition or reduction of fines in cartel cases" (1996).
[812] See, for example, European Commission. "Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases." 2006.

considerable adjustments to increase its effectiveness.[813] The connection between the "modernization" of EU competition law and leniency regimes is that a thorough implementation of a leniency policy demanded from the EU Commission resources that it was devoting to other activities. Therefore, the fight against cartels, and with it the implementation of the leniency regime, could be seen as a justification for changing the allocation of resources within the Commission.

It is important to note then that the OECD's recommendation from 1998 takes place against this background, where US leniency policy was obtaining considerable victories and EU leniency policy went hand-in-hand with the "modernization" process of this area of law. We contend that the OECD's recommendation contributed to shape the idea that EU anti-cartel enforcement required a shift in the activities and resources managed by the Commission. By the time leniency regimes were firmly established in the US and the EU - the early 2000s - it made sense to consider the importance of having other jurisdictions to adopt their own leniency regimes as well, especially if not doing so affected the effectiveness of the leniency regimes already in place. Precisely because strengthening the leniency regime of a few members of the network also benefits those members that have high stakes in their own regimes, such as the US and the EU, it makes sense to seek the improvement of such regimes in Latin America.

IV.B. Chile: From Opportunity to Skepticism

The adoption of a leniency regime in Chile involved considerably higher stakes than the ones entailed by the implementation of this regime in the US or the EU. This was so because while in these jurisdictions the leniency regime complemented the other mechanisms available for fighting cartels, in Chile it became very important for obtaining evidence to prosecute cartels in the first place. Hence, the adoption of leniency solved an immediate problem regarding prosecution, and only after it did so it became a complement to other enforcement mechanisms.

In chapter 5 we showed how shortly after its creation in 2003 the *Tribunal de Defensa de la Libre Competencia* (hereinafter TDLC) and the Chilean Supreme Court adopted a more demanding evidentiary standard for condemning collusive behaviors. First the Supreme Court and then the TDLC began requiring from the competition law enforcer, the *Fiscalía Nacional Económica* (hereinafter FNE), that it provides direct evidence of the occurrence of the above mentioned

[813] McGowan, Op.cit. Pgs. 162 - 166.

conducts. As a consequence of this new requirement, the FNE lost most of its collusion cases between 2003 and 2009. As mentioned in chapter 5, officials from this agency considered that their situation at the time was particularly problematic.

The solution to this complex situation came from several fronts. Firstly, the FNE decided to engage in cases where it could obtain direct and indirect evidence of collusive agreements easily; this paid-off with a case involving large retail stores. The second front involved an amendment to Chile's core competition law statute, DL 211 of 1973, by adopting the basics of a leniency regime developed after suggestions by the OECD.[814] The particular parts referring to the leniency regime were highly criticized, among other reasons, because the mechanism of leniency was reserved for criminal activities considered particularly damning.[815] Finally, the third front came from a litigation strategy developed by the FNE itself in another case involving drugstores. Regarding this particular front, the enforcer settled with one of the investigative parties early on, and in exchange it obtained first-hand evidence that was used successfully before the TDLC against the other cartel members. While this result did not stem from a leniency application itself, it did contribute to the enactment of law 20.361 of 2009 by the Congress and to meet the evidentiary standard set by the courts.

As we mentioned in chapter 5, the leniency regime was used by the FNE shortly after the enactment of law 20.361 of 2009 but since then it has been used only in a few cases (as of February 2015). The first instance in which this regime was used involved several manufactures of compressors for refrigerators and freezing cabinets; the information resulting from the leniency application produced useful evidence for a positive verdict by the TDLC.[816] However, since then the leniency regime has been used successfully only in two other cases involving transport companies and asphalt vendors.[817] Perhaps the lack of enthusiasm that this regime has produced is a consequence of the fact that it has been highly criticized by different actors, including the President of the TDLC, because it does not clear applicants from criminal liability. Such criticism stems from an unintended development. In spite of the fact that explicit criminal liability for anticompetitive conducts had been eliminated in 2003, Chile's public prosecutor used

[814] See for example Winslow, Terry. *Chile - Peer Review of Competition Law and Policy.* Chile - Peer Review of Competition Law and Policy. OECD - IDB, 2004. Pg 59. Also Clark, John. *Peer Reviews of Competition Law and Policy in Latin America: A Follow Up Argentina, Brazil, Chile, Mexico, Peru.* OECD - IDB, 2007. Pgs. 9 & 19.
[815] See Chile, Congressional record of law 20.361. Pgs. 102 & 205. statements by Representative Eluchans, pg. 90, Arenas, pg. 101 and Rep. Cardemil, Pgs. 106 - 107.
[816] TDLC, Sentencia 122 de 2012 de 14 de Junio de 2012.

an arcane article from the criminal law code to prosecute the drugstores involved in the case above-mentioned.[818] Furthermore, the bill currently discussed in this country's congress is quite likely to reintroduce once more explicit criminal liability for conducts like cartels,[819] in part because the recent cartel cases caused considerable uproar.

Chile's leniency regime, as it stands today, plays a role in the acquisition of evidence necessary for a conviction regarding collusive agreements and cartels. It appeared in a particular context and quickly became a mechanism for addressing a particular situation that, from the perspective of the enforcement agency, threatened to affect severely the entire enforcement system. Hence, it is more than a useful tool, which is the way that leniency regimes are characterized in the US and the EU. However, its sparse use (and the low numbers of collusion cases), as well as the criticisms levied against it by important actors, suggests that it may have to change in different aspects before it is used as it is in other jurisdictions.

IV.C. Colombia: Performance Anxiety

The adoption of Colombia's leniency regime occurred at about the same time it happened in Chile, but the reasons for this were quite different. As we mentioned in chapter 6, the directors of SIC had tried to reform Colombia's CLR in order to make this agency more politically independent, sometimes against the will of the government and business associations. In one of these instances, the director of SIC at the time, Jairo Rubio Escobar, submitted to Congress a bill amending the CLR and which included a short paragraph facilitating the development of a leniency regime.[820] The proposal for leniency was modified as the bill underwent the legislative procedure, and was finally enacted as article 14 of law 1340 of 2009. It is important to note that there is no formal reference to the OECD or the leniency practice of other jurisdictions in the original submission of the bill, or in the presentation made by the congressman in charge of its discussion before Congress.[821]A general reference to the practices of enforcer to member States to the EU appears much later on in the text presented for the fourth and last debate before

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[817] FNE, Requerimiento contra Pullman Bus Costa Central y otros de Julio 2 de 2001 and La Tercera *FNE requiere por colusión a cuatro grandes proveedoras de asfalto* July 2011.
[818] Menchaca, Tomás. "Novena Cuenta Pública Del Presidente Del Tribunal De Defensa De La Libre Competencia." 2013. Pgs. 10 & 11.
[819] Diario UChile, *Ministro de Economía: "La colusión de pollos es el delito más grande de la competencia en Chile"*. Septiembre 25 de 2014.
[820] Colombia, Congreso de la República de Colombia, Exposición de Motivos. Proyecto de ley 195 de 2007 Senado. Gaceta 583 de 2007 (published Nov. 16, 2007).
[821] Colombia, Congreso de la Republica de Colombia, Proyecto de Ley 195 de 2007 Senado (texto para primer debate). Gaceta 169 de 2008 (published April 23, 2008).

Congress.[822] Even so, by the time the bill was presented to Congress (2007) the Colombian authorities and the OECD were already building a relation, especially as a result of the analysis of the Colombian regime presented in the second LACF forum in 2004. Hence we believe the inclusion of the leniency provisions in the bill evidences the increasing proximity between competition law enforcers and this organization. This proximity crystalized with the publication of the Peer Review report in 2009, which emphasizes the importance of the swift implementation of this provision.[823]

The first leniency application was informed shortly after the Colombian government announced its formal intention of beginning the review process to become a formal member of the OECD. We contend that the application became an opportunity to show that the CLR met the demanding standards of this organization. (I personally recall a director of SIC being particular eager to apply this regime shortly after law 1340 of 2009 was enacted.) The first application resulted from a visit that SIC did to a firm that participated in a cartel involving baby diapers in 2013 - four years after the regime was officially established. However, only until August 2014 SIC made the public announcement that it had formally begun the first leniency application in this case.[824] Even so, over a year later, there is still no final decision either sanctioning or absolving the investigated parties. Instead, thanks to the media hype created by SIC, it was possible to guess the identity of all the firms involved, including the likely identity of the "whistle-blowers", and the benefits to be gained through these actions.[825] This has also exposed this regime's weakness from the perspective of the due process rights of the investigated parties, who until then did not have the opportunity to challenge the evidence collected against them.[826] The other two cartels where leniency has been involved are connected with the first one, and this was disclosed (perhaps by accident) early on;[827] even so SIC's director proceeded to announce each one of them within a few months of difference and as if each one of them were a major achievement.

There is no solution in sight to the situation created by SIC regarding the application of the leniency regime. After the first three announcements of leniency applications there have been no new announcements on this issue. The rumors of a new amendment to Colombia's CLR suggest

[822] Colombia, Congreso de la Republica de Colombia, Proyecto de Ley 195 de 2007 Senado (texto para tercer debate). Gaceta 335 de 2009. (published May 19, 2009).
[823] Petracola, Diego. *Competition Law and Policy in Colombia A Peer Review.* 2009. Pg. 59.
[824] Revista Semana "El cartel de los pañales caros" Agosto 4 de 2014.
[825] La Silla Vacía. "La empresa que está en todos los carteles". March 4, 2015.
[826] Revista Dinero. "La Superindustria quiere más autonomía y herramientas". May 14, 2015.

that SIC wants to establish clearer rules regarding when certain information about a leniency application can be disclosed to the media and the access to reserved information by third parties. However, the recent decisions against the sugar mills (which we commented briefly in chapter 6) have not created a hospitable political environment for reforming the CLR. Even so, SIC continues to enforce the substantive prohibitions of the CLR against different cartels and the business associations participating in them.

The current state of Colombia's leniency regime comes across as a *non sequitur*. It is unclear that SIC can muster the trust from potential "whistle-blowers" to participate in its leniency regime. Instead of considering this case as one of lack of transparency, it comes across more as an example of rushing in to show results where there are very few. This may be, ultimately, a consequence of SIC depending politically from the government as the latter aims to ensure Colombia's membership in the OECD. In other words, the strategy of following the events taking place in other jurisdictions misfired, and maybe the outcomes would have been different if SIC (and the government) were not so busy trying to show that they produce results.

IV.D. Mexico: Early Success

Mexico's leniency regime is the oldest of the ones we consider here, and it is also one of the most successful. As we mentioned in chapter 7, this regime dates back from the 2006 amendments made to the 1992 *Ley Federal de Competencia Económica* and which the OECD in its Peer Review of 2004 also advised for.[828] An amendment, dating from 2011, apparently contributed to improve this regime as suggested by the number of leniency applications per year - which reached 19 up to October 2012.[829] This placed Mexico's leniency regime ahead of their Chilean and Colombian counterparts. The amendments to Mexico's constitution that took place in 2013, and the enactment of a new law the year after did not affect significantly the application of the leniency regime. According to an OECD Workshop about markers in leniency programs, Mexico's leniency regime (at the time) included clear definitions about the benefits held by the parties, their place in particular investigations (the "marker") and other elements.[830] In June 25 of 2015 the new competition law enforcer, the *Comisión Federal de Competencia Económica* (COFECE)

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[827] El Tiempo, *'Cartel de los pañales' salpica a 4 países y a otros productos.* August 9, 2014.
[828] Schaffer, Jay C. *Competition Law and Policy in Mexico.* OECD, 2004. Pg. 65.
[829] Guerrero Rodríguez, Omar, and Alan Ramirez Casazza. "Mexican Competition Law Aligned Incentives for Effective Cartel Enforcement." *Competition Policy International* (2012). Pgs. 3 - 4.
[830] OECD Working Party No. 3 on Co-operation and Enforcement. Use of markers in leniency programs - Mexico. (2014).

adopted new leniency guidelines (based on previous experiences) that grants criminal immunity and reduced fines to investigated parties.[831] In a report issued on October 7, 2015, COFECE states that in the last two years it received 24 leniency applications.[832]

There is much to be said about the efforts undergone by different Latin American States to adopt leniency regimes that contribute to fighting more effectively against cartels. However, the analysis of the trajectories of the leniency regimes of these three countries casts a shadow over the success that an organization like the OECD may have in achieving convergence across CLRs. In this sense, it is interesting to note the different roles that leniency regimes have in these States. This is a consequence precisely of the capacity of local interactions to shape the trajectory of the transfer and development of new institutions. From the perspective of the OECD, Mexico's regime is a hallmark of adequate competition law enforcement. Assessing the role of these regimes is more complex in Chile and in Colombia. In the former, we saw that it contributed to overcome a particularly difficult situation involving evidentiary requirements. However, its fate is uncertain. In the latter, we contend that it was an opportunity to show compliance with the demanding requirements of the OECD - and a missed one. The outcomes of this continue to be unclear, but the trust that different actors place in SIC has been affected by its mismanagement of the leniency applications. Hence, while all three regimes purport to do the same thing, in each of their contexts they produced different outcomes and have different connotations that are ignored by considering only whether they converge or not.

V. Conclusions

Throughout this chapter we have addressed the roles that international organizations like the OECD, UNCTAD and the ICN had in the development of a transnational field of competition law-related advice. We argued that each of these organizations compete and collaborate to extend their influence to the different member States, as well as partnering States, that make part of each organization. We then described briefly their history and their approaches. All of this in order to consider the extent to which these organizations have contributed to a convergence of the different CLR's in Latin America. Furthermore, in order to consider the extent to which convergence may be taking place, we compared the development of leniency regimes in the US and in the EU with the development of the same regimes in Chile, Colombia and Mexico. We

[831] COFECE. "Guía Del Programa De Inmunidad Y Reducción De Sanciones.

[832] https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/inaugura-presidente-pena-nieto-jornada-por-la-competencia (accessed October 20, 2015)

assert that while these three States now have such regimes, this does not amount to convergence in any significant sense because the regimes themselves bring about quite different outcomes. For convergence to be truly useful to a network-like organization like the ones mentioned above, it has to bring about a series of similar outcomes, which is quite different from the outcomes observed in these three examples.

An aspect that we have not drawn upon but that is very important is how these changes have affected the trajectories of the different individuals that have contributed to the development of Latin American CLRs. In chapter 3, where we mentioned briefly the relationships between the literature about these regimes and the trajectory of their authors, we noted that most of the authors were elite lawyers and economists involved directly with the changes taking place. In doing so, they were taking advantage of their expertise over foreign languages and legal materials, and their social connections, to bring about changes that were beneficial to them professionally. We contend that the activities organized by the organizations we have been referring to so far have opened new opportunities for these individuals. Thanks to these activities, these individuals are able to meet with other like-minded individuals in institutional settings dedicated to the promotion of competition law. In doing so, they create an "epistemic community" based on very similar perspectives and which enables them to offer their expertise across jurisdictions with considerable ease.[833] Organizations like the OECD and the ICN facilitate the development of these communities. Firstly, they provide the material basis for their meetings when they organize meetings like the LACF or workshops associated with particular competition law topics. Moreover, they also become directly involved with these organizations when they are hired to do peer reviews or formulate policy recommendations. However, this otherwise brief characterization would fall short if it only considered that these individuals are independent from enforcement agencies. In some cases, it is belonging to these enforcement authorities that brings them close to these organizations. Doing so enables them to build their network of contacts that they can rely upon once they develop their own personal projects as academics, litigants and consultants (sometimes simultaneously). Hence, these individuals are positioned in-between their jurisdictions and international organizations, and are becoming increasingly influential in bridging the relations between enforcement authorities (and their States) and these organizations. The

[833] Regarding epistemic communities, see Haas, Peter 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control', *International Organization* 43.3 (1989): 377–403. Regarding epistemic communities and competition law see Djelic, Marie-Laure. "From Local Legislation to Global Structuring Frame The Story of Antitrust." *Global Social Policy* 5, no. 1 (2005): 55-76.

"competition law generation" of the 1990s became a generation of competition law *compradors*,[834] as the internationalization of CLRs continues to take place. Whether these developments have also intensified competition or collaboration between them remains unclear.

The professional trajectory of Ignacio de León illustrates this tendency. Between 1991 and 1994 he was a member of the Venezuelan competition law authority of the time, *Pro Competencia*. In 1994 he enrolled at University College London, where he obtained his PhD from UCL in 1999 based on his dissertation about the institutional foundation of CLRs in Latin America. This dissertation became the main input for his two books, which are the most extensive work about competition law in this region. Between 2000 and 2012 he chaired *EconLex*, a firm dedicated to provide assistance to developing States (and to other international organizations dealing with them) for the development of projects that ranged from building regulatory capacity to facilitating access to credit. Between 2006 and 2009 he also chaired a non-governmental organization dedicated to the promotion of free markets, the *Centro de Divulgación del Conocimiento Económico para la Libertad*. More recently, in 2012, he joined the IDB as a specialist in innovation and competition policy.[835] From this position he continues to write about the development of competition law in Latin America, and through which he has a privileged position to influence the discussions of the OECD - IDB events.[836]

The internationalization of CLRs, and the corresponding internationalization of the elites that contributed to its development evidence a "double movement" away from the governance structures of these regimes. Since their inception, the legitimacy of CLRs in Latin America has been related to the legitimacy of presidentialist bureaucratic structures, and in the case of Chile and Mexico, to the legitimacy of semi-autonomous administrative bodies and specialized courts. In the same vein, the actors involved in the development of these CLRs were elites by local accounts; the internationalization of CLRs enables them to participate in places of global

[834] See Dezalay, Yves, and Bryant G Garth. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. University of Chicago Press, 2002. Chapter 12.

[835] We learn this much from his Linked-in profile. See https://www.linkedin.com/profile/view?id=ADEAAALJebQBa9UoCz9gdrPSkAP4wIaet2V1-y0&authType=NAME_SEARCH&authToken=xYFV&locale=es_ES&srchid=123037008144573570950 4&srchindex=1&srchtotal=8&trk=vsrp_people_res_name&trkInfo=VSRPsearchId%3A123037008144573570950 4%2CVSRPtargetId%3A46758324%2CVSRPcmpt%3Aprimary%2CVSRPnm%3Atrue%2CauthType%3ANAME_SEARCH. (accessed October 23, 2015).

[836] See for example Umaña, Mario A. Advocacy: Mainstreaming Competition Policy into the Overall Economic Policy and Government Actions in Latin America and the Caribbean. Background paper by the IDB Secretariat, Latin American Competition Forum, Washington: OECD - IDB, 2014

economic advice, such as the OECD or the ICN. Neither of these schemes has been particularly open and participatory from the perspective of the "demands of democracy".

9. Conclusions: Assessing The Trajectories of Competition Law Regimes in Chile, Colombia and Mexico

I. Introduction

A background paper for the Latin American Competition Forum asks why competition law policies do not figure prominently in the economic policies of Latin American and Caribbean States.[837] These policies are, according to this paper, like "*a second division player waiting to be promoted to the premier league*".[838] A tentative answer it offers is that this is so because of a series of factors, including the low priority that governments give to competition law policies. In light of the preceding chapters, such a statement should bring about questions. If competition law policies are so unimportant, then how can we explain the recent inclusion of competition law issues in political programs in Mexico and Chile noted in chapters 5 and 7? What about the use of competition law to challenge anticompetitive practices in the agricultural sector in Colombia noted in chapter 6? To be sure, this background paper states that within Latin America and the Caribbean there are some regimes that stand out, like Chile's, and there are other that have been recently reformed in order to strengthen them, like Mexico's.[839] Even so, the state of affairs that this paper describes is quite dismal and, as expected, is used to advocate for further reforms to the different CLRs in this region.

In this final chapter we offer an alternative account of the trajectory of the development of competition law regimes (hereinafter CLRs) in Latin America by resorting to the experiences in Chile, Colombia and Mexico. We do so as a conclusion because it is an opportunity to build upon the framework and the findings presented in the preceding chapters to offer a different, more nuanced answer to questions like the ones that the background paper mentioned above asks. It is also an opportunity to reinstate the argument that we have advanced in this dissertation. Therefore, in this chapter we argue that the interplay between the neoliberal competition law project and its State-centered counterpart have shaped competition law regimes

[837] Umaña, Mario. Background paper by the IDB Secretariat, Washington: Inter-American Development Bank, August 28, 2014. This forum is organized jointly by the Organization for Economic Co-Operation and Development (hereinafter OECD) and the Inter-American Development Bank (hereinafter IDB)
[838] Ibid. Pg. 2 (Italics in the original).
[839] Ibid. Pg. 4.

in Latin America along particular trajectories of their own. If anything, there is considerable diversity among CLRs at this moment in time.

This chapter is divided in several sections. In section II we refer to the analysis presented in chapters 3 and 4 about what we know about the development of CLRs in Latin America and how this process is portrayed. We will argue there that for the most part the different regimes in this period were very similar, organized towards State-centered ideas and institutions. In section III we address how the advance of neoliberalism in the different countries we consider here set their competition law regimes in different trajectories. The trajectories of these three regimes, based on the analyses presented in chapters 5 through 8, shows that there is considerable diversity amidst the limited number of ideas and institutions promoted by the projects that shape these regimes. Finally, in section IV we conclude by assessing the contributions and relevance of this dissertation, its limitations, and future venues of enquiry.

II. The Origins of Competition law in Latin America

In this section we discuss the findings and the conclusions that we presented in chapters 3 and 4 regarding what we know about the emergence of competition law in Latin America. While there is very little information about the enforcement of these CLRs (and not withstanding Eduardo White's efforts to the contrary), the few data we collected shows that there was a relative proximity between these regimes. This proximity involved the different elements that made the regimes as well as the particular understandings about their purpose and how they "fit" with regard to other economic policies at the time. However, this particular aspect was all but forgotten by the literature that emerged in the 1990s. This particular body of literature argues, like the background paper commented above, that during the time period that the first CLRs were adopted - in 1917 in Mexico and in the 1950s in Chile and Colombia - the protection of competition was not a priority to the governments in place at the time. This is so because the economic ideas that prevailed then favored protectionism, and so there was little interest in enforcing the CLRs when doing so would run counter to more important policies.[840]

[840] See for example Peña, Julian. "The Consolidation of Competition Law in Latin America." *Antitrust Chronicle* 11 (2011). Also De León, Ignacio. *An Institutional Assessment of Antitrust Policy: The Latin American Experience.* Kluwer Law International, 2009. Also Coate, Malcolm B, Rene Bustamante, and A E Rodríguez. "Antitrust in Latin America: Regulating Government and Business." *The University of Miami Inter-American Law Review* (1992): 37-85.

We argued in chapter 4 that such views brought about questions that were not addressed satisfactorily. In particular, this view involved an implicit self-contradiction, for if Latin American States were so bent in protectionism then they would not have adopted CLRs in the first place, much less enforced them. Since we have evidence that these events did happen - CLRs *were* enacted *and* enforced - then clearly there must be a better explanation for how these regimes came to be and were understood at the time than the one offered by these texts.

The answer that we advanced in chapter 4 to this particular issue involves considering the proximate fields from which CLRs originated. We argued that there was a connection between the changes that occurred in constitutional law during the first half of the 20th century and the adoption of CLRs by the 1950s (with the exception of Mexico, where these changes happened simultaneously). In particular, in Chile, Colombia and Mexico the adoption of CLRs was preceded by changes in the constitutional protection awarded to private property and by the bureaucratic development of the State itself via the extension of its duties and prerogatives. These changes occurred because of the mounting pressures that social issues were exerting in the constitutional and legal systems at the time.[841] This connection makes sense for two reasons. First, because competition law enforcement requires resorting to higher values (like the ones explicitly stated in constitutional doctrines) that justify limiting the agreements individuals could make or how they used their property. Second, because enforcement also presupposes that the State has the bureaucratic capacity to conduct investigations, take decisions and impose sanctions, and this too required the development of constitutional mandates relating to the duties and prerogatives of the executive branch, and especially of the presidents. There are a few pieces of data that corroborate this argument. One of them is a decision issued by the Colombian competition law enforcement authority that refers explicitly to constitutional doctrine - concerning the "social function of property" - to justify its decision.[842]

The Constitution - competition law nexus that we advance relies on the historical fact that constitutional doctrines related to "the social function of property" in Chile, Colombia and Mexico served as a foundation for a wide array of economic policies that were established in each of these States. The case of Mexico is quite unique, because since article 28 of its 1917 Constitution addressed issues pertaining to competition law directly, it complemented the famous article 27 of the same charter in providing a constitutional foundation for regulating

[841] See Gargarella, Roberto. *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution.* Oxford University Press, 2013. Chapter 6.
[842] República de Colombia. Superintendencia de Regulación Económica. Resolución 021 de 1963. Pg. 23.

different aspects of the economy. Hence Mexico has a long tradition of laws and bylaws developing its constitutional provisions regarding competition. (See Appendix 1) In Chile and in Colombia these developments were less straightforward because their constitutions did not include, at that time, provisions about competition. In any case, the "social function of property" doctrine enabled the adoption of their respective CLRs in 1959 in both of these countries. In Chile, the 1959 regime followed from the recommendations of the *misión* Klein - Saks issued for the government of Carlos Ibañez and which were later adopted by the government of Jorge Alessandri. This first regime, contained in law 13.305 of 1959, was enforced continuously since the early 1960s until it was replaced by *Decreto Ley* 211 of 1973. In Colombia the military government ruling during the mid 1950s issued the first CLR, of which little is known today, and the reformist democratic government that followed issued a relatable regime in 1959. Overall, constitutional doctrines setting the limits for private property and hence the scope of action for regulatory proceeding provided the substantive foundations of these two CLRs

The reference to doctrines such as the one of "the social function of property" is also telling of how competition law regimes were understood during this particular period. We argue in chapters 3 and 4 that they were understood as one of several policy tools that the governments had at their disposal to achieve development via industrialization. In this sense, CLRs were part of the patchy quilt of economic policies that were in place at the time, and which granted the government with considerable discretion as to how to address particular issues related with the economic development. We find further corroboration of this theory in the combination of the administrative structure of the enforcement agencies and the content of the regimes themselves. As to the former, the competition law enforcement bodies were administrative bodies with little political autonomy and often under the direct supervision of a ministry. This was convenient, for it facilitated the coordination of competition law enforcement with other policies - a legitimate end in of itself, especially so at a time in which all of these policies were geared towards development. As to the content of the regimes themselves, we find that they have wide exemption regimes that allow the enforcers to accept an anticompetitive practice if other administrative authorities allow it. Once more, this is a highly convenient mechanism for coordinating different economic policies with competition law enforcement. We find further evidence of this particular way of understanding these CLRs in a few decisions that justify certain practices by presenting their effects in terms of their contribution to the development of a

particular economic sector.[843] We also find support for this particular understanding in the texts of influential development economists like the Chilean Jorge Ahumada.[844] Even though these three regimes had all these aspects in common, their particular developments varied.

It is important to note that the enforcement record of these different regimes is notoriously incomplete, except for the case of Chile, where there is a record of the decisions issued since 1959. The situation is quite different in Colombia and in Mexico. Different authors state that law Colombia's 155 of 1959 was seldom enforced or not at all.[845] Our own research, however, shows otherwise. We found 22 decisions issued between 1961 and 1969 by the enforcement body at that time, the *Superintendencia de Regulación Económica*, concerning mergers, collusive practices and abuses of dominance (see appendix 1). Our research, however, was limited to Colombia's general archives and we have reasons to believe that in SIC's archives there are other decisions from that period, although we did not have access to it. In the case of Mexico, our research of the database of the Supreme Court showed that there were more than 90 rulings issued by this Court between the late 1910s and 1990. In these decisions, the Court addresses the constitutionality of bylaws and other judicial rulings based on article 28 of the 1917 Constitution through the figure of *amparo* (see appendix 1). We have reason to believe that our findings complement other studies describing the enforcement practice of the different enforcement authorities before the 1990s.[846] Even so, there is a great deal to find out regarding this particular issue.

Overall, the preceding considerations invite further analyses about the history of competition law in Latin America before the 1990s. The generalized claim that the CLRs in place before the 1990s were seldom enforced or were irrelevant deserves better foundations - both theoretical and empirical - than the ones provided by the relevant literature. Just as well, the relation between these regimes and the other economic policies in place at the time cannot be summarily stated as being about competition versus protectionism. As we suggest, the relation was considerably more complex, for State-led development strategies sought a balance between both which cannot be properly captured in such a stark opposition. Hence, the literature about competition law that developed in the 1990s, addressing it both as a regional or a national issue,

[843] República de Colombia. República de Colombia. Superintendencia de Regulación Económica. Resolución 0008 de 1963. Pg. 2.
[844] See Ahumada, Jorge. *En Vez De La Miseria*. Editorial del Pacífico, 1958. Pgs. 71 - 72.
[845] See for example Petracola, Diego. "Colombia - Peer Review of Competition Law and Policy." OECD - IDB, 2009. Country Studies. Pg. 12. Also Miranda, Alfonso. "El Derecho De La Competencia Desde La Constitución De 1886 Hasta La Expedición Del Decreto 2153 De 1992." August 2, 2012. Slide 10. Finally, Cortazar Mora, Javier. "Colombian Competition Law Regime." Institute De Droit De La Concurrence, 2012. Pg. 2.

set apart important pieces of information that challenged the thesis they advanced. Because this literature supports the advance of the neoliberal competition law project, such a move is particularly suspicious.

III. The Advance of Neoliberalism and the Trajectories of Competition law

In this section we recall the analysis and conclusions presented in chapters 5 through 8 of this dissertation to show how the advance of the neoliberal competition law project set the trajectories of the different regimes we consider here in particular paths of their own. We describe each of these trajectories and the particular field dynamics that contributed to their establishment.

III.A. Chile: Fixed on Neoliberalism

The advent of neoliberalism in Chile was particularly forceful and affected its society in ways that continue to have a lasting impact today, quite notably in its political system, its constitutional law and its CLR. All of these aspects are related. The military regime that resulted from the 1973 coup was politically intolerant to ideas and views about social ordering that were related with the socialist regime it has overtaken. As a result of this, the regime promoted a particularly narrow political regime that came to be embedded in the 1980 constitution and its political system even after the military regime and during the transition to democracy. Because of this particular issue, we argued that developing a State-centered competition law project like the one that prevailed before the coup was not politically feasible.

We argue in chapter 5 that these background conditions have fixed Chile's CLR along a neoliberal trajectory. Even so, since the advent of neoliberalism we identify two variants of the neoliberal competition law project developing in this country. We identified the first variant with the development of the 1980 Constitution, the activities organized by the *Centro de Estudios Públicos* and the doctrines regarding competition law in place between the late 1970s and the 1990s (although it remains popular among the legal community). In turn, we identified the second variant with a more "law and economics" approach to competition law and which we identified with the works of Chilean economist Ricardo Paredes. The transition between one variant and the other occurred precisely during the 1990s, when the latter variant (and the actors

[846] See for example White, Eduardo. "La Legislación Antimonópolica Y El Control Del Poder Económico En

that supported) became influential enough to promote changes to the CLR as it was established in the early 1970s. This transition was not without problems for it led to an institutional mismatch between enforcers and adjudicators, and which was ultimately resolved by furthering the neoliberal aspects of this regime. In the aftermath resulting from this transition, the more recent reforms that have been proposed continue to further the neoliberal aspects of this regime, like its leniency regimes, and plan to amend previously established ones, like mandatory merger control.

Even so, the neoliberal competition law project in Chile's CLR may not be internally stable. As we mention in chapter 2, one of the particularities of such projects is that they are not entirely coherent and can be porous, allowing for some internal inconsistencies. The institutional mismatch referred to above evidences the reality of this possibility in the Chilean context. This is so because this mismatch was a consequence of the efforts to mold the enforcement institutions after the second variant of neoliberalism that was becoming increasingly influential at the time. Moreover, there is the possibility that future confrontations take place *within* the current variant of the neoliberal project. In chapter 5 we pointed to the possibility that actors that oppose to the current reforms based on the first variant of neoliberalism do so using arguments dear to them and to other actors from beyond the neoliberal camp. We suggested that rights-based arguments about governmental transparency, privacy, the protection of individual communications and due process could challenge reforms that seek to further the powers of the enforcers in the name of efficiency.[847] The key question is whether the rights involved in these issues can be curtailed in the name of making competition law enforcement more effective. This question reveals the tension between the classic liberal ideas and values upheld by the first variant of neoliberalism and the more efficiency-oriented considerations of the second variant of neoliberalism.

III.B. Colombia: The Persistence of State-centered Competition law

In contrast with Chile, the advent of neoliberalism in Colombia took place amidst regular democratic practices, although these practices themselves occurred at the shadow of an internal conflict that has taken place for more than five decades. As we argued in chapter 6, the uneven impact of neoliberalism has to do with the 1991 Constitution, which was enacted to address peacefully the conflicts taking place in this country. While it established for the first time a

América Latina: Recientes Tendencias." *Derecho de la integración* 11, no. 29 (1978): 35 - 59.

[847] See for example Chile, Congressional record of law 20.361. Pgs. 102 & 205. See also Ibid, statement by Axel Buchesteir, member of *Libertad y Desarrollo*. Pgs. 57 - 58.

mandate for protecting competition, it also allowed such mandate to be easily overcome for other considerations. Business associations, which are very important in the politics of this country, obtained protection for their activities and pressured against the establishment of a strong CLR. Just as well, other actors interested in the development of regimes related to competition opted for the establishment of sector-specific CLRs because they were skeptic of the efforts undergone to strengthen the main regime enforced by SIC. As a consequence, Colombia's CLR was dispersed across several regimes, and the main provisions, which date back to the 1950s, were extended in time and their enforcement resumed in the late 1990s.

Against this background, SIC's directives developed an increasingly activist agenda during the 2000s that targeted business associations. This agenda paid off initially, for in 2009 a new law made SIC the sole enforcer of the different regimes and granted it more prerogatives via new enforcement tools and higher sanctions. However, once SIC decided to use its new prerogatives, it faced a backlash from a new government and the business sector. This led to the appointment of a new director of SIC and a less contentious approach to competition law. Also SIC's reliability has been questioned by its mismanagement of leniency applications. Although a new competition law statute is in the making, it is unclear what the future holds for competition law enforcement in Colombia. Consequently, Colombia's CLR continues to be fashioned around State-centered institutions and provisions, in spite of efforts to sway it in the direction of the neoliberal competition law project.

Overall, the trajectory of SIC and of Colombia's CLR in general shows the extent to which the different projects are intertwined with the collaborations and struggles of the different actors involved in the development of this area of law. This is arguably the case of the relations between the business associations and the political establishment in Colombia. While Colombia's presidents have close ties with such associations since the mid 1950s, the armed struggle brings their interests together because it addresses fundamental issues related to the integrity of the State and of the business sector. Against such issues, the protection of competition does not come close as a major political priority. This would also explain why the governments have not actively supported changes to Colombia's CLR, and as a result, the endurance of the State-centered institutions. The directors of SIC, however, may view this issue differently. For them, acquiring prominence facilitates that when they return to the private sector, where they are sought by firms facing investigations before SIC. Developing "activist" agendas is a way in which they raise their own professional profiles as well as those of their agency, both locally as well as

internationally. This would explain the *de facto* independence that they have tried to assert in office. It is unlikely that as the armed conflict looms in the background these issues will change.

III.C. Mexico: Plots, Heroes and Villains.

The advent of neoliberalism in Mexico was quite different from how it happened in Chile and in Colombia. As in Colombia, it took place within the confines of the democratic practices in this country. As in Chile, it was a profound process that had a lasting impact on various areas of law, including its CLR. However, contrary to what happened in these countries, it also involved a higher degree of internationalization that is quite unique and that the other two countries would not experience until much later. It was only natural that the development of its CLR exhibited these different characteristics, albeit in unique ways.

In chapter 7 we characterize the trajectory of Mexico's CLR as a story of institutional transformation. We argued that the adoption of a new CLR in 1992 took place against several important legal reforms, including the privatization of State-owned enterprises, like the telephone company *Telmex*. In particular, the adoption of the regime was largely consistent with this privatization effort. At the time of the enactment of the new regime, embodied in the *Ley Federal de Competencia Económica*, it was not clear if it would be applicable because this company's own legal regime and the difficulties of doing so retroactively. Also, the law did not establish the legal prerogatives for the competition law enforcer, the *Comisión Federal de Competencia* (hereinafter CFC), to address its sheer economic power but only some of its manifestations.

Against this background, the CFC began to enforce the law against *Telmex* after clearing the hurdles of its jurisdiction in the late 1990s. At this moment several strategies come into place. On one hand, the CFC continued its enforcement activities against *Telmex* based on the complaints of its foreign-owned rivals. On the other, these same rivals persuaded the United States government to take action against the Mexican government before the World Trade Organization (hereinafter WTO). The United States argued that Mexico had failed to comply with the duties established in the telecoms treatises that were part of the "umbrella" of this organization by skewing its regulation in favor of *Telmex*. On both accounts these companies achieved partial success. While they obtained favorable rulings from the CFC, *Telmex* was still able to delay its compliance through legal hurdles. At that same time, a panel organized by the

WTO ruled against the Mexican State, but the redesign of its telecoms regulation depended once more on the same local actors that favored this company in the first place.

By the mid 2000s the CFC began to impose higher punishments to *Telmex* and to figure prominently in the news. The director of the CFC, Eduardo Perez Motta, began to figure prominently as a champion of competition law as he regularly appeared in the news explaining the activities of the CFC and to advocate for more powers for this agency, which he obtained from congress in 2006 and in 2011. In one particular episode involving an investigation regarding the tariffs for connecting to *Telmex*'s network, Perez Motta advocated for the imposition of a 1 billion dollar fine to this company. He was forced to recuse himself from the final judgment by the other commissioners of the CFC, and *Telmex* accepted a new tariff system fashioned after a recommendation made by the OECD. This episode contributed importantly to the image of Perez Motta as a *Don Quixote* of competition law.

The confrontations between the CFC and *Telmex* have had a profound impact on the general perception of the ties between the Mexican political establishment and the business sector (as well as on the literature about competition law in Mexico). In the 2012 presidential elections, then candidate Enrique Peña Nieto addressed this issue in his campaign, which included issues about reforms in the telecoms sector and the strengthening of competition law enforcement. These issues also appeared in his "*Pacto por Mexico*", a multi-party political platform that has guided his government's legislative agenda since his election. More important still, these issues were addressed in the 2013 Constitutional amendment to article 28 of the 1917 Constitution and led to a new competition law statute in 2014. While in other aspects this regime evidences a clear neoliberal inspiration, the political drive resulting from the *Telmex* saga has reaffirmed the State-centered ethos that inspired Mexico's competition law tradition based on preventing abuses of economic power.

III.D. Convergence and Leniency Regimes in Chile, Colombia and Mexico

Until now our analysis has focused mostly on local field dynamics resulting from the interactions between local actors. In chapter 8 we addressed the role that organizations like the OECD, the United Nations Conference on Trade and Development (hereinafter UNCTAD) and the International Competition Network (hereinafter ICN) had in the development of CLRs in Latin America. We argue that in spite of the efforts of the above-mentioned institutions, Latin

American CLRs are *not* in the process of converging towards institutions similar to those of their North-Atlantic counterparts. The programs deployed by these institutions are part of their strategy to achieve convergence in the absence of an international CLR, and given the fate of the efforts behind the International Trade Organization in the late 1940s and the World Trade Organization in the late 1990s. However, these programs are redefining the trajectory of these CLRs by altering the interactions between local actors that shaped these regimes in the past. Moreover, the deployment of these programs has led to rivalries and collaborations between these organizations, for each one of them aims to further its own goals and, in doing so, also ascertain their own understandings about what competition law should be about.

An aspect we focused on was the trajectory of the leniency regimes of the different countries we study here. These regimes are of particular interest for the OECD because they are connected with its agenda of prioritizing the fight against cartels. We traced the origins of these regimes back to the writings of George Stigler and the amnesty policies of the Department of Justice of the 1970s, and from there to the European Union in the mid 1990s. Underlying this policy is also the idea that cartels are the most harmful of anticompetitive behavior. In Latin America, the OECD Peer Reviews of the three countries we investigate address the importance of adopting or strengthening such regimes as a useful mechanism for fighting cartels.

As expected, the reception of leniency regimes has been cultured by the local field dynamics in particular ways. Regarding Mexico there is very little information about the regime itself except for the information provided by the CFC, and which states that it has received about 12 leniency applications per year. This regime was established in 2006 and continued operating during the reforms that took place in 2013 and 2014. According to the information collected, it is the most successful leniency regime of the three CLRs we study here.

The success of Mexico's leniency regime contrasts with that of Colombia. In the former, there has only been one leniency application involving three different markets. This came across as a great opportunity to show Colombia's commitment to the OECD's competition law prescriptions. However, SIC did not manage well the filings and because of all the publicity it gave to this issue, the media found out soon enough who were the parties involved and had been the whistle-blower. Moreover, SIC has taken a considerable amount of time in deciding the case, an aspect that has undermined the confidence on it. SIC's "performance anxiety" seems to have been the source of its own undoing.

The success of Mexico's leniency regimes also contrasts with that of Chile. In this country the leniency regime appeared at a moment in which it was particularly difficult for the FNE to produce direct evidence of an anticompetitive agreement - part of the institutional mismatch we mentioned before. In a collusion case, one of the investigated parties decided to settle with the FNE and provided it with first hand information that the FNE then used to prosecute the other parties involved. While this procedure did not amount to a formal leniency process, it showed that having a leniency regime could increase the effectiveness of the prosecution efforts of the FNE, and contributed to the enactment of the law that established the leniency regime formally. However, since then the leniency regime has been used sparingly. Apparently this is so because even in the presence of a leniency application Chile's public prosecutor, who is different from the FNE, can open a criminal investigation against the parties involved.

What can we learn about these three examples involving the convergence of CLR? The most obvious lesson is that promoting the adoption of a particular regime, like a leniency regime, is not enough to assure that convergence is taking place. On the contrary, these examples show that there is an important degree of diversity amidst a very narrow set of policy prescriptions regarding such regimes. For convergence to deliver the results that is expected of it, the differences between the different regimes have to be minimal. It is entirely unclear that such possibility is feasible given how field dynamics shape CLRs and their different aspects. It is unclear if, as the neoliberal project continues to advance in Latin America, different field dynamics could produce very similar outcomes.

IV. Looking Back: Contributions and Relevance, Limitations and Further Venues of Enquiry

IV.A. Contributions and Relevance

Throughout this dissertation we have advanced a particular view about CLRs in Chile, Colombia and Mexico, and which consists in showing how these regimes are shaped by different actors that compete and collaborate to determine what competition law is about and how it is practiced. Our argument relies on a particular framework that consists of two parts; the first one is about the different substantive ideas that underlie these regimes, while the latter is about the different dynamics that led to the establishment of the abovementioned ideas as the "common

sense" of these regimes. And then, through a variety of data that ranges from previously unaddressed legal decisions to newspaper articles and academic texts, we have described how these ideas and power struggles continue to shape the regimes of these countries. In doing so, we have also pointed to issues that are not properly addressed by the literature on competition law in Latin America, and which range from the origins of these regimes to how they are characterized at present.

The main contribution of this dissertation is to offer a different narrative about the origins and trajectories of CLRs in Latin America, and especially in these three countries. This narrative challenges the traditional ideas about how this area of law is understood and shows, with examples taken from the regimes themselves as well as from other sources, that they are inadequate. Another important contribution is precisely to rely on first-hand sources like decisions issued by different competition law enforcement bodies, a practice that unfortunately is not that common in the literature about this area of law in these jurisdictions. Finally, a third and just as important contribution consists of identifying scores of decisions issued by the enforcement authority in Colombia during the 1960s and by the Mexican Supreme Court since the 1910s until 1990. The fact that this dissertation relies on different sources provides a solid foundation for the argument it advances and should be taken as a point of entry towards reconsidering how competition law is understood in this region.

These contributions highlight the relevance of this dissertation from two separate perspectives. On one hand, this dissertation is highly relevant for the study of competition law in Latin America for the reasons mentioned above, and in particular because it contrasts importantly with the existing literature on this issue. On the other, it is also highly relevant for the study of how ideas and power shape legal rules. In particular, we believe that by relying on field theory, this dissertation becomes highly relevant for lawyers and social scientists that want to approach Latin American economic regulation from an interdisciplinary perspective. In doing so, it bridges different theories and approaches that show the importance of studying law as a social fact. Overall, its relevance is mostly related with its substantive approaches and can also be of interest for its theoretical framework and data analyses.

IV.B. The Limitations of This Research

In completing the research that led to this dissertation we identified three particular limitations that prevented us from offering more profound insights about the origins and trajectories of the different CLRs we study. This has to do with the amplitude of the research, the sample of the countries we selected, and the availability of certain sources. We conclude by considering whether the lack of generalizability of our findings may constitute a limitation or not.

To begin with, our research aims to balance depth with breadth - getting to know a particular area of law very well in several countries. Also, we wanted to describe legal reforms and to address different time periods. Looking back at it, we can now see that this has been an ambitious and challenging project. Such an ambition can easily turn out to be a limitation if a proper balance is not struck between these different goals. In striving for this balance, we decided to exclude considerable amounts of information, some of which might be useful in future, more detailed research about each of the countries considered. While we are convinced that this dissertation strikes a good balance, we are aware that by aiming to address legal reforms and different periods of time we foreclosed the opportunity of delving deeper into each of the CLRs we address.

Originally, our research aimed to cover the jurisdictions we studied and four more countries - Argentina, Brazil, Peru and Venezuela. However, we decided to discard the last four because the volume of the data exceeded the time and capacity we had to complete this research on time. This decision came across as particularly important since we did not want to limit ourselves to a summary analysis of the enforcement activity taking place in all these States, but we also wanted to dive more into the details related to particular areas of law that we considered important, the interplay of different actors in the formation of the respective competition law projects. In the particular case of Brazil, we decided to exclude it also because of language barriers, and the depth of our analysis was not something that could be achieved by reading translations and reports of decisions and statutes. Even so, the three countries we worked with - Chile, Colombia and Mexico - are very interesting, as developments there influence other jurisdictions, and have more than enough issues to address in future research.

Just as well, our research aimed to look at all the areas of the CLRs we study here, that is, mergers, vertical and horizontal agreements, abuse of dominance, leniency and competition

advocacy. Partly this was motivated by the sheer curiosity of wanting to know why a country like Chile does not have a mandatory merger review regime while a country like Colombia does. However, the sheer volume of data necessary to understand the field dynamics of each of these regimes exceeds our research capacity. As we mentioned in the introduction, we decided to focus instead in one area of each of these regimes in order to understand it well enough and to trace its trajectories over time.

Finally, the fact that our sample consists of only three countries, and of a sub-set of the competition law activities that takes place in each one of them can be seen as a limitation for generalizing the findings and conclusions that we reach to the whole Continent. We could agree on this if we aimed to make such generalizations, but we do not. Our research was not done with the purpose of identifying elements that could be generalizable. We are actually skeptic about such generalizations, for they tend to disregard the particularities of the contexts that led to the legal rules studied in the first place. Instead, we believe that our analysis could be useful for individuals and policymakers in the three countries we focus on as well as in others more because of the discussions and reflections it provokes. We also believe that our framework could be of benefit for those researchers aiming to understand better the connections between ideas and power in Latin American law. In this sense, throughout we emphasize the importance of focusing on the ideas and individuals behind competition law enforcement in each of the different countries we study. Further research on the intellectual history of competition law in Latin America could benefit from the ideas and findings we present.

IV.C. Future Venues of Enquiry

In this dissertation we offer a particular perspective about the development of competition law in this region, knowing well in advance that it can be complemented or refuted by different lines of enquiries.

One particular line of enquiry that could be particularly useful relates with the empirical foundations of what we know about competition law enforcement before the 1990s. The absence of thorough archival research continues to be one of the biggest shortcomings of the literature about competition law in Latin America, both as a region as well as in each of the different countries this region is made up. Moreover, international organizations as well as local

competition law enforcement bodies would benefit from this research, for it would give them a better understanding of how the legal provisions they engage with came to be, and would have to rely less on semi-fictional accounts of their history. Such research could disprove the prevailing understandings, or could give them better foundations; in either case we would know more about competition law in Latin America than what we know now.

The literature about legal transplants, discussed in chapter 1, provides useful elements for the development of such research. By focusing on the interactions between legal rules and the different contexts in which they are enforced, future researchers may eventually "unpack" the processes through which US antitrust and EU competition law are influential in this region. Determining how their influence works, what does it amount to, and what are the political and economic elements underlying could be highly useful for further enquiries about CLRs in Latin America. Moreover, such a enquiry can be highly useful for determining the extent to which competition law rules depend on the epistemic power balances present in the contexts in which they are being enforced.

A second interesting line of enquiry has to do with the internal tensions that take place within the neoliberal competition law project regarding the conflict between efficiency and enforcement effectiveness over classic liberal rights like the inviolability of communications and due process. This issue is at the forefront of the concerns of the competition law community all over the world, and is a consequence of the transfer of leniency regimes across the world. Studying this tension in different jurisdictions, including the three ones we research here, would be of enormous practical utility as well as of academic interest. Moreover, such a research could also rely on the framework we advance here because it would facilitate showing how this conflict originated and how it has evolved over time.

A third interesting line of enquiry has to do with the activities of international organizations like the OECD, UNCTAD and the ICN in Latin America. Our discussion in chapter 8 provides a summary at best, and further research on the agendas of these organizations, their rivalries and collaborations would also be particularly useful. It could also provide further information about the trajectories of the different Latin Americans that work with these organizations, either permanently or sporadically. Also, it could explore the development of a regional network of individuals that are dedicated to provide counsel on competition law enforcement issues

regarding what type of ideas and institutions they promote, their intellectual itinerary, and other related issues.

* * *

In this dissertation we argued that there is a different way of understanding the origins and trajectories of competition law in Latin America by looking at the CLRs of Chile, Colombia and Mexico. Doing so involves exploring the different sources of data available from a critical perspective, and challenging well-established views about this area of law. We hope to provoke further reflections and enquiries about what competition law has been about in this region. Predicting what it can become in the future is a daunting task, the single most important question left unanswered in this dissertation.

Appendix 1

Competition law Developments in Colombia and in Mexico

Table 1

Competition law Decisions by *Superintendencia de Regulación Económica* (Colombia)

1961 - 1968

Decision #	Year	Topic	Parties	Outcome
005	1961	Price fixing	Cooperativa Nal. Del Cuero	Fine not specified (had to be assessed by the agency's council).
003	1962			Bylaws of cooperative are approved
001	1962	Merger	Productora Nal. De Automotores S.A. (PANAL) & Fábrica Col. De Automotores S.A.	Approved; PANAL is exempted
002	1962	Merger	Seguros Tequendama & Seguros la Unión and others	Approved; La Unión is considered exempted.
008	1962	Merger	Cristalería Peldar & Owen Illinois International	Merger approved
001	1963	Price fixing	Fábrica Nal. De Oxigeno y Productos Metálicos//Gases Industriales de Colombia	Possible agreement; orders oversight of pricing policy
011	1963	Price fixing		Amendment to Res. 01 of 1963 is not granted
017	1963	Price fixing	Distribuidora de Fosforos Ltda.	Amends Res. 10 of 1963.
019	1963	Merger	Seguros Tequendama & Sociedad Nal. De Seguros Albingia S.A.	Merger rejected for insufficient information and lack of clarity about the merger proposed
022	1963			Petition to repeal res. 019 of

				1963 denied
023	1963			Orders investigation about the legality of the bylaws of the merging firms
031	1963			Orders extending the information gathered to the *Superintendencia Bancaria*
006	1964			Petition to repeal res. 031 of 1963 denied
032	1964			Parties provide missing documents; merger cleared
021	1963	Abuse of dominance	Fábrica de Hilasas Vanylon	Repeal of Res. 03 of 1963 denied; amends a term,
007	1964			Orders termination of the investigation
(No number)	1965	Abuse of dominance	Film Board of Trade//Alvaro Sánchez and others	Denies complaint; denial of service is adequate when absence of payment
05	1966	Interlocking directorates	Compañía Colombiana de Cauchos El Sol	Order to replace board members that attend boards of other corporations involved in distribution
377	1966	Merger	Sedalana SA & Textiles La Esmeralda	Merger approved
571	1966	Merger	Seguros Tequendama SA & Aseguradora Mercantíl SA	Merger approved
108	1968	Merger	Banco de Bogotá & Banco de Los Andes	Merger approved
145	1968	Merger	Ladrillera Santa Fe Ltda. & Empresa Ladrillera de Soacha	Merger approved

Table 2

Laws and Bylaws Developing Article 28 of the 1917 Mexican Constitution

Laws	Title	Bylaws	Title
Date (dd/mm/yy)		**Date (dd/mm/yy)**	
28/06/26	Ley reglamentaria del articulo 28 constitucional	31/12/26	Reglamento de la ley reglamentaria del articulo 28 constitucional
24/08/31	Ley orgánica del articulo 28 constitucional, relativa a monopolios	19/12/31	Reglamento de la ley orgánica del articulo 28 constitucional
31/08/34	Ley orgánica del articulo 28 constitucional en materia de monopolios	01/02/36	Decreto que reglamenta el otorgamiento de las autorizaciones a que se refiere la fracción II del artículo 4 de la Ley Orgánica del Artículo 28 Constitucional
		12/08/38	Reglamento de las fracciones IV y V del artículo 5º de la Ley Orgánica del Artículo 28 Constitucional
		07/01/42	Reglamento del artículo 15 de la Ley orgánica del artículo 28 constitucional en materia de monopolios.
		21/05/42	Reglamento de la fracción II del artículo 7 de la Ley orgánica del artículo 28 constitucional en materia de monopolios
30/12/50	Ley sobre atribuciones del ejecutivo federal en materia económica	04/01/51	Decreto que declara comprendidas en el artículo 1º de la Ley sobre atribuciones del Ejecutivo Federal en materia económica las mercancías que en el mismo se especifican.
		10/01/51	Reglamento de los Artículos 2; 3; 4; 8; 11; 13; 14 y 16 a 20 de la Ley sobre atribuciones del ejecutivo federal en materia económica.

		26/01/51	Reglamento para los comités especiales a que se refiere el artículo 22 del Reglamento de la Ley sobre atribuciones del ejecutivo federal en materia económica.
		21/02/51	Reglamento de los Comités de Precios y Distribución.
		03/10/74	Decreto que regula los precios de diversas mercancías.
		24/09/76	Reglamento para la fijación de precios a los productos de importación.
		21/10/77	Decreto que reforma el Reglamento de los Artículos 2o., 3o., 4o., 8o., 11, 13, 14 y 16 a 20 de la Ley sobre Atribuciones del Ejecutivo Federal en Materia Económica. (Corrected on 25/10/77)
		24/02/82	Decreto que declara comprendidas en el artículo 1º de la Ley sobre atribuciones del Ejecutivo Federal en materia económica las mercancías que se indican.
		30/12/82	Decreto que declara comprendidas en el artículo 1º de la Ley sobre atribuciones del Ejecutivo Federal en materia económica, las mercancías que se indican.

Table 3

Mexican Supreme Court Decisions Regarding Article 28 of the 1917 Constitution (1917 - 1990)[848]

	Year	Registration No.	Section of the Court	Period	Volume	Page	Procedure
1	1918	81154	Pleno	5th	II	695	Amparo admtvo
2	1919	289587	Pleno		IV	303	Amparo admtvo. en revisión
3	1928	280607	Pleno		XXXIV	499	Amparo admtvo. en revisión
4	1931	337625	2nd		XXXI	888	Amparo admtvo. en revisión
5	1932	337262	1st		XXXIV	2745	Amparo penal
6	1934	809441	2nd		XL	3479	Amparo admtvo. en revisión
7	1934	336264	2nd		XLI	2277	Amparo admtvo. en revisión
8	1934	336168	2nd		XLI	426	Amparo admtvo. en revisión
9	1934	336083	2nd		XLII	2477	Amparo admtvo. en revisión
10	1935	312692	Pleno		XLIII	2761	Review of criminal decision
11	1935	335916	2nd		XLIII	2586	Amparo admtvo. en revisión
12	1935	335901	2nd		XLIII	2237	Amparo admtvo. en revisión
13	1935	335900	2nd		XLIII	2144	Amparo admtvo. en revisión
14	1935	335836	2nd		XLIII	782	Amparo admtvo. en revisión
15	1935	335807	2nd		XLIII	180	Amparo

[848] These were the results obtained from combining the original results of two searches in the database of the Mexican Supreme Court based on the keywords “libre competencia” and “monopolio”.

							admtvo. en revisión
16	1935	33570	1st		XLIV	4032	Incidente de suspensión
17	1935	335605	2nd		XLIV	2024	Amparo admtvo. en revisión
18	1935	335338	2nd		XLV	3456	Amparo admtvo. en revisión
19	1935	334980	2nd		XLVI	2777	Amparo
20	1936	327792	2nd		LXX	4649	Amparo admtvo. en revisión
21	1936	334321	2nd		XLVIII	2267	Amparo admtvo. en revisión
22	1936	334026	2nd		XLIX	1234	Amparo admtvo. en revisión
23	1936	333616	2nd		L	752	Amparo admtvo. en revisión
24	1937	333358	2nd		LII	1716	Amparo admtvo. en revisión
25	1937	332803	2nd		LII	2572	Amparo admtvo. en revisión
26	1937	331863	2nd		LV	1166	Amparo admtvo. en revisión
27	1938	331003	2nd		LVIII	3889	Amparos admtvo. Acumulados
28	1938	331111	2nd		LVII	818	Amparo admtvo.
29	1938	330773	2nd		LVIII	802	Amparo admtvo. en revisión
30	1939	330657	2nd		LIX	2861	Amparo admtvo. en revisión
31	1939	330387	2nd		LX	2588	Amparo admtvo. en revisión
32	1939	330056	2nd		LXI	2914	Amparo admtvo. en revisión
33	1939	329830	2nd		LXII	3029	Amparo admtvo. en

							revisión
34	1940	329020	2nd		LXV	2563	Amparo admtvo. en revisión
35	1941	327590	2nd		LXX	1386	Amparo admtvo. en revisión
36	1942	326755	2nd		LXXII	3236	Amparo admtvo. en revisión
37	1942	326385	2nd		LXXIII	6614	Amparo admtvo. en revisión
38	1942	326037	2nd		LXIII	1386	Amparo administrativo directo
39	1942	325641	2nd		LXXIV	1123	Amparo admtvo. en revisión
40	1942	325638	2nd		LXXIV	1107	Amparo admtvo. en revisión
41	1943	325387	2nd		LXXV	5841	Amparo admtvo. en revisión
42	1943	324426	2nd		LXXVII	1069	Amparo admtvo. en revisión
43	1943	324349	2nd		LXXVIII	4405	Amparo admtvo. en revisión
44	1944	323938	2nd		LXXIX	3038	Amparo admtvo. en revisión
45	1944	323916	2nd		LXXIX	2673	Amparo admtvo. en revisión
46	1944	374336	2nd		LXXIX	36	Amparo en materia de trabajo
47	1945	373251	2nd		LXXXIII	3878	Amparo directo en materia de trabajo
48	1946	322051	2nd		LXXXVIII	2863	Amparo admtvo. en revisión
49	1947	321156	2nd		XCI	1220	Amparo admtvo. en revisión
50	1948	302300	1st		XCV	537	Amparo penal

51	1948	806171	2nd		XCVI	1931	Amparo admtvo. en revisión
52	1948	805809	2nd		XCVIII	1381	Amparo admtvo. en revisión
53	1949	301319	1st		XCIV	1543	Amparo penal directo
54	1951	386340	Auxiliary		CVIII	1655	Amparo civil directo
55	1952	319068	2nd		CXI	978	Amparo admtvo. en revisión
56	1953	296062	1st		CXX	2182	Amparo penal directo
57	1953	804945	4th		CXVII	998	Amparo en revisión en materia de trabajo
58	1954	240793	3rd		CXXI	2163	Amparo civil directo
59	1955	366670	4th		CXXVI	209	Amparo en revisión
60	1955	803953	2nd		CXXIII	45	Amparo admtvo. en revisión
61	1956	316289	2nd		CXXVIII	10	Amparo en revisión
62	1958	268610	2nd	6a epoca	XII, 3d part	103	Amparo en revisión
63	1961	804108	Pleno		LIII, 1st part	157	Amparo en revisión
64	1965	257746	Pleno		CI, 1st part	33	Amparo en revisión
65	1967	803549	Pleno		CXXIV, 1st part	13	Amparo en revisión
66	1968	805876	Pleno		CXXXIII	123	Amparo en revisión
67	1969	239190	2nd	7a epoca	XII, 3d part	75	revisión fiscal
68	1969	233840	Pleno		XII, 1st part	37	Amparo en revisión
69	1970	233825	Pleno		XIV, 1st part	25	Amparo en revisión
70	1971	233536	Pleno		XXXV, 1st part	19	Amparo en revisión
71	1971	233559	Pleno		XXXIV, 1st part	31	Amparo en revisión

72	1972	233415	Pleno		44, 1st part	55	Amparo en revisión
73	1973	255761	Trib. Circ.		58, 6th part	41	Amparo en revisión
74	1973	233344	Pleno		49, 1st part	59	Amparo en revisión
75	1973	233280	Pleno		52, 1st part	34	Amparo en revisión
76	1973	233244	Pleno		55 1st part	37	Amparo en revisión
77	1973	233190	Pleno		59, 1st part	64	Amparo en revisión
78	1973	238540	2nd		66, 3rd part	47	Amparo en revisión
79	1974	25541	Trib. Circ.		67, 6th part	41	Amparo en revisión
80	1975	253318	Trib. Circ.		97 - 102, 6th part	384	Amparo en revisión
81	1975	254592	Trib. Circ.		78, 6th part	84	Amparo en revisión
82	1975	254889	Trib. Circ.		73, 6th part	62	Amparo en revisión
83	1975	254282	Trib. Circ.		81, 6th part	24	Amparo en revisión
84	1976	253397	Trib. Circ.		87, 6th part	98	Amparo en revisión
85	1977	253185	Trib. Circ.		97 - 102, 6th part	213	Amparo en revisión
86	1981	250793	Trib. Circ.		145 - 150, 6th part	69	Amparo directo
87	1981	251055	Trib. Circ.		145 - 150, 6th part	287	Juicio de amparo
88	1981	251033	Trib. Circ.		145 - 150, 6th part	270	Incidente en revisión
89	1983	249740	Trib. Circ.		169-174, 6th part	56	Queja, juicio de amparo
90	1983	249531	Trib. Circ.		175 - 180, 6th part	134	Amparo directo
91	1988	231108	Trib. Circ.	8a epoca	I, 2nd part - 1, Jan-Jun. 1988	170	Amparo en revisión
92	1988	231557	Trib. Circ.		I, 2nd part - 1, Jan-Jun. 1988	403	Amparo en revisión
93	1989	228654	Trib. Circ.		III, 2nd part, Jan – Jun. 1989	454	Amparo en revisión

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