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SYMPOSIUM

COMPETITION POLICY IN LATIN AMERICA

INTRODUCTION

*Ana Julia Jatar**

The decade of the 1980s witnessed a worldwide trend towards economic liberalization and the promotion of trade. Latin America was no exception and during this period of structural change, governments in the region substituted discretionary control over the economy with policies oriented to promote efficiency, competition, and exports. Also, after leaving behind the import substitution model, a variety of trade agreements were negotiated among the countries of the region in order to stimulate growth through exports.

This transition from protectionism to international competitiveness required a profound structural adjustment to encourage competition and efficiency. With that purpose, together with the lifting of trade barriers, new laws and regulations have been implemented to change business practices and to promote local rivalry. At the regional level, on the other hand, efforts have been made to harmonize trade policies and to develop common rules to organize business transactions among countries.

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Nevertheless, after a decade of efforts, the development of effective rules and solid institutions to support a market economy is still a major task for Latin American countries. In this context, competition policy has emerged as an important element in the achievement of these goals. Domestically, a healthy competition policy stimulates local rivalry among firms, a key element for efficiency enhancement and international competitiveness. Internationally, cooperation among countries in the enforcement of antitrust laws encourages the development of common rules to regulate trade across the region.

There are important lessons to derive from the experience of competition agencies in the region so far. The promotion of competition in Latin America has been a much more complicated task than simply implementing antitrust laws. It is a wider struggle to wrest market control from entrenched government-protected monopolists and to challenge traditional anticompetitive ethics from the business community. There are still important challenges ahead in overcoming the risks provided by continuous interest group pressures. In the context of regional economic integration, there are also new challenges confronting these institutions that need to be analyzed. Among others, determining the need for harmonizing policies, evaluating a common treatment for practices like international cartels or mergers, which may have a supranational impact. In this issue, the *Brooklyn Journal of International Law* addresses most of these elements while analyzing some of the achievements on competition policy matters in the region.

It is clear from the papers presented that the concept of antitrust, though not new in the region (some countries have laws dating back to 1919), had not been seriously enforced until the late 1980s when most countries reacted to their debt crisis by liberalizing their economies. Today, 10 countries have legislation and competition institutions on free competition: Argentina (1919, amended in 1946, 1980 and currently under review), Brazil, (1962, amended in 1990 and revised in 1994), Colombia (1959, amended in 1992), Costa Rica (1994), Chile (1959, revised in 1979), Jamaica (1993), Mexico (1934, replaced in 1992), Panama (1996), Peru (1991, modified in 1994 and 1996), and Venezuela (1991). Since the late 1980s, antitrust agencies in these countries have been promoting competition issues and changing business attitudes across the region with

different degrees of success.

Changes in attitudes are difficult to induce, but competition agencies in Latin America have been doing exactly that. They have been deregulating markets, promoting reforms in laws and institutions originally designed as barriers to entry. They have also strongly opposed protectionist policies originated in other government agencies while punishing anticompetitive behavior in both public and private enterprises. The task has been overwhelming for these newly-created institutions, which in many circumstances have been at the verge of collapse due to effective political pressure from powerful interest groups. In order to survive such pressures most agencies have pursued the strategy of developing strong jurisprudence in record time. This has sometimes forced the understaffed agencies to decide complicated technical antitrust matters too quickly. Unfortunately, these pressing situations have sometimes negatively affected the quality of the decisions.

In other words, owing to a long history of protectionism, the promotion of competition in these countries can not be circumscribed to antitrust enforcement, because they lack the business ethics based on competition that makes antitrust enforcement widely accepted in countries like the United States. Promoting competition in *rent-land* and *competition-land* are two completely different stories. In *rent-land*, for example, consumers have to be convinced that competition is better than price controls and producers have to be convinced that the government is not there to protect them from competitors. In *rent-land*, only other laws can change the institutional and legal structures created to support state dirigism, and they usually take years to be passed. In *rent-land*, most government regulations on economic issues have been designed as barriers to entry. In *rent-land*, policy makers have spent years promoting inward-looking strategies in small economies, which makes markets highly concentrated. In *rent-land*, corporations usually have tight control over their distribution channels. This characteristic hampers (after liberalization) the benefits of potential external competition. In *rent-land*, competition advocacy and deregulation can take more time from enforcers than punishing anticompetitive behaviors.

As Shanker Singham analyzes in his paper, in spite of their intrinsic differences, countries in the process of economic liberalization had two models to follow in their efforts to intro-

duce effective competition rules: the European model based on the provisions of Articles 85 and 86 of the Treaty of Rome, and the Sherman Act of the United States. And so they did. Eastern European countries followed the European model, while Latin American countries adopted rules from both systems, depending on their legal traditions or the influence of commercial partners. Mexico, for example, based its law on the United States' Sherman Act after joining NAFTA, while Venezuela adopted articles 85 and 86 of the Treaty of Rome.

There are important lessons to be derived from their experiences so far, and there are still important challenges on the horizon. The paper written by Gesner Oliveira, *Competition Policy in Brazil and MERCOSUR: Aspects of the Recent Experience*, presents a thorough analysis of Brazil's recent experience on competition policy enforcement. The article offers an overview of the different decisions in cartels, bid rigging, tied sales, abusive prices, predatory pricing and cartels. The article describes the Brazilian experience with all its complexity, making it an excellent example that is representative of the Latin American reality. CADE's (Brazil's competition agency) involvement in deregulation, competition advocacy, privatization, and regulation of natural monopolies' policies are a good example of the variety of policy issues Latin American agencies are involved with.

Some of the lessons after a decade of antitrust enforcement in the region are the following: first, a strong and transparent competition policy is a good signaling device for foreign investment, because it guarantees clear rules and a level playing field for the business community. Second, the objective followed by most agencies has been consumer welfare, and not the defense of smaller competitors. Third, per se rules to punish hard core cartel behavior has worked better than the rule of reason. Fourth, vertical agreements, on the other hand, are very rarely punished. Fifth, there are mixed feelings on merger control. Some countries like Peru prefer not to regulate mergers, while others like Venezuela and Brazil have been very active in that area. Sixth, distribution channel control by dominant firms continues to be a headache for competition agencies. For this reason, vertical mergers reducing barriers to entry in distribution are often seen with good eyes by the agencies by enforcers who have kept in mind that more than 50% of the direct foreign investment in the region comes through

mergers. Seventh, competition advocacy efforts have absorbed much more time and resources than initially expected. The lessons are many, and the challenges are more.

What are the challenges? What is the best set of rules for the countries in the region? When and how should per se criteria or rule of reason be used? What kind of institutions should be responsible for enforcing the laws? What degree of independence must they have? What is the role of competition policy and antitrust enforcement within a process of trade liberalization and, more specifically, in the creation of a free trade area? What are the policy priorities when enforcing supranational regulations? What are the objectives?

On these important questions, the papers presented in this issue of the *Brooklyn Journal of International Law* are extremely useful and enlightening. With theoretical insights and practical advice, these papers provide the elements for thinking about the challenges in a variety of ways.

José Tavares de Araujo, Jr. and Luis Tineo evaluate the elements that make harmonization desirable for the promotion of a free trade area. In their analysis of the MERCOSUR case, they argue that the recent MERCOSUR protocol on competition policy constitutes a "new driving force" towards the conclusion of the ongoing economic reforms in the member countries. They also argue that the MERCOSUR experience will affect the debate about antitrust issues in other forums, such as the FTAA and the WTO.

In his paper, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, Shanker Singham compares European and U.S. antitrust laws, analyzes the philosophical foundations of both, and stresses the perils of the "wholesale adoption" by emerging economies of the provisions of one or the other. The paper surveys the current competition regimes in different countries in Latin American and evaluates whether a mixed "hybrid" system would be more suitable for them. Mr. Singham also provides an interesting discussion on how to approach not only the implementation of antitrust policies in individual countries, but also incorporation of the necessary elements to evaluate the economic objectives at a supranational level.

I am sure that this timely issue of the *Brooklyn Journal of International Law* on competition policy in Latin America will contribute towards a better understanding of antitrust in the region and will also increase the quality of the debate of experts on the subject.