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Antitrust in Latin America: Regulating Government and Business

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ANTITRUST IN LATIN AMERICA: REGULATING GOVERNMENT AND BUSINESS*

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I. INTRODUCTION

In recent years, many Latin American countries have instituted privatization and deregulation policies as part of a major structural change from an active industrial policy to a market economy.[1] Under the market system, each individual or firm may buy and sell freely, with the government enforcing property rights.[2] The competition between numerous individuals and firms, all acting in their own best interest, ensures that the market will offer the combination of goods and services most valued by consumers.[3] As these countries move towards a free market system,

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1. Several authors have chronicled the movement towards privatization of state-owned enterprises. *See, e.g.*, L. GRAY COWAN, PRIVATIZATION IN THE DEVELOPING WORLD (1990); AGENCY FOR INTERNATIONAL DEVELOPMENT, PRIVATIZATION AND DEVELOPMENT (Steve H. Hanke ed., 1987); PIERRE GUISLAIN, DIVESTITURE OF STATE ENTERPRISES: AN OVERVIEW OF THE LEGAL FRAMEWORK (World Bank Tech. Paper No. 186, 1992); CHARLES VUYLSTEKE, TECHNIQUES OF PRIVATIZATION OF STATE-OWNED ENTERPRISES (World Bank Tech. Paper No. 88, 1988); Albert Fishlow, *The Latin American State*, J. ECON. PERSP., Summer 1990, at 61.

2. Adam Smith noted that an optimal government has three functions: (1) It provides for the national defense; (2) it administers justice; and (3) it erects and maintains public works and institutions. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 651 (Edwin Cannan et al. eds., The Modern Library 1937) (1776). This third duty foreshadows the concept of a public good, defined as a noncompetitive (consumption by one does not preclude use by others) and nonexclusive (once produced for one, the product is available to all) product. *Id.* Given that public goods are noncompetitive in consumption and nonexclusive in production, inducing a market economy to produce an optimal amount of public goods is difficult. Thus, efficiency may suggest that the government produce goods which have a strong "public" characteristic.

3. The concept of market failure describes situations in which the market fails to generate the optimal result. Such failures, however, can often be traced to an inability to set up the foundations of a market system. For example, pollution occurs when the market system fails to assign a property right to the air, water, or land. If everyone owns the air, economic decisions are based on a zero price for clean air. Thus, air becomes polluted and often the market is blamed for the failure of the property rights system. One can argue that the gov-

however, they become increasingly concerned with monopolization.[4] If a single entity captures an entire industry, monopoly could replace state control and thus stifle the benefits of competition.[5] Antitrust policy is a useful method of protecting the development of a market economy by preventing certain forms of noncompetitive behavior.

This Article presents an overview of the antitrust policies employed by Latin American countries and evaluates a number of possible antitrust regulations. Section II discusses the historical development of antitrust law in Latin America, introduces the market and dominance theories of antitrust regulation, and describes the antitrust policies employed by Latin American countries. Section III presents a more detailed discussion of these antitrust policies. It begins by describing advocacy programs and suggests that they may be an effective method of ensuring that government regulations do not unduly burden competition. Next, Section III describes the difficulties of defining an antitrust market, a necessary step for implementing antitrust policy. It then explores anticompetitive tactics: monopolization evolves as the major antitrust concern due to surreptitious conduct, such as price fixing agreements, predatory actions that directly eliminate rivals, and mergers that create market power. In each situation, branches of the government may also create barriers to new competition. Thus, the optimal antitrust policy must control monopolistic practices at both the market and government levels.

This Article also discusses the anti-competitive and efficiency explanations for various horizontal restraints, vertical agreements, and price discrimination schemes. Active antitrust enforcement in these areas is likely to be costly and of questionable benefit to Latin American economies. This paper concludes by arguing that Latin American countries need not choose between the market power and dominance approaches to antitrust policy, but should consider a hybrid policy that focuses only on monopoly.

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ernment's obligation to administer justice includes assigning property rights as technical change creates markets for previously ignored resources. For a more detailed discussing of this type of market failure, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

4. For example, in discussing the economic reforms occurring in Eastern Europe and Latin America, an executive report of the U.S. government noted a need for antitrust laws to control price fixing and mergers that result in monopolies. 1991 PRES. ECON. REP. 210.

5. A monopolist acts in its own self-interest and would thus, restrict output and increase the price to earn higher profits.

II. Antitrust in Latin America

A. *General Context*

In virtually all Latin American countries, antitrust policies must be implemented on top of a history of the state's own monopolistic practices, such as government ownership of crucial industries, price controls, and import-substitution.[6]

1. Government Ownership

In many Latin American countries, nationalization has long been a standard response to perceived economic problems.[7] For example, government ownership, initially reserved for natural resource industries, such as oil (Mexico, Venezuela) and mining (Brazil, Chile), has expanded to airlines (Mexico, Argentina, Bolivia), banking and insurance operations (Mexico, El Salvador), telephone industries (Argentina), and even luxury hotels (El Salvador).[8]

Not surprisingly, these nationalized industries perform poorly, leaving the government saddled with debt and obsolete businesses.[9] Recently, governments seeking to shed operations that the private sector can run more efficiently have implemented a process of privatization—selling government-owned enterprises to private

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6. *See* Lawrence F. Ebb, *Transfer of Foreign Technology in Latin America: The Birth of Antitrust Law?*, 43 FORDHAM L. REV. 719 (1974-75); The UNCTAD Secretariat, *Control of Restrictive Business Practices in Latin America*, 21 ANTITRUST BULL. 137 (1976); Eduardo White, *El control del poder económico en América Latin—Política y legislación*, 7 DERECHO DE LA INTEGRACION; REVISTA JURÍDICA LATINOAMERICANA [REV. JUR. LATINAM.] 13 (1974); Eduardo White, *La legislación antimonópolica y el control del poder económico en América Latina: recientes tendencias*, 11 REV. JUR. LATINAM. 35 (1978) [hereinafter White, *La legislación*].

7. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989) [hereinafter DE SOTO, THE OTHER PATH]; Fishlow, *supra* note 1, at 62-66; Anne O. Krueger, *Government Failures in Development*, J. ECON. PERSP., Summer 1990, at 9 [hereinafter Krueger, *Government Failures*].

8. *Latin America*, BUS. INT'L, Jan. 8, 1990, at 11-12; *Privatisation in Latin America: Going, going . . .*, ECONOMIST, Mar. 23-29, 1991, at 80-82.

9. P.T. Bauer & A.A. Walters, *The State of Economics*, 18 J.L. & ECON. 1 (1975); Hernando de Soto, *What's Wrong with Latin American Economies?*, REASON, Oct. 1989, at 38; Krueger, *Government Failures*, *supra* note 7, at 10-13. Philip Swan noted that "heavy public spending programs have meant sizeable government budget deficits" and that common policy responses included "overvalued exchange rates; trade policies biased against exports; and domestic policies biased against the agricultural sector." Philip L. Swan, *Economic Reform in Latin America*, BUS. ECON., Apr. 1992, at 18, 18-19.

interests.[10] Efforts in Chile and Mexico have succeeded in attracting local and foreign private capital and in integrating their markets into the world economic system.[11] For example, the government in Chile sells stock at preannounced dates, encourages broad-based ownership of private pension funds, and induces strong foreign bank involvement via debt swaps.[12] Mexico has developed a system of competitive bidding in which private companies submit sealed bids to a government commission.[13] Companies wishing to invest may also use debt-equity swaps in certain circumstances.[14] Overall, the privatization of state enterprises fosters a market economy, generates tax revenue, and eliminates subsidies to further reduce government deficits.[15]

2. Price Controls

In non-state-owned industries, governments have played a less direct, but nevertheless disruptive, role by fixing prices of certain products. Generally, governments introduce price controls to pro-

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10. Among the reasons for the failure of state-owned enterprises in the developing world, analysts list the "staggering burden" of subsidy costs, the inability of government to monitor the performance of state enterprises, inexperienced management, and unnecessary constraints that management places on the enterprises. REBECCA CANDOY-SEKSE, TECHNIQUES OF PRIVATIZATION OF STATE-OWNED ENTERPRISES (World Bank Tech. Paper No. 90, 1988); COWAN, *supra* note 1, at 3-4; *see* Jeremy Main, *How Latin America is Opening Up*, FORTUNE, Apr. 8, 1991, at 84 (discussing how "newly elected governments . . . have thrust their businessmen into the free market, cutting tariffs, welcoming foreign capital, [and] unloading hopelessly unprofitable state corporations"); *see also* Stephen Baker et al., *Latin America: The Big Move to Free Markets*, BUS. WK., June 15, 1992, at 50 (noting that in order to "modernize, Latin America must privatize, crush inflation, slash tariffs, open the doors to foreign investment, and sign free-trade pacts with neighbors and eventually with the [United States]"); INSTITUTE OF INTERNATIONAL FINANCE, FOSTERING FOREIGN DIRECT INVESTMENT IN LATIN AMERICA (1990) [hereinafter FOREIGN DIRECT INVESTMENT]. The promotion of foreign direct investment, or investment associated with foreign ownership and management control, must constitute a major part of any strategy to rekindle sustained economic development in Latin America. *Id.*

11. Economist Intelligence Unit, *Chile*, *in* EIU WORLD OUTLOOK (1991) [hereinafter WORLD OUTLOOK: CHILE]; Economist Intelligence Unit, *Mexico*, *in* EIU WORLD OUTLOOK (1991) [hereinafter WORLD OUTLOOK: MEXICO].

12. *A Decade of Privatization in Latin America Offers Lessons to MNCs*, BUS. INT'L, Feb. 18, 1991, at 59 [hereinafter *Decade of Privatization*]; WORLD OUTLOOK: CHILE, *supra* note 11, at 30-38; Swan, *supra* note 9, at 20.

13. *Decade of Privatization*, *supra* note 12; WORLD OUTLOOK: MEXICO, *supra* note 11.

14. *See* FOREIGN DIRECT INVESTMENT, *supra* note 10, at 3-4; Thomas J. Trebat, *Resolving the Latin American Debt Crisis: Prospects for the 1990s*, Q. REV. ECON. & BUS., Autumn 1991, at 13; Swan, *supra* note 9, at 21-22.

15. Milton Friedman, *Using the Market for Social Development*, 8 CATO J. 567, 572-73 (1989); JOHN VICKERS & GEORGE YARROW, PRIVATIZATION: AN ECONOMIC ANALYSIS (1988); VUYLSTEKE, *supra* note 1, at 41-42.

tect selected groups. For example, some Latin American countries protect their urban poor with controls on food and other necessities, while others protect the rich by limiting the price of gasoline.[16] Sometimes, governments protect selected industries by controlling prices of financial capital and raw materials.[17]

Imposing these policies on competitive markets distorts incentives by breaking the link between the marginal value and cost of a product.[18] Moreover, price controls can stifle innovation by preventing investors from earning a sufficient return on investment. Under international pressure, various governments have recently lifted price control systems and allowed market economies to develop. For example, Venezuela, Costa Rica, and Ecuador have begun revising prices structures for agricultural goods and energy. Colombia also has undertaken a major price reform.[19] Abolishing price controls may appear to have a negative effect at the outset, as prices rise to compensate for years of artificially-depressed levels. Eliminating price distortions, however, will cause competition among producers to increase and will ensure that prices do not exceed costs.

3. Import Substitution

In addition to the direct intervention of nationalization and price controls, Latin American governments tended to follow an "import-substitution" industrial development strategy. Generally, this involved erecting tariff barriers or quotas on imports, followed by the establishment of a local industry to produce the goods.[20]

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16. RAMGOPAL AGARWALA, PRICE DISTORTIONS AND GROWTH IN DEVELOPING COUNTRIES (World Bank Staff Working Papers No. 575, 1983).

17. Werner Baer, *Social Aspects of Latin American Inflation*, Q. REV. ECON. & BUS., Autumn 1991, at 45.

18. For example, price controls on food suppress production by the rural poor because the low prices discourage work effort; rent controls prevent housing development to serve the new migrants to the cities; low rents make housing investments unprofitable; and interest rate controls stifle venture capital because the low return induces capitalists to send their funds abroad.

19. 1991 WORLD BANK ANN. REP. 133-140.

20. In the 1950s, Raul Prebisch and H.W. Singer argued that the declining terms of trade resulted in a long-term transfer of income from developing to developed countries. *See* U.N. COMMISSION FOR LATIN AMERICA, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS (1950) (essay prepared by Raul Prebisch); H.W. Singer, *The Distribution of Gains Between Borrowing and Investing Countries*, AM. ECON. REV., May 1950, at 473. Singer supported policies to develop and protect manufacturing industries of less developed countries (LDCs) in order to raise wages and prevent the overexpansion of the primary

Typically, the governments gave foreign companies investment incentives to participate in the development process.[21] In the long run, the import-substitution policy not only cut off access to efficiently-produced manufactured goods from the developed world, but often limited the size of the national market by precluding regional trade.[22]

Trade restrictions induced various Latin American economies to over-diversify and created small, inefficient corporations.[23] Monopoly and oligopoly market structures to evolved as Latin America broke up into small markets. Without competition, local economies failed to perform. Small firms could take advantage of the lack of competition to enter at an inefficient scale and sell under the artificial, but state supported, price umbrella.

Recently, the consensus for import-substitution has all but evaporated. Chile led the way in instituting substantial trade reforms.[24] By 1979, Chile had eliminated its quotas and established a uniform tariff rate of ten percent.[25] Mexico and Bolivia followed Chile's lead in 1985.[26] Mexico liberalized its quotas and reduced its tariffs to an average of eleven percent in 1988.[27] Bolivia overhauled its trade regime and eliminated its quotas,[28] setting tariff rates at ten percent for capital goods and seventeen percent for other products.[29] By late 1989 and early 1990, Brazil, Peru, and Venezuela announced comprehensive import liberalization and trade reforms.[30] These Latin American structural reforms should set a foundation for the growth of the a market economy.

These liberalization programs are not without their critics. A region cannot undertake a major economic restructuring without

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export sector.

21. Anne O. Krueger, *Import Substitution Versus Export Promotion*, FIN. & DEV., June 1985, at 20 [hereinafter Krueger, *Import Substitution*].

22. *See* MOISÉS NAÍM, LAS EMPRESAS VENEZOLANAS: SU GERENCIA (2d ed. 1989) (a collection of essays by Venezuelan scholars on microeconomic problems endemic to Latin American economies).

23. Rudiger Dornbusch, *The Case for Trade Liberalization in Developing Countries*, J. ECON. PERSP., Winter 1992, at 69.

24. Dani Rodrik, *The Limits of Trade Policy Reform in Developing Countries*, J. ECON. PERSP., Winter 1992, at 87, 88.

25. *Id.* (except for automobiles).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

raising serious concerns from those who believe that the proposed change will make them much worse off. Monopolization represents one such concern. It would be a mistake for Latin American countries to allow private monopolies to replace the state in its control of the market. If a small group in society gains control of key resources, the group's leaders can enrich themselves at the expense of others by restricting output and increasing prices in the controlled sectors. Antitrust policy, however, may control monopolization and preserve the benefits of competition for society.

B. *History of Antitrust Policy in Latin America*

The basic concept of antitrust is not new to Latin America. In 1923 Argentina enacted the region's first official antitrust policy,[31] and in 1934, Mexico passed an antimonopoly law.[32] Chile imposed an antitrust law in 1959.[33] Colombia and Brazil's antitrust traditions also date back thirty years.[34]

In contrast to this legislative history, antitrust in Latin America has a sparse enforcement record. With the exception of Chile, no country has actively enforced these laws. One could conclude from the enforcement records that most of these countries do

31. Represión de los trusts [Antitrust], Law 11,210 of Aug. 24, 1923 (Arg.), *translated in* LAWS OF ARGENTINA IN ENGLISH 899 (J.A. de Marval & E. de Marval trans., 1933), *repealed by* Represión de monopolios, Law 12,906 of Dec. 12, 1946, CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS ANOTADOS [C.C.L.C.A.], at 1071 (2d ed. 1970), *repealed by* Ley de defensa de la compentencia, Law 22,262 of Aug. 1, 1980, ANALES DE LEGISLACIÓN ARGENTINA [A.D.L.A.], at 2521 (1980) [hereinafter Argentine Law 22,262].

32. Ley organica del articulo 28 constitucional en materia de monopolios [Organic Law of Monopolies], DIARIO OFICIAL DE LA FEDERACIÓN [D.O.], Aug. 31, 1934, *amended by* Decree of Dec. 27, 1979, D.O., Jan. 8, 1980, *repealed and replaced by* Ley federal de compentencia económica [Federal Law of Economic Competition], D.O., Dec. 24, 1992 (Mex.) [hereinafter Mexican Competition Law].

33. Law No. 13,305, tit. V, arts. 172-182, DIARIO OFICIAL [D.O.], Apr. 6, 1959, *amended by* Law Decree No. 211 of 1973, D.O., Dec. 22, 1973, *amended by* Decree No. 511 of Sep. 17, 1980, D.O., Oct. 27, 1980 (Chile) [hereinafter Chilean Decree 511].

34. *See* PRACTICAS COMERCIALES RESTRICTIVAS, NUEVO CÓDIGO DE COMERCIO [NUEVO CÓD. COM.] arts. 7269-1 to 7299-4 (Colom.) (The new code of July-Sept. 1991 compiles Law 155 of Dec. 14, 1959; Law 3307 of Sept. 30, 1963; and Decree 1302 of June 1, 1964.); *see also* Lei que disciplina a repressão ao abruso do poder econômico, Law 4,137 of Sept. 10, 1962, 26 LEGISLACÃO FEDERAL E MARGINÁLIA 314 (1962) (Braz.) [hereinafter Brazilian Law 4,137]; Decree No. 52,025 of May 20, 1963, 203 Revista Forense [R.F.] 422 (1963) (Braz.) (approving the regulation of Brazilian Law 4,137); Decree No. 92,323 of Jan. 23, 1986, 293 R.F. 592 (1986) (Braz.) (approving the regulation of Brazilian Law 4,137); Law 8137 of Dec. 27, 1990, DIARIO OFICIAL [D.O.], Dec. 28, 1990 (Braz.) (crimes against tributary and economic order); Law 8158 of Jan. 8, 1991, D.O., Jan. 9, 1991 (Braz.) [hereinafter Brazilian Law 8158] (sets rules to protect competition).

not have organized antitrust policies.[35] This has partially resulted from import-substitution policies that encouraged oligopoly and monopoly market structures. Furthermore, rather than reserving antitrust laws to attack market power situations, governments have integrated them with price control policies to "protect" consumers against selected price increases.[36]

Recently, other Latin American nations have begun implementing antitrust policies. Peru passed a broad antitrust law in November 1991 that limits monopolistic and dominant firm behavior.[37] Venezuela followed in 1992 with regulations that likewise attack monopoly and dominance.[38] Argentina and Jamaica are considering revised antitrust laws,[39] while other countries are considering implementing antitrust policies in their constitutions.[40]

C. *Antitrust Policy in the Market Economy*

Simply stated, antitrust policy attempts to prevent monopolization and to preserve competition benefits for society. Anti-monopoly policies must proceed on two tracks: (1) limiting coordination between existing competitors; and (2) maintaining ease of entry for new competitors.[41]

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35. JULIAN O. VON KALINOWSKI, WORLD LAW OF COMPETITION—OVERVIEW § 1.21[2][b] (1987); White, *La legislación*, *supra* note 6, at 38-40.

36. UNCTAD Secretariat, *supra* note 6, at 139.

37. Law Decree No. 701 of July 11, 1991, [1991] NORMAS LEGALES 126 (Peru) [hereinafter Peruvian Law 701].

38. Ley para promover y proteger el ejercicio de la libre competencia, G.O. No. 34.880 of Jan. 13, 1992, GACETA LEGAL—RAMIREZ & GARAY, Jan. 15, 1992 (Venez.) [hereinafter Venezuelan Law 34,880].

39. Mark Dutz, Competition Law to Support Market-Oriented Reform: The Argentine Context (March 1992) (unpublished manuscript, on file with the *University of Miami Inter-American Law Review*); Enrique Szewach, *Desregulación y Monopolio*, AMBITO FINANCIERO (Buenos Aires, Arg.), Nov. 6, 1991, at 18; Competition Policy in Jamaica (Jan. 23, 1991) (unpublished manuscript on file with author).

40. For example, in accordance with article 110 of its constitution, El Salvador will enact a series of laws designed to protect consumers and deter monopolistic practices. *El Salvador Agreements: The Path to Peace*, U.N. Observer Mission in El Salvador (ONUSAL), at 82, U.N. Doc. DPI-1208 (1992).

41. That the United States has more experience in the first track has more to do with institutional structures than any explicit choice. The policy of the United States also includes lowering entry barriers through, for example, successful deregulatory and pro-entry policies in the transportation and communication industries. For a discussion of deregulation in transportation, see 1986 PRES. ECON. REP. 159. For an overview of deregulation in telecommunications, see 1982 PRES. ECON. REP. 164. The authors believe that the primary and secondary education markets still suffer under state monopolies. In the United States, local government offers primary and secondary educational services through a public school

For transitional economies, some residual regulations will exist that slow or prevent entry into certain sectors. Moreover, entrenched bureaucrats may attempt to justify their continued existence by accommodating special interests and shifting from direct to more subtle forms of regulation. These regulations can range from non-tariff import barriers to complex licensing requirements that deter domestic entry. While some regulations may be politically necessary, the antitrust office can serve as a public advocate for easy entry and relatively free trade.[42]

Analysts ground antitrust policy on two competing theories—market power and dominance. The United States enforces an antitrust policy based on market power, making illegal any activity that restricts competition and leads to higher consumer prices.[43] Market power theories can be justified with either monopoly or oligopoly considerations. The European Economic Community (EEC) and many member countries employ a dominance-based antitrust policy.[44] Dominance encompasses the ability of large firms to influence the commercial viability or opportunities of small rivals and trading partners.[45] Under a dominance policy, antitrust may protect the long-term interests of suppliers and competitors, rather than the short-term interests of consumers. Dominance policies, however, may allow the formation of large firms, which may lead to lower consumer prices because large firms can achieve economies of scale.

Both types of antitrust policy—market power and dominance—address the issue of monopolies.[46] A firm can monopolize a

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system at basically a zero price to parents. In effect, this has established an education monopoly by pricing well below cost. Of course, a little fringe competition exists as some consumers desire specialized educational services. Education reform plans offer all parents tuition vouchers that would be good at the school of the parent's choice. Such programs would break the government education monopoly and allow a competitive market to develop. *See generally* DAVID F. LINOWES, PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT (1988).

42. This Article labels all of these general policies as "advocacy" in later analysis.

43. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) [hereinafter BORK, ANTITRUST PARADOX]; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976) [hereinafter POSNER, ANTITRUST LAW]; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

44. *See generally* ROGER A. BONER & REINALD KRUEGER, THE BASICS OF ANTITRUST POLICY: A REVIEW OF TEN NATIONS AND THE EUROPEAN COMMUNITIES (World Bank Tech. Paper No. 160, 1991) (describing the contrast between market power and dominance-based antitrust policy).

45. *Id.* at 15.

46. Although both market power and dominance theories address structural and behav-

market by: (1) coordinating with its rivals (price fixing); (2) driving its rivals out of business (predation); or (3) acquiring its significant rivals (mergers). No single strategy requires the firm to obtain a perfect monopoly. A monopolist must simply eliminate sufficient competition to enable it to impose an anticompetitive price increase. While no clear lines exist, a cutoff at a ninety percent share of a properly-defined market is usually high enough, but a sixty percent share is often too low to establish a monopoly.[47]

Price fixing remains an antitrust concern because an agreement among competitors on price can injure consumers. Price-fixing agreements can monopolize a market simply by setting a price for all the competitors to charge, much like the firms may have done in the past with the government's blessing. Alternatively, an agreement can divide customers so that each firm obtains a monopoly in a market segment, such as a neighborhood, an end use, or a specific list of customers. Because such price fixing agreements undermine the market process and restrict consumer choice, they are a major concern for antitrust regulators.

Monopolization by predation usually involves specific unilateral actions that a firm undertakes to harm competitors. These actions are more difficult to identify than simple price-fixing because unilateral actions to disadvantage competitors often define competition. Thus, a competitive policy aimed at monopolization by predation must have a narrow focus to avoid harming the competitive process.

The final core policy involves mergers. Generally, firms should not accomplish through merger what the antitrust laws prohibit through bans on price-fixing and predation. Moreover, some argue that merger enforcement should reach transactions that significantly concentrate a market and facilitate oligopolistic pricing.[48] In oligopolies, the limited number of firms may choose not to compete and raise prices towards the monopoly levels. Others would suggest that oligopolistic pricing exists only in theory and therefore, requires no action.[49] Regardless of the merger policy, efficiencies

ioral concerns, market power analysis more commonly proscribes mergers and less commonly proscribes behavior.

47. BORK, ANTITRUST PARADOX, *supra* note 43, at 166.

48. *See, e.g., id.* at 199-216.

49. *See, e.g.*, Laurence E. Gesell & Martin T. Farris, *Antitrust Irrelevance in Air Transportation and the Re-Defining of Price Discrimination*, 57 J. AIR L. & COM. 173, 173-74 (1991).

should always be a consideration.

Antitrust concerns can go beyond price fixing, predation, and mergers. Competitors can enter into horizontal restraints constraining competition on various non-price aspects. Similarly, manufacturers can enter into vertical agreements with customers to limit product sales. Under special conditions, these agreements may facilitate monopolistic pricing. Firms can also use various forms of price discrimination, including tying,[50] to market their products. If the pricing scheme deters entry, the scheme may be anti-competitive. However, horizontal restraints, vertical agreements, and price discrimination often produce efficient and pro-competitive results.[51] Moreover, in comparison to the potential for direct monopolization, anti-competitive effects may be relatively small. Thus, while one cannot effectively argue that this behavior should always be legal, one can argue that it should not always be an enforcement priority.

D. *Overview of Antitrust Policies*

Table 1 presents an overview of the antitrust policies in twenty Latin American countries.[52] The first column lists the country with the year of the last amendment to the antitrust law in brackets.[53] If the country has never passed a law implementing policy, no year appears next to the name of the country. Column two of the table contains basic information about the structure of the antitrust laws. Almost two-thirds of the countries have antitrust provisions in their constitutions. These regulations usually amount to a general ban on monopoly pricing. A few countries, such as Venezuela and Peru, also have laws that further define the antitrust policy. Other countries, including Argentina and Guatemala, base their policies directly on law either as stand-alone legis-

50. A tying arrangement is one in which the seller agrees to sell a product on the condition that the buyer also agree to purchase an additional product. BLACK'S LAW DICTIONARY 1519 (6th ed. 1990).

51. *See generally* BORK, ANTITRUST PARADOX, *supra* note 43, at chs. 11, 13, 20.

52. For cites to antitrust policies in all twenty Latin American countries, see Appendix, *infra*. The table omits Jamaica because its British traditions differ from the Iberian heritage of Latin America. This difference is legally significant: Jamaica operates under a common law system and Latin America under a civil law system. Jamaica is currently considering an antitrust policy that would make price fixing and resale price maintenance illegal per se, tying and abuse (predation) illegal for dominant firms, and various other horizontal and vertical agreements illegal under a rule-of-reason.

53. The year appears without brackets if no change in policy has ever occurred.

lation or as part of the commercial code. A third type of law is an administrative decree. These laws represent government mandates that have become part of the country's legal structure. A number in parenthesis following the relevant abbreviation denotes the number of changes or modifications in the laws or decrees. For example, our data suggest that Chile has not changed its law but has amended the meaning of the law with two decrees.

The third column indicates whether the country's antitrust policy promotes price control by the government. As the table indicates, most Latin American governments have been involved in setting prices. The laws often create maximum resale price maintenance systems that define the prices at which controlled goods can trade. Such price controls may prevent monopoly pricing, but at the cost of limiting the market's ability to adjust. As previously discussed, Latin American countries have generally begun phasing out their price control systems.

The fourth column presents data on how the law enforcement process functions. Some countries allow more than one approach, while others allow only one type of enforcement activity. The courts are directly involved in judicial, civil, and criminal policies. The government brings the judicial cases, and private parties bring civil enforcement cases. The government alone enforces criminal law, which can lead to imprisonment of an antitrust violator. The administrative-judicial policy involves an initial administrative approach followed by judicial review, while an executive-judicial policy vests the control of antitrust in the executive branch with judicial review. Pure administrative policies appear to dispense with the court's ability to review the actions of the enforcement agency. Other policies involve either legislative action, in which the legislature takes the lead in law enforcement, or executive action, in which the executive branch controls policy directly. The final category, labeled federal, acts as a catch-all category when it is not clear how the antitrust laws are enforced.

The effectiveness of a regulatory policy depends, in part, upon the choice of an enforcement system. Although antitrust is a classic example of "public interest" regulation, the regulators may nonetheless be "captured" or co-opted by the targets of the regulation.[54] If the targets of the regulation obtain implicit control of the

54. TOWARDS A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980).

TABLE 1. OVERVIEW OF LATIN AMERICAN ANTITRUST POLICIES (see Appendix A)

Country	Law	Price Control	Enforcement	Per se	Rule of Reason	Dominance
Argentina [1980]	L[2]		EJ, C, Cr		PF, PM, HR	RPM, VR, T, PD
Bolivia	Con, L	PC	A, E, Cr, Le	PM, PF		
Brazil [1991]	Con, L[2], D	PC	AJ, E, C, Cr	PM, PF, T	VR	MM, HR, RPM, PD
Chile [1980]	L, D[1]		AJ, E, Cr		MM, PM, PF, VR, RPM	
Colombia [1964]	L, D[1]		A	MM, PM, PF, HR, VR		
Costa Rica	Con	PC	A, C, Le	PM		
Cuba*	Con	PC	F	PM		
Dominican Republic	Con, CC	PC	F, Cr	PM, PF, PD, T		
Ecuador	Con, D	PC	A, C			PM
El Salvador	Con	PC	F	PM		
Guatemala	CC	PC	A, C, Cr	PM, PD		
Haiti*	Con	PC	Le	PM		
Honduras	Con	PC	F	PM, PF		
Mexico [1992]	Con, L, D[3]	PC	E, A, Cr	PF	MM	PM, T, HR, RPM, VR
Nicaragua*	Con	PC	A	PM		
Panama	Con	PC	A, C	PM		
Paraguay	Con		F	PM		
Peru* [1991]	Con, L		A, Cr		PF, HR, VR	PM, PF, T
Uruguay	Con	PC	Le			
Venezuela [1992]	Con, L		AJ, C	MM, PM, PF, HR	RPM	VR, T, PD

Law

Con Constitution Law
CC Commercial Code
L Law
D Decree
PC Authority for Price Controls

Enforcement

A Administrative Enforcement
AJ Administrative with Judicial Review
J Judicial Enforcement
C Civil Suits
Cr Criminal Liability
Le Legislative
E Executive
EJ Executive with Judicial Review
F Federal Action

Policies

PF Price Fixing
PM Predation and Monopolization
MM Mergers to Monopoly
T Tying Arrangements
HR Horizontal Restraints
RPM Resale Price Maintenance
VR Vertical Restraints
PD Price Discrimination

* Denotes countries whose constitutions have changed.
Changes of Laws and Decrees are stated in brackets.

regulators, antitrust policies may not protect consumers from monopolistic pricing. On the other hand, if the antitrust agency remains insulated from political control by the executive and legislative branches of the government, the probability of capture is lowered.[55] There would also be less concern if courts could effectively review administrative decisions.

The table shows that a number of countries with active policies use administrative systems, many with judicial review, while others rely on government systems more at risk of capture. Venezuela probably has the best system, with an independent antitrust agency subject to judicial review.[56] Argentina and Chile have independent antitrust agencies, but they must obtain government concurrence on final orders.[57] Thus, while the possibility of capture exists, the potentially public nature of the actions clearly raises the cost of political interference. Brazil's agency appears to have an independent ability to litigate, but the Council's members still defer to the government.[58] In all of these countries, firms can appeal adverse decisions. In three other countries—Columbia, Peru, and Mexico—the government controls antitrust enforcement.[59] Only in criminal cases may parties appeal to the courts. Although this

55. In the United States, the Federal Trade Commission can enforce the laws independently of the executive branch, while the Department of Justice remains under the control of the President. In Germany, the Cartel Office acts independently, except for merger decisions which may be appealed to the Economics Ministry. Both countries allow for judicial review. For more details on these and other countries, see BONER & KRUEGER, *supra* note 44, at 22-27.

56. Venezuelan Law 34,880, *supra* note 38, arts. 19-29.

57. *See* Guillermo Cabanellas & Wolf Etzrodt, *The New Argentine Antitrust Law: Competition as an Economic Policy Instrument*, 17 J. WORLD TRADE L. 34, 40 (1983); Argentine Law 22,262, *supra* note 31, arts. 16, 19, 24, 26, 29, 30; VON KALINOWSKI, *supra* note 35, at § 7.03[20]; Chilean Decree 511, *supra* note 33, art. 6.

58. VON KALINOWSKI, *supra* note 35, at § 7.03[17]; Irecê de Azevedo Marques Trench & Juliana L.B. Viegas, *Brazil*, *in* SURVEY OF FOREIGN LAWS AND REGULATIONS AFFECTING INTERNATIONAL FRANCHISING 30-31 (Philip F. Zeidman ed., 2d ed. 1989) (prepared by A.B.A. Sec. of Antitrust Law). In 1991, Brazil charged the National Secretariat of Economic Rights, an office of the Ministry of Justice, with inspecting and prosecuting antitrust violations. *See* Brazilian Law 8158, *supra* note 34.

59. *See* NUEVO CÓD. COM. art 7294 (Colom.) (charging the Superintendency of Industry and Commerce, part of the Ministry of Economic Development, with enforcing the laws); Peruvian Law 701, *supra* note 37, arts. 7-14 (delegating from the National Congress to the Executive Branch the power to legislate against monopolistic practices that control and restrict free competition); Mexican Competition Law, *supra* note 32, art. 23 (describing the Federal Competition Commission as an autonomous administrative body in the Ministry of Trade and Industrial Promotion with responsibility and authority to investigate and combat monopolies, monopolistic practices, and trusts under the terms of the new law); *id.* art. 7 (providing that the federal executive is exclusively responsible for determining which goods and services may be subject to maximum prices).

structure seems more likely to suffer from regulatory capture, it may provide the only choice for countries without well-functioning institutions.

Civil enforcement also merits discussion. Some argue that when the government's antitrust resources are limited, policy must allow civil enforcement of the law. On the other hand, private litigants may use the antitrust laws to protect themselves against competitors. Unless a well-developed and experienced court system exists, civil suits would not be advisable. There are a few other approaches to reduce the risk of counterproductive litigation. First, one could follow the lead of Argentina, Brazil, and Venezuela and require all civil cases to be filed with the antitrust commission.[60] The government could then litigate significant cases to maximize the likelihood of an efficient outcome, certify other less significant, but reasonable, cases for private litigation, and close the unjustified ones without a chance for a trial.[61] To further control private litigation, countries could implement the "British rule" in which the unsuccessful party pays all legal fees and court costs.[62] Reformers in the United States have proposed this change to enhance American competitiveness.[63] Finally, courts could limit damages to actual injuries and court costs. To allow private parties to obtain multiple damages creates unnecessary incentives to litigate instead of engaging in competition in the marketplace.

E. *Per se, Rule-of-Reason, and Dominance Antitrust Laws*

The rest of the table classifies the antitrust laws into three categories: per se, rule-of-reason, and dominance. For each category, evidence must be gathered to demonstrate an actual violation of the law. Thus, all three types of antitrust policy require the enforcement agency or court to conduct detailed investigations of behavior. Additionally, the rule-of-reason and dominance standards

60. Argentine Law 22,262, *supra* 31, arts. 19, 24, 26, and 30; Brazilian Law 4,137, *supra* note 34, arts. 27, 28; Venezuelan Law 34,880, *supra* note 38, art. 32.

61. This approach would enable the enforcement agency to serve as a gatekeeper for litigation. Cases having a broad-based impact on the economy would be litigated by the government to economize resources so that other private parties would not have to bring similar cases. Private litigation would be allowed for marginal cases that would primarily affect only the parties involved in the dispute. Finally, weak cases would be closed to economize on transaction costs. It is unclear if Latin American enforcement agencies follow this approach.

62. *See* 1992 PRES. ECON. REP. 162.

63. *Id.*

require investigating the economic structure. By its very nature, the classification scheme is somewhat subjective. However, this paper tries to follow simple rules to minimize the potential for error.

Per se laws create an absolute ban on certain behavior.[64] Examples of such behavior include predation and price fixing in Bolivia, and mergers that result in monopolies in Venezuela. The enforcement agency or court need only determine whether the behavior occurred to find liability. In general, per se cases will require less enforcement effort than rule-of-reason or dominance cases.

Rule-of-reason laws require analysis beyond a simple finding of whether the behavior occurred. Conduct is illegal only if it has a net anti-competitive effect.[65] Thus, the enforcement agency or court must look at the effect of the behavior and balance the injuries with any potential benefits to evaluate liability. Rule-of-reason laws may have a much broader application than per se laws because liability depends on the specific facts. Examples include various horizontal monopoly concerns in Argentina, both horizontal and vertical issues in Peru, and resale price maintenance in Venezuela.

Finally, under the dominance concept, behavior is illegal only if: (1) a dominant firm performs it; and (2) the behavior injures a protected group of consumers or business associates.[66] Dominance

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64. *See* BORK, ANTITRUST PARADOX, *supra* note 43, at 18-19; Donald L. Beschle, *"What, Never? Well, Hardly Ever" : Strict Antitrust Scrutiny as an Alternative to per se Antitrust Illegality*, 3 HASTINGS L.J. 471 (1987); Robert H. Bork, *The Rule of Reason and the per se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966) [hereinafter Bork, *Rule of Reason*]; Wesley J. Liebeler, *1984 Economic Review of Antitrust Developments: Horizontal Restrictions, Efficiency, and the per se Rule*, 33 UCLA L. REV. 1019 (1986); Thomas A. Piraino, Jr., *Reconciling the per se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685 (1991).

65. *See* BORK, ANTITRUST PARADOX, *supra* note 43, at 33-41; *see also* Bork, *Rule of Reason*, *supra* note 64, 74 YALE L.J. at 801-805, 829-32; John R. Carter, *From Peckham to White: Economic Welfare and the Rule of Reason*, 25 ANTITRUST BULL. 275 (1980); Ernest Gellhorn & Teresa Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155 (1984-85); Keith Leffler, *Toward a Reasonable Rule of Reason: Comments*, 28 J.L. & ECON. 381 (1985); Piraino, *supra* note 64, at 689-91; Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977).

66. BONER & KRUEGER, *supra* note 44, at 15-18; Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986). The distinction between rule-of-reason and dominance can be confusing. For example, the Mexican prohibitions against predation, tying, horizontal restraints, and various vertical agreements can be interpreted as a rule-of-reason approach if the final regulations cover both coordinated and unilateral activities. *See*

policy has a narrower focus than the rule-of-reason approach in that it only applies to large firms, but has a broader focus in that it is easier to prove. Dominance is the standard for scrutinizing vertical restraints in Argentina, monopolization in Ecuador, non-price vertical restraints called tying, and price discrimination in Venezuela.

Latin American countries have civil code judicial systems in which the courts give more weight to written law and less weight to historical (common) law.[67] This difference causes no problems for per se regulations because courts need only decide if the action occurred to determine its legality. On the other hand, dominance requires the additional consideration of whether a dominant firm undertook the activity and whether the activity had an adverse effect.[68] In a common law system, the courts would issue decisions based on the interaction of the law and the related caselaw, and these decisions would serve as dominance guidelines. However, under the civil code, the law must be more specific.[69] Governments must write regulations to identify when a firm has a dominant position. The court would then apply the regulations and reach a judgment. For dominance situations, this would likely lead to prohibitions on certain activity by firms that fit the definition of dominance. Of course, rule-of-reason cases would become more complex because they would require case-by-case balancing.

Initially, Latin American governments could define a set of exclusionary practices, such as exclusive territories, exclusive dealing, resale price maintenance, tied sales, refusal to deal, and agreements not to compete. If a party undertakes any of these practices, the court could review a checklist of conditions to determine whether an antitrust violation had occurred.[70]

At a minimum, the checklist should include the following conditions. First, the challenged practice must be applicable to a substantial part of the market. Thus, the firm or firms employing the practice must have market power. Second, the potential for entry into the market from either foreign or domestic sources must be

Mexican Competition Law, *supra* note 32, art. 13.

67. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985).

68. Fox, *supra* note 66, at 985-987.

69. MERRYMAN, *supra* note 67, at 26-33.

70. An example of such a list can be found in Easterbrook, *supra* note 43, at 19-39. As Latin American countries write regulations, they will find such checklists useful.

such that it cannot eliminate the threat to competition. Third, the activity must relate to either the production or distribution of the product in question. This requirement eliminates the need to consider trivial restraints. Finally, in order to challenge a practice, one must show that the practice either causes anticompetitive effects or results in no increased efficiencies. If the first three factors are satisfied and the firm could not show increased efficiencies, the practice would be condemned. On the other hand, if the facts showed that the practice increased efficiencies and lead to lower consumer prices or higher quality, the challenger would need to prove that the practice caused adverse effects on competition. Though this final condition may be difficult to meet, applying the checklist is probably no more difficult than the rule-of-reason approach, which admittedly is a significant hurdle to plaintiffs in U.S. courts.[71]

The table shows greater activity of nominal antitrust policy in some countries than others.[72] For example, Venezuela and Chile have relatively well-developed antitrust laws, while most small Latin American countries tend to ignore antitrust considerations. In fact, the seven largest Latin American countries have significant antitrust laws, while the remaining smaller countries do not.[73] Of the relatively rich countries, only Uruguay and Costa Rica do not have broad antitrust laws. In general, countries with fully-developed laws tend to apply rule-of-reason or dominance considerations, while countries with a few or old proscriptions use per se rules. Venezuela is the exception, as its law applies all three approaches. One can argue that all the antitrust policies allow for exemptions, although the exemptions may prove as simple as decisions not to prosecute.

71. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980); Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777 (1989).

72. *See* Appendix A, *infra*.

73. Small countries usually have fewer national markets and can rely on international competition to preserve a competitive market structure. Thus, active antitrust would be a lesser priority in these countries.

III. Evaluation of Antitrust Principles and Policies

A. *Advocacy on Regulation*

One of the most under-appreciated aspects of antitrust policy is the antitrust agency's need to champion the free market system within the government. Although the modern world requires some regulations, governments should not expect to draft these regulations without attracting the attention of special interest groups. Special interest groups attempt to influence the regulation to obtain advantages for their constituents, almost always at a cost to society. This cost often involves regulations that deter or delay entry.[74] Even well-intentioned regulatory processes may create government directives that block or delay entry into markets, thus undermining the competitive market system.

Numerous government policies affect the ease of entry, some in obvious ways and others more subtly. In his book *The Other Path*, Hernando de Soto chronicled the steps necessary to open a small business in Peru.[75] He found it would take 289 days to open a small six-person garment shop in the capital, Lima.[76] Opening a legitimate business would require the approval of the City Council, Police Headquarters, the Peruvian Social Security Institute, and the Ministries of Industry, Labor, the Economy, and Health.[77] Similarly, gaining government approval for a privately-operated bus route would take twenty-seven months.[78] De Soto's analysis revealed that Peruvian state intervention in commercial activity raises the costs of private suppliers by an average of 11.3% and lowers profits by nearly three-fourths.

In addition to hurting small business, numerous government regulations in Latin America restrict imports from entering national markets. These laws prevent both large multinationals and export-oriented firms in neighboring countries from competing in the market. Other regulations create barriers to entry by treating existing market players more favorably than entrants.[79]

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74. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211 (1976); Richard A. Posner, *Taxation by Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 22 (1971); *see also* Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. & Mgmt. Sci. 3 (1971).

75. De Soto, The Other Path, *supra* note 7, at 131-188.

76. *Id.* at 134.

77. *Id.*

78. *Id.* at 146.

79. For example, the entire concept of government licensing determines who partici-

Advocacy programs in the United States exist at both the Antitrust Division of the Department of Justice and the Federal Trade Commission. Government economists and attorneys prepare comments on proposed policies of other federal and state government agencies. These comments bring the expertise of the staff, acquired through years of work on competition matters, to bear on regulatory questions of interest to other government agencies. This competition advocacy ensures that the relevant decision makers are exposed to the competitive consequences of their proposed actions.

In any economy, the antitrust agency can act as a useful watchdog to protect the market economy from excessive regulation. In effect, the antitrust agency should attempt to regulate bureaucracy and minimize the burden of government on society. Competition advocacy educates the populace and exposes the hidden costs of regulation, such as non-tariff barriers to trade. The antitrust agency can also foster growth by establishing free trade associations in Latin America.[80] By ensuring that government regulations do not create unnecessary impediments to entry, advocacy provides a useful complement to antitrust policy, especially in those countries whose citizens do not truly understand the market system.

B. *Market Definition*

Defining the market is a crucial step in antitrust enforcement.

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pates in a market. While the safety of consumers requires some regulation in areas such as the medical profession, it is difficult to argue that entry restrictions are necessary for the 800 different professions that currently require a license in at least one U.S. state. Countries that desire quality assurance could simply certify producers who meet certain standards and let the market decide if the additional qualifications are worth the cost. Absolute bans on entry are not easily justified. *See* CAROLYN COX & SUSAN FOSTER, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (Oct. 1990) (unpublished manuscript, on file with the Bureau of Economics, U.S. Federal Trade Commission).

80. *See* Manfred Caspari, *Competition and Regional Co-operation*, COMPETITION AND ECON. DEV. June 6, 1991, at 75; Luis José Diez-Canseco Nuñez, *Competition Law in the Andean Pact*, COMPETITION AND ECON. DEV., June 6, 1991, at 79; Luis José Diez-Canseco Nuñez, *Armonización de la legislación sobre trafico económico* (April 8, 1987) (unpublished manuscript, presented at the *Seminario Subregional Legislación de los Países Miembros del Acuerdo de Cartagena sobre Tráfico Económico*, Apr. 8-10, 1987 in Lima, Perú, in association with *La Junta del Acuerdo de Cartagena*) (on file with *University of Miami Inter-American Law Review*); Felipe Salazar Santos, *El Derecho del mercado en el grupo Andino* (Aug. 10, 1989) (unpublished manuscript, on file with *University of Miami Inter-American Law Review*) (Dr. Felipe Salazar Santos is associated with *La Junta del Acuerdo de Cartagena*).

Although policies, such as advocacy against entry restrictions and regulations against per se price fixing, can be implemented without reference to a market, most policies require the definition of an antitrust market.

Antitrust markets must be defined with respect to both consumers (demand-side) and producers (supply-side). From a demand perspective, the question concerns the magnitude of the customer response to a price increase. If a sufficient number of customers can shift to alternative products to prevent the product in question from being priced independently, then that product does not represent an antitrust market. In other words, the demand side of the market encompasses the consumers' realistic alternatives for the product in question. Theoretically, the elasticity of demand—the ratio of the percentage change in quantity demanded to the percentage change in price—provides a measure of these alternatives. The supply response is equally important. If other firms can quickly and profitably convert sufficient capacity to produce the good in question such that the product cannot be priced independently of the alternative products, the good does not represent an antitrust market. In general, the supply response includes the viable reactions of new competitors striving to serve consumers. The elasticity of the supply response equals the ratio of the percentage change in quantity produced by other firms to the percentage change in price of the product. A proposed market does not represent a valid antitrust market unless firms have sufficient flexibility to set price considering both demand and supply side factors simultaneously.

Market definition has two dimensions—product and geographic. The product dimension reflects the characteristics of the good in question. Variables include size, quality, function, and numerous other basic aspects of the good. The product market definition identifies the characteristics of the products that comprise the antitrust market and that are subject to a potential increase in price. Once the product market is defined, one can examine the geographic area where the product trades. While a product may be sold in markets that range from the local area surrounding a town (especially in the case of some services) to international arenas, the geographic market includes only those areas where the seller can successfully raise the product's price. Once the geographic market is defined, one should check whether the competition from other products and geographic areas is sufficient to prevent independent pricing; if so, one must consider a broader product market.

Actual evidence of past behavior represents the best data with which to define a market. For example, if manufacturers have shown flexibility to shift productive capacity between two products in the past, a significant price increase will likely induce a large shift. Thus, a narrow market cannot be substantiated. On the other hand, if prices in one geographic region have maintained themselves at a higher level than other areas following a market shock (i.e. increase in demand), then a narrow geographic market appears valid. If sufficient historical data exist, it should be possible to identify the relevant market. However, the data may not be readily available.

Antitrust authorities in the United States have established a hypothetical price test to structure the investigation when no strong historical evidence is available. The approach breaks the market definition process into two stages: demand side substitution and supply side substitution. As presented in the U.S. Merger Guidelines, the approach asks if a firm (a hypothetical monopolist) acting as the only present and future seller of the product in question would find it profitable to impose a "small, but significant and nontransitory" price increase.[81] If the price increase proves profitable, the potential market is acceptable from the demand side. If the price increase proves unprofitable, the Guidelines suggest repeating the analysis with a broader proposed market. After the identification of a proposed demand-side market, an evaluation of supply side substitution occurs. The guidelines consider any firm that could easily and economically manufacture and sell the product in question within a short period of time to be in the market.[82]

81. The 1984 Department of Justice Merger Guidelines defined "small, but significant and nontransitory" as a five percent price increase lasting for one year. U.S. Department of Justice & Federal Trade Commission 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (1984), *reprinted in* 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169 (Special Supp. June 14, 1984) [hereinafter 1984 Guidelines]. The 1992 Guidelines keep the five percent test as a general rule, but suggest the price increase should last for the indefinite future. *See* U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,555 (1992), *reprinted in* 62 Antitrust & Trade Reg. Rep. (BNA) No. 1559 (Special Supp. April 2, 1992) [hereinafter 1992 Guidelines].

82. The 1992 Guidelines are a little more specific and consider even an uncommitted entrant to be a market participant if that firm can recover its sunk costs of entering the market within one year. 1992 Guidelines, *supra* note 81, at 41,556-57. Sunk costs are investments in the industry that cannot be liquidated (sold) in the event of exit. Both the 1984 and 1992 Guidelines use a one year standard for market definition. 1984 Guidelines, *supra* note 81; 1992 Guidelines, *supra* note 81.

In order to define an antitrust market for analysis, one must apply the Guidelines' approach to both the product and geographic market question.

In practice, one must be careful in applying the hypothetical approach to market definition. The most obvious pitfall involves using a price test in differentiated product markets where most competition occurs on non-price dimensions.[83] Although the approach is still valid, gathering relevant information is difficult because customers do not regularly make price-based comparisons. Solutions involve generalizing the questions to focus on the non-price aspects of competition or raising the significant price level.

A second problem involves structural conditions that preclude substitution in the short-run. For example, many chemical manufacturing processes require costly qualifications for their inputs. Once an input meets the requisite qualifications, manufacturers are not likely to switch inputs until the next product reformulation. The analyst can solicit more relevant information by asking for the hypothetical response to a price increase at the next reformulation.[84]

A third problem involves the qualitative nature of the data on product market substitution.[85] Both demand and supply side analyses require speculation on how consumers or producers might respond to a price increase. However, it is difficult to suggest an alternative technique if no historical data exists. At best, one can try to quantify the performance differences between related products and show how a five percent price change affects the dynamics of product choice. To support a narrow market definition, the evidence must show that a significant level of sales will not be lost to other products in response to a price increase.[86]

A fourth and more elementary problem unique to developing countries is that a significant part of the market may consist of the so-called "informal sector."[87] Identifying market participants in

83. Although non-price considerations can be important in a geographic market analysis, transportation costs tend to quantify most of the difference between locations.

84. The 1992 Guidelines attempt to address this problem by focusing on the response to a price increase over an indefinite future. As long as the indefinite future covers the reformulation, no problem should exist. 1992 Guidelines, *supra* note 81, at 41,552.

85. For a geographic market analysis, the analyst can use the cost of transportation into a region to determine if a small price increase makes distant sellers competitive.

86. John R. Morris & Gale R. Mosteller, *Defining Markets for Merger Analysis*, 36 ANTITRUST BULL. 599 (1991).

87. *See* David L. Lindauer, *Parallel, Fragmented, or Black? Defining Market Structure*

the informal sectors poses a significant problem for antitrust authorities attempting to assess the competitive environment. However, the mere existence of an informal sector operating at the margin of the law may suggest government imposed barriers to entry. In its general advocacy role, an antitrust authority can advance arguments facilitating the removal of these obstacles.

Although the administration of merger law actively employs the Merger Guidelines, U.S. courts have used the guidelines less actively.[88] Numerous merger decisions are based on the demand side market definition precedent in *Brown Shoe Co. v. United States*,[89] an approach that has stood the test of time.[90] The Guidelines have had a clear impact on supply side substitution, especially on geographic market definition where price data is generally available.[91] Thus, U.S. courts have accepted the hypothetical price test when the evidence used to implement the hypothetical involves more than informed speculation.[92]

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in Developing Economies, 17 WORLD DEV. 1871 (1989); Christine Jones & Michael Roemer, *Editors' Introduction: Modeling and Measuring Parallel Markets in Developing Countries*, 17 WORLD DEV. 1861 (1989); Victor E. Tokman, *Policies for a Heterogeneous Informal Sector in Latin America*, 17 WORLD DEV. 1067 (1989).

88. Malcolm B. Coate, *Economics, the Guidelines and the Evolution of Merger Policy*, 37 ANTITRUST BULL. (forthcoming 1992).

89. 370 U.S. 294 (1962). According to *Brown Shoe*, the "outer boundaries [of a product market] are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325.

90. The 1984 Merger Guidelines list the following considerations: The buyers' perception of whether the products are substitutes; differences or similarities in the price movements of the products; similarities between the products with respect to customary use; design or technical characteristics; and evidence on the sellers' perceptions of the degree of competition between the products in question. 1984 Guidelines, *supra* note 81.

91. *See* United States v. Country Lake Food, Inc., [1990] 2 Trade Cas. (CCH) ¶ 69,113 (D. Minn. 1990) (court deemed evidence that large customers would switch to distant firms for a five percent price increase to be sufficient for a larger market); *see also* FTC v. Occidental Petroleum Corp., [1986] 1 Trade Cas. (CCH) ¶ 67,071 (D.D.C. 1986) (court found producers could switch between PVC homopolymer and PVC copolymer with a small investment).

92. The district courts in United States v. Calmar, Inc., 612 F. Supp. 1298 (D.N.J. 1985), FTC v. Owens-Illinois, Inc., 681 F. Supp. 27 (D.D.C. 1989), *vacated*, 850 F.2d 694 (D.C. Cir. 1988), and FTC v. R.R. Donnelley & Sons Co., [1990] 2 Trade Cas. (CCH) ¶ 69,239 (D.D.C. 1990), rejected narrow markets based on the DOJ guidelines. In general, the courts focused on evidence of market behavior and not responses to hypothetical questions. In particular, the *Calmar* Court concluded that the anecdotal testimony concerning responses to price increases reflected customer inertia rather than any underlying business reality. *Calmar*, 612 F. Supp. at 1298.

C. *Antitrust Policies*

1. Price Fixing

Preserving competition among independent firms in the marketplace constitutes one of the most fundamental antitrust policies. Adam Smith, the father of modern economics, wrote: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[93] Price fixing agreements offer no benefits to society, and they distort the market by shifting resources out of the victimized industry and into other less productive areas.[94] Although history shows that price fixing agreements have little stability, the social costs of the resulting higher prices justify antitrust assaults on these agreements.

Price fixing agreements elevate and maintain price above the competitive level.[95] While collusive firms may increase prices with little difficulty when the market structure permits, they face more obstacles when the customer sets the prices. In such cases, the cartel must approach customers to ask for price increases and then boycott uncooperative customers, thus forcing them to accept higher prices. Maintaining price increases may be difficult when a cartel member posts its prices because other members can offer secret discounts and undercut the price agreement. To deter cheating on an agreement, collusive firms may allocate customers or geographic areas to particular firms. Alternatively, the cartel may explicitly agree on a bid rotation or allocation scheme to ensure that the price fixing agreement allows for a particular firm to service each customer. Any of these actions would create a number of monopoly situations and eliminate the ability of other firms to secretly undercut the price.[96]

The United States considers naked price fixing a per se violation of the law, regardless of the market power of the parties, the

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93. SMITH, *supra* note 2, at 128.

94. George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

95. For a discussion of price fixing in government procurement, see Malcolm B. Coate, *Techniques for Protecting Against Collusion in Sealed Bid Markets*, 30 ANTITRUST BULL. 897 (1985). Latin American countries will have difficulty analyzing pricing patterns because inflation tends to cover up collusive price increases. However, standard investigational techniques, designed to ferret out agreements, are still useful.

96. Such cartels are more likely to be successful in markets where the industry is concentrated, the product is homogeneous, and the demand curve is inelastic. Stigler, *supra* note 94.

reasonableness of the price, or the effectiveness of the agreement.[97] However, the definition of price fixing only includes agreements on price, group boycotts over price, and agreements that divide markets.[98] If horizontal competitors enter into non-price agreements to enhance the performance of the market,[99] courts will scrutinize these agreements under a relaxed standard.[100] The U.S. approach invites criticism because it apparently prefers categorization over the analysis of behavior. In contrast, Canadian courts scrutinize all horizontal agreements under a less stringent standard, allowing price-fixing firms to escape liability when the agreements have no effect in the market.[101]

Under the antitrust laws of the European Economic Community (EEC), where price fixing is also illegal,[102] prosecution pursuant to article 85 of the Treaty of Rome only requires proof that

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97. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (1940).

98. *Socony-Vacuum Oil Co.*, 310 U.S. at 222-23.

99. *See* NCAA v. Board of Regents, 468 U.S. 85 (1984).

100. *See infra* part III.C.4.

101. This standard emerged from caselaw and turned on the analysis of two problems: (1) the interpretation of the term "unduly;" and (2) the question of intent. In general, the Canadian law on agreements "makes criminal offenses of agreements that 'prevent or lessen,' or 'restrain or injure,' competition 'unduly.'" Thomas W. Ross, *Proposals for a New Canadian Competition Law on Conspiracy*, 36 ANTITRUST BULL. 851, 853 (1991). Ross comments:

> In his famous concurring opinion in [*Howard Smith Paper Mills, Ltd. v. The Queen*, [1957] S.C.R. 426;] in 1957, Justice Cartwright offered his view (though it was not an issue in that case) that a lessening of competition becomes undue when the participants are "free to carry on those activities virtually unaffected by the influence of competition." Cartwright's virtual elimination of competition test is strict, and it was not completely accepted in subsequent decisions. However, it did have some impact as in [*Aetna Insurance Co. v. The Queen*, [1978] 1 S.C.R. 731,] in which the defendants were acquitted at least in part because there were several competitors who had not joined the conspiracy.

Ross, *supra*, at 853-854. Ross further notes that in both *Aetna* and *Atlantic Sugar Refineries Co. v. Attorney General*, [1980] 2 S.C.R. 644, the Court articulated a rule-of-reason test for ascertaining whether actions by accused firms exhibited the essential elements of "double intent":

> [I]t must be proven both that the parties intended to enter into an agreement and that they intended that the agreement lessen competition unduly. Given the high standard in criminal cases proving this second element of intent presents serious problems for enforcement. Recognizing this, the amendments of 1986 added subsection 2.2 which indicates that the Crown is not required to prove intent to lessen competition.

Ross, *supra*, at 854. Note, however, that recently the constitutional validity of these provisions has been successfully challenged.

102. Treaty Establishing the European Economic Community, Jan. 1, 1958, art. 85, 298 U.N.T.S. 11, 47-48 [hereinafter Treaty of Rome].

suppliers have agreed to fix prices, although firms may apply for exemptions.[103] In contrast, Spain, Sweden, and the United Kingdom have laws that scrutinize horizontal price fixing under a rule-of-reason standard.[104]

In Latin America, price fixing should be an enforcement priority. If the new competitive environment squeezes profit margins, firms may enter collusive pricing agreements, rather than use innovations to reduce costs. Thus, to deter price fixing, courts should follow a per se analysis instead of a rule-of-reason approach because the per se standard increases certainty and economizes enforcement resources. Enforcement should focus on obtaining evidence of agreements to set prices, boycott customers, or allocate business to specific suppliers. Public education may aid in enforcement by informing citizens of how the market should work.[105] Furthermore, disgruntled employees and rivals may provide useful information. The enforcement agency can monitor markets by looking for irregularities in price movements or sales patterns that are incompatible with competition. In setting penalties, governments may want to consider a transition period for businesses to adapt to the new environment in those industries where government price fixing has been a way of life.[106]

2. Monopolization by Predation

In addition to taking action against price fixing, antitrust policy should prevent a single firm from obtaining or enhancing monopoly power. When implementing this policy, however, one must distinguish between cases where the firm obtains a monopoly through superior efficiency and cases where the firm abuses the competitive process (predates) and makes it impossible for rivals to engage in competition. Predation is defined as:

> a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be consid-

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103. BONER & KRUEGER, *supra* note 44, at 37; VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 119 (4th ed. 1990). Governments, however, rarely grant exemptions for price fixing agreements.

104. BONER & KRUEGER, *supra* note 44, at 51.

105. In Venezuela, the antitrust agency published a pamphlet designed to introduce the agency and its mission. PRO COMPETENCIA: SUPERINTENDENCIA PARA LA PROMOCIÓN Y PROTECCIÓN DE LA LIBRE COMPETENCIA (1992).

106. Note that policies to promote entry would undermine cartel pricing because entrants would not necessarily abide by collusive agreements.

> ered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market power sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening.[107]

Predation impairs consumer welfare because it can lead to monopolistic behavior.

Examples of predation include: predatory pricing; non-price predation; and misuse of government processes. Predatory pricing occurs when a firm sells below cost to drive rivals out of the market with the expectation of later raising prices to monopoly levels.[108] Price predation only produces profits if rivals do not reenter the market. Thus, for predation to provide a viable option, some form of entry barrier must exist to ensure that rivals do not quickly reappear.

Predation may also involve non-price means, such as innovation and promotion. Although non-price predation may be cheaper than price predation, no simple cost rule differentiates predation from competition. Again, the cost of predation must be recouped for the strategy to be profitable.[109]

Misuse of a government process is another example of predation. Since the predator will probably incur very low costs, an abuse of the courts or other governmental agencies constitutes an effective means of slowing or quelling competition.[110] For example, an incumbent monopolist, fearing potential loss of business, may intervene before a regulatory authority or file a lawsuit to delay a new entrant. This activity may be profitable if the incumbent can preserve its market position for an extended period of time.

In the United States, courts look at two necessary conditions

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107. BORK, ANTITRUST PARADOX, *supra* note 43, at 144.

108. POSNER, ANTITRUST LAW, *supra* note 43, at 184.

109. Another form of non-price predation, "raising rivals' costs," involves a predator who undertakes actions to directly raise its competitors' costs and hence, the market price. The predator need not drive the rival from the market. Although it is impossible to prove that predation cannot occur, a complete analysis shows that due to the significant costs, such predation is quite rare. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anti-competitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (describing in detail the concept of raising rivals' costs); *see also* Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, 33 ANTITRUST BULL. 95 (1988) (discussing the limitations of the concept of raising rivals' costs); Malcolm B. Coate & Andrew N. Kleit, *Exclusion, Collusion and Confusion?: The Underpinnings of Raising Rivals' Costs*, 16 RES. IN LAW & ECON. (forthcoming 1993).

110. BORK, ANTITRUST PARADOX, *supra* note 43, at 159.

for predation: (1) investment in securing a monopoly position; and (2) recoupment of the costs of this investment. For price predation, the evidence must show that the firm sells at a price below average variable cost.[111] Although more complex, predation can be unprofitable if the market remains competitive.[112] Once predatory conduct is identified, the evidence must show also that the costs can be recouped.[113] When the alleged predatory investment cannot be recouped, the inference is that the market is competitive.[114] Finally, to a certain extent one can use evidence of intent to supplement evidence of recoupment.[115]

The EEC antitrust laws view predation as an abuse of a dominant position.[116] Since a predation case in Europe may require much less evidence than that required in the United States, some criticize the European policy as protecting competitors, rather than competition.[117] For example, the EEC Court of Justice found a company guilty of abusing its dominant market position after it lowered its prices with the intent to eliminate a competitor.[118] When a company lowers its prices below total cost with the intent to disadvantage a competitor, a court may deem the action illegal even if the price is above average costs. Other cases have suggested that the predator has a duty to deal with its vertically related com-

111. *See* Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980).

112. For example, in Lorain Journal Co. v. United States, 342 U.S. 143 (1951), a newspaper refused to do business with firms that advertised on a new radio station. *Id.* at 148. The newspaper would not recoup the loss of revenue unless its activities were successful in eliminating the radio station as a competitor. *See id.* at 153; BORK, ANTITRUST PARADOX, *supra* note 43, at 344-45.

113. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1985). The U.S. Supreme Court ruled that "the success of any predatory scheme depends on maintaining monopoly power for long enough to recoup the predator's losses and to harvest some additional gain." *Id.* at 589.

114. Price can easily fall below cost if a small firm is investing to build market share, or a firm fails in the marketplace and manages an orderly exit.

115. One should not, however, use evidence of intent as a substitute for evidence of recoupment. Judge Easterbrook opined that antitrust inquiry as to the intent of the parties is not justified unless recoupment is likely. He further noted that "[o]nly if the market structure makes recoupment feasible need a court inquire into the relation between price and cost." A.A. Poultry Farms, Inc. v. Rose Acres Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989).

116. Treaty of Rome, *supra* note 102, art. 86 (dealing with abuse of a dominant position and predation).

117. BONER & KRUEGER, *supra* note 44, at 62-63.

118. Case 62/86, AKZO Chemie BV & Anor v. Commission, [1991 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 686 (1991).

petitors, even if they attempt to enter its market.[119] By refusing to sell, the predator could defeat the attempt at entry. However, the dominance concept does not always require evidence showing that the predator exercised market power and recouped its investment in predation.[120]

An active predation policy must carefully focus only on exclusionary tactics of would-be monopolists, rather than on the interactions associated with robust competition. This focus has particular importance in Latin America, where small firms may accuse their large rivals of predation when the large firms introduce new competitive tactics in response to shifts in the market economy.[121] Given the unilateral nature of monopolization, distinguishing these predatory strategies from active competition is difficult. Legitimate aggressive long-term investment at the expense of short-term gains may lead ultimately to greater efficiencies and thus, the demise of competitors. Such strategies are predatory only when their sole economic justification depends on the returns from the subsequent elimination of competitors. Antitrust policy should screen cases to eliminate those where predation cannot explain the market behavior.[122] For example, the antitrust policy can insist (1) that the alleged predatory firm have a large share (i.e. over fifty percent); (2) that the one who alleges predation demonstrate an expenditure of resources by the alleged predator;[123] (3) that barriers to entry either exist or will be created by the alleged predation; and (4) that the alleged predatory practice adversely affects most of the small firms in the market. Even if the alleged predation passes all four

119. *See* Commission Decision relating to a proceeding under article 86 of the EEC Treaty (IV/32.279-BBI/Boosey & Hawkes: Interim measures) 1987 O.J. (L 286) 36 [hereinafter BBI/Boosey]; Joined cases 6/73 & 7/73, Commercial Solvents v. Commission, 1974 E.C.R. 223, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8209 (1974); *British Sugar*, 1988 O.J. (L 284) 41. These cases generally prohibit predatory actions to maintain dominance in a vertically related market when competitors threaten to enter.

120. BONER & KRUEGER, *supra* note 44, at 65.

121. *See generally* Diez-Canseco Nuñez, *supra* note 80, at 84-85.

122. For a more general approach, see Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981) (considering the nature and potential for success of various predatory strategies and concluding that each strategy, although superficially possible, is unlikely to be profitable given the risks faced by the predator and the responses available to rivals); *see also* Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979) (presenting a list of conditions that should be met in a predation case).

123. For example, courts would not consider the dominant firm's pricing predatory if it exceeded either the marginal cost or, where the marginal cost is unobservable, the average variable cost.

tests, a rule-of-reason analysis would be necessary to determine whether future anti-competitive effects outweigh the efficiency benefits.

3. Merger Analysis

Thus far, antitrust enforcement appears designed to prevent firms from explicitly coordinating their actions to proxy a monopolist and to defeat any unilateral attempts to monopolize a market. Antitrust policy should also prevent firms from undertaking horizontal mergers likely to generate similar anti-competitive effects.

Merger enforcement proceeds along two tracks: monopoly and oligopoly. An anti-monopoly policy prevents a firm from obtaining a monopoly or dominant position by acquiring its rivals in markets protected by barriers to entry. Two types of entry barriers arise in most analyses. Under the first, entrants bear a cost not borne by existing competitors.[124] These barriers allow incumbents to maintain prices above the competitive level for the indefinite future and are often traceable to some governmental policy. The second type of entry barrier considers the time required for profitable entry.[125] If entry takes such a long time that incumbents could profitably raise prices in the short run and tolerate entry in the long run, then a competitive market structure is necessary to preserve competition. The U.S. Merger Guidelines suggest a two-year standard for entry.[126] Thus, if entry could profitably deter or defeat an anti-competitive price increase within two years, challenging a merger is not warranted.

Under the more complicated oligopoly enforcement track, the government pursues a policy to prevent firms from obtaining market shares sufficient to tacitly collude and price above the competitive level. There is no agreed upon standard for what constitutes tacit collusion. Oligopoly policy, like monopoly policy, focuses on entry conditions because neither oligopolists nor monopolists can set prices above the competitive level in the absence of entry barriers. Robert Bork, the most noted antitrust expert of a generation,

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124. POSNER, ANTITRUST LAW, *supra* note 43, at 310-11.

125. *Id.* at 310-11, 314-15.

126. The 1992 Merger Guidelines describe a three-part test: timeliness; likelihood; and sufficiency for entry. 1992 Merger Guidelines, *supra* note 81, at S-12. To deter or defeat an anti-competitive price increase, entry must (1) affect competition within two years, (2) have sales opportunities for the entrant greater than the minimum viable scale of entry, and (3) have sufficient magnitude to address the anti-competitive effect of concern. *Id.*

suggested a policy that would allow a firm to acquire a forty percent share through a merger, as long as such a share allowed for two other large competitors.[127] Alternatively, one could express Bork's rule as "three is enough" for competition (this translates into a post-merger Herfindahl index of 3333.)[128] Of course, if structural conditions made tacit collusion a feasible option with more than three firms, other mergers could be challenged.

Efficiencies represent the key remaining issue. By combining the resources of two firms, horizontal mergers permit the joint firm to produce more output with any given input level. Examples of efficiencies include lower transportation costs, economies of scale, and overhead cost savings. One must balance these efficiencies against anti-competitive effects to achieve the optimal enforcement policy. One commentator observed that even small efficiency gains can outweigh the deadweight loss associated with large monopoly price increases.[129] Analysts have criticized this approach for ignoring the higher prices paid by consumers. If monopolists invest resources to raise prices, society may lose the total value of the monopoly.[130] A policy that considers the price effects of mergers would require large efficiencies to offset monopoly pricing. A third approach would incorporate the likelihood of both efficiencies and anti-competitive effects in the analysis. Thus, likely efficiencies could outweigh relatively unlikely anti-competitive effects. A more specialized approach to efficiencies rests in a failing firm policy.[131] If a merger partner can save a business that would otherwise exit the market, the implicit reduction in costs would benefit society.

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127. BORK, ANTITRUST PARADOX, *supra* note 43, at 221-22. Bork would allow mergers that result in a firm with a sixty to seventy percent share of the market. *Id.* at 221. Bork also noted that barriers to entry must exist before warranting merger enforcement. *Id.* at 195.

128. The Herfindahl index equals the sum of the squares of the market shares (usually defined as percentages) held by the existing participants in a market. It is a measure of market structure with a range from almost zero for a perfectly competitive market to 10,000 for a monopoly. *See* RESOURCE ECONOMICS: SELECTED WORKS OF ORRIS C. HERFINDAHL (David S. Brooks, ed., 1974). In the example in the text, a merger that reduced the number of firms in the industry to three (each with a market share of 33.33 percent) would generate a post-acquisition Herfindahl of 3333.

129. Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

130. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

131. *See* John E. Kwoka, Jr. & Frederick R. Warren-Boulton, *Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis*, 31 ANTITRUST BULL. 431, 444-450 (1986).

Merger policy in the United States attacks transactions in highly concentrated industries when barriers to entry exist.[132] Almost all of the mergers enjoined since 1982 have had Herfindahl statistics over 1800, with most being over 2400.[133] This represents a dramatic relaxation of the standards from the 1960s, under which all mergers in oligopolistic industries were considered illegal (even when Herfindahls were below 1000). Structural and performance evidence is also considered in deciding whether to block a merger when the anti-competitive effect would require the cooperation of the remaining players. While the FTC does not allow efficiencies to offset anti-competitive effects in any systematic manner,[134] courts tend to be slightly more sympathetic.[135]

Europe has a more relaxed merger policy than the United States, with EEC policy focusing primarily on transactions that would create or enhance a dominant firm.[136] Only Germany has an active oligopoly merger control policy.[137] German merger investigations respond to the absolute size of the parties, sometimes prohibiting mergers where one of the parties is large, even though that

132. United States v. Waste Management, Inc. 588 F. Supp. 498 (1983), *rev'd*, 743 F.2d 976 (1984) (presenting a clear analysis of why countries require that a market have barriers to entry before deeming a merger to have an anti-competitive effect). In United States v. Syufy Enterprises, 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990), the court concluded that a merger would not be anti-competitive, even if the transaction created a monopoly, unless barriers prevented new firms from quickly entering the market.

133. Coate, *Economies*, *supra* note 88. The court in United States v. Baker Hughes, Inc., 731 F. Supp. 3 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990), discusses the classic three-prong test for merger analysis, as established in United States v. Philadelphia National Bank, 374 U.S. 321 (1963). The government (or plaintiff) must prove a concentrated market to create a presumption that the merger in question will create an anti-competitive effect. The defendant then has the burden to show that the merger will probably not be anti-competitive. While evidence on ease of entry may prove particularly probative, analysis of other points such as ease of collusion and efficiencies is also relevant. The plaintiff, however, retains the overall burden of proof on the merits. Thus, concentration numbers represent only the first stage of the merger analysis. Coate, *Economies, supra* note 88.

134. Malcolm B. Coate & Fred S. McChesney, *Empirical Evidence on FTC Enforcement of the Merger Guidelines*, 30 ECON. INQUIRY 277, 284 (1992).

135. Coate, *Economies, supra* note 88.

136. EEC Merger Control Regulation 4064/89, 1989 O.J. (L 395) 1 [hereinafter EEC Regulation 4064]. This regulation establishes a pre-merger notification system for large transactions and charges the Commission with the responsibility of evaluating mergers under article 86.

137. BONER & KRUEGER, *supra* note 44, at 28-30. This conclusion may change as a result of the EEC's acceptance of a consent agreement involving an oligopolistic dominance problem with bottled water sold in France. *See Commission Closes Inquiry into Merger Between Nestlé and Perrier* (July 22, 1992) (unpublished Commission agreement, on file with author). In the absence of this settlement, two firms would have dominated the market.

firm may not have had a large market share.[138] In this sense, the dominance concept supports more frequent intervention against horizontal mergers than the market power concept. On the other hand, dominance only creates a rebuttable presumption of a violation.[139] In reality, German officials often reject the dominance hypothesis, generating much weaker policy than the U.S. focus on oligopoly.[140] German merger control rarely features a balancing of efficiencies against the anti-competitive effects.[141] However, numerous other countries such as France, Sweden, and the United Kingdom employ a merger policy motivated by public interest standards that could include efficiencies. The EEC policy also calls for some consideration of efficiencies.[142]

In Latin America, merger enforcement policy should make allowances for scale and other efficiencies.[143] As the economies reorganize after years of state oversight, the current market structure will likely prove inefficient and firms will want to merge to better compete under the new market conditions. In general, an enforcement focus on mergers that result in monopoly will permit firms to capture efficiencies. Even a monopoly-based merger policy would require barriers to entry for the merger to be of concern. Efficiency could outweigh the anti-competitive effects in industries with potential for international competition, while local markets could use a tighter anti-monopoly policy. By basing the policy choice on the type of problem, the government can minimize the enforcement

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138. Courts presume dominance where the merging parties have sales of at least DM12 billion. *See* BONER & KRUEGER, *supra* note 44, at 78.

139. *Id.* at 77. Dominance may not be found if other large competitors exist. *Id.*

140. *Id.* at 78.

141. *Id.*

142. *See* EEC Regulation 4064, *supra* note 136. In particular, article 2.3 defines the conditions under which a merger may be allowed, and article 21.3 empowers individual states to exempt certain transactions.

143. Joint ventures represent an antitrust concern for merger policy. If the joint venture results in a pooling of the total business assets within a relevant market, a court should deem the venture to be a merger. On the other hand, if the venture only represents an agreement between the firms to pool some assets, then the courts should consider that the two companies retain substantial independence. For example, the General Motors (G.M.)-Toyota joint venture in the United States added an automobile plant to the U.S. economy, but both G.M. and Toyota remained independent.

Output expansions are rarely, if ever, anti-competitive, and thus, policy should encourage them. Moreover, research and development joint ventures tend to be more efficient because they expand future output, without much risk to competition. In general, joint ventures between foreign and domestic firms to develop products for Latin American markets are likely to be pro-competitive.

costs.[144]

4. Non-Price Horizontal Restraints

Non-price horizontal restraints consist of agreements between direct competitors that limit a form of competitive behavior other than price. Some agreements, such as naked customer boycotts that focus on price, are subject to being condemned as a form of price fixing. Governments can evaluate the competitive effects of other horizontal restraints with the rule-of-reason standard, which balances the potential efficiencies and anti-competitive impacts of the policy in question.

Horizontal agreements are generally ancillary to some cooperative venture. If manufacturers are not likely to make a product without a horizontal agreement, the rule-of-reason standard generally permits the agreement to ensure that society obtains the benefit of the product. For example, music licensing law requires firms, such as nightclubs and radio stations, to obtain a license to play copyrighted music.[145] If these firms had to deal individually with the composers, transactions costs could prevent the general use of many types of music. However, if composers combine to issue blanket licenses, each user would have access to all the musical compositions. In effect, the joint licensing (a horizontal agreement) adds to consumer choice and can be considered pro-competitive.

In other markets, no clear line exists. A group of manufacturers may want to offer a high quality product and agree on a set of restrictions that maintain quality. Alternatively, a group of firms may set up a cooperative to purchase feedstocks at lower prices and agree on a set of restrictions to ensure that all members participate in the program.[146] In either case, the restrictions may limit competition, but a rule-of-reason analysis would balance the effi-

144. As in the United States and the European Community (EC), antitrust authorities in Latin America might establish a pre-merger screening system for large acquisitions to avoid the problems associated with disentangling consummated transactions. In addition, screening ensures cooperation because the merger is not permitted until the end of the review. However, the costs associated with the screening process may hamper efficient transactions. Thus, subject to the need for information, a government should design its screening programs to minimize the costs imposed on transactions.

145. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

146. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (finding that a cooperative could expel a member without committing a per se antitrust offense, as long as it did not have market power or exclusive access essential to an element of competition).

ciency and anti-competitive effects. For example, a trade association may make rules that set minimum quality standards or limit advertising. A rule-of-reason analysis would initially search for anti-competitive effects or, in the absence of such effects, market power. The activity does not require enforcement action if the agreement does not injure competition or create market power. On the other hand, if the agreement produces either an adverse effect or market power, one must balance the anti-competitive effect with the efficiency benefits.

A third type of horizontal agreement involves an upstream or downstream boycott designed to disadvantage a horizontal competitor. Again, the analysis depends on whether the net impact of the agreement is pro-competitive or anti-competitive. For example, a group of retailers may jointly threaten a manufacturer to stop carrying its product if the manufacturer continues to sell through a rival distribution channel. If the retailers, acting together, can exclude the rival and if transaction costs slow entry to the point where exclusion results in higher (quality adjusted) consumer prices, a violation would exist as long as efficiencies did not offset the anti-competitive effect. On the other hand, if the retailers lack market power, they are unlikely to affect price.

Policy in the United States is shifting from a per se standard, which makes all horizontal agreements illegal, to a rule-of-reason standard.[147] One could argue that U.S. courts adhere to a truncated rule-of-reason policy, with horizontal agreements condemned in the absence of a clear efficiency.[148] The complete transformation to a pure rule-of-reason standard awaits Supreme Court action to apply its rule-of-reason vertical antitrust approach to the horizontal area.[149] Under such a standard, horizontal restraint investigations would focus on either effects or market power and the resulting efficiencies. If one can show a direct anti-competitive effect, then one can object to the agreement provided no significant efficiencies exist.[150] However, in most cases, one must infer the anti-

147. *Compare* NCAA v. Board of Regents, 468 U.S. 85 (1984) (where the Court, after searching for an efficiency justification, found restrictions on television contracts to be illegal) *with* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (where the Court held that a trade association regulation against price competition was per se illegal).

148. *See* FTC v. Massachusetts Bd. of Registration, 110 F.T.C. 549 (1988).

149. *See* Northwest Wholesale v. Pacific, 472 U.S. at 284 (Supreme Court almost endorsed a rule-of-reason standard for all ancillary restraints in horizontal cases).

150. For example, if a local group of retailers agreed to open their shops only from 10

competitive effect from market power and balance it against efficiencies.[151]

The EEC enforces horizontal relationships through article 85, although the existence of exemptions suggests that the actual policy sometimes follows a rule-of-reason analysis.[152] The dominance concept also provides an enforcement mechanism for agreements that implicitly create or strengthen a large supplier while disadvantaging smaller rivals.[153] Thus, European policy may require a showing of market share, but once that share is obtained, finding a violation for horizontal activity that injures small rivals is likely.

Latin America should not make non-price horizontal restraints an enforcement priority for several reasons.[154] First, an active policy will create minimal benefits in comparison to the returns from a direct attack on price fixing. Second, the need to conduct rule-of-reason analyses to show that anti-competitive effects outweigh the efficiency benefits will make the costs associated with an active enforcement policy high. Finally, the pro-competitive effect of entry may offset any anti-competitive effects before government action can impact the market. Thus, the optimal policy would limit the number of horizontal restraint cases.

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a.m. to 2 p.m., and if the prices for their products rose, one would balance this anti-competitive effect against any efficiencies to determine the legality of the agreement.

151. *See* John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301 (1991).

152. Treaty of Rome, *supra* note 102, art. 85. *See* KORAH, *supra* note 103, at 120 (noting that the EEC uses exemptions in a number of situations where U.S. courts would not find liability).

153. Treaty of Rome, *supra* note 102, art. 86. *See* Commission Decision relating to a proceeding under articles 85 and 86 of the EEC Treaty (IV/30.979 and 31.394, Decca Navigator System) 1989 O.J. (L 43) 27. The Commission found illegal an agreement between Decca and its small horizontal competitors which allocated the commercial navigation customers to Decca, while allowing the non-commercial navigation customers to buy systems from small firms. Decca argued that it needed to earn revenue from the commercial accounts to pay for the radio system that both Decca and its rivals used. This decision appears to protect small competitors, at a risk to the overall level of competition.

154. Technology licensing represents a type of non-price horizontal agreement that does not justify enforcement actions under most circumstances. The innovating company (often foreign) may find it more efficient and profitable to license its technology to a domestic company. Although one could argue that the license is an agreement, it actually represents only one step in the exploitation of the patent or trade secret. Regulations against exclusive license agreements could force the innovating firm to enter the market itself (in a slower and less efficient manner) or forego participation in the local market entirely. Overactive enforcement would injure domestic consumers. Of course, in some cases, the innovating firm would prefer to enter directly or form a joint venture with a local firm. Thus, policies that require licensing can also be inefficient.

5. Vertical Restraints

Manufacturers use vertical restraints to control the downstream behavior of their distributors. Transaction costs generally preclude a manufacturer from integrating into the retail sector. Therefore, a manufacturer must deal with independent distributors and retailers to sell its product.[155] Unless restrained, distributors or retailers may take action that adversely affects the manufacturer's attempt to maximize profits. Distributors and retailers may behave opportunistically, considering only short-run profit. Manufacturers often impose vertical restrictions to preclude, or at least reduce, such opportunism.

Vertical restrictions may include either price or non-price restrictions. Resale price maintenance (RPM) agreements restrict the retailer from selling a manufacturer's product below a specified price. Such agreements ensure that the retailer provides the necessary service on a product because the manufacturer can terminate any retailer that fails to perform. By guaranteeing the retailer a fixed margin on the sale of a product, the manufacturer creates a quasi-rent that the retailer loses if he behaves opportunistically.[156]

Non-price restraints limit intra-brand competition by restricting the territory or the customers available to a retailer.[157] Thus, the retailer is less likely to behave opportunistically and undercut the manufacturer's suggested prices. In effect, non-price restraints function in much the same way as price restraints.

In rare cases, vertical restraints may be anti-competitive. For example, a cartel may institute resale price maintenance to ensure

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155. In any market economy, the act of trading in a market requires the parties to incur transaction costs. For example, consumers incur search costs when gathering information about the quality and prices of products available in the market. Retailers incur costs when financing transactions. In many market economies, manufacturers have found it more efficient to avoid the business of distribution by selling to the retail sector. Specialist retailers can reduce transaction costs by achieving economies of scale and investing in specialized knowledge.

156. Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988). For example, opportunism would include the failure to provide pre- or post-sale service.

157. Vertical restraints also include exclusive distribution, where a manufacturer insists that a retailer not carry products of the competitors. In theory, such a restraint prevents the retailer from opportunistically using the product of one manufacturer to draw in customers and then selling the product of another manufacturer that carries a higher retail margin. This practice cannot be anti-competitive as long as either a number of unconstrained retailers exists or there is ease of entry into retailing.

that retailers do not cause deviations from the collusive prices. To be effective, the RPM agreement requires participation by most of the cartel members. A retailer cartel could also force a manufacturer to institute RPM to preserve a collusive price agreement on margins. However, in both cases, since the RPM acts as a symptom of a horizontal problem, governments could take enforcement action against the horizontal agreement.

Though current U.S. law makes resale price maintenance per se illegal, the U.S. Supreme Court interprets vertical price agreement so narrowly that the manufacturer must practically enter into written contracts with retailers before the manufacturer would violate the law.[158] Courts in the United States currently scrutinize restrictions under a rule-of-reason standard.[159] A recent review of federal appellate decisions reveals that the courts almost always uphold non-price restraints.[160] Thus, when a court applies the rule-of-reason approach, the action is almost always found to be legal.

In general, the EEC condemns vertical restraints under article 85 of the Treaty of Rome as agreements among competitors.[161] Vertical restraints also cause concern in the European antitrust tradition when employed by a dominant firm (with dominance defined at relatively low share levels). For example, a number of cases involve a duty to deal with a vertically related firm.[162] In theory, dominant firms have the same efficiency incentives to use vertical restraints as other firms, but the anti-competitive hypotheses do not apply if the dominant firm has unilateral market power. At best, the restrictions on vertical restraints facilitate entry by handicapping the dominant firm. Consumers do not benefit from a policy that disadvantages large firms, forces up price, and induces en-

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158. Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).

159. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

160. *See* Douglas H. Ginsberg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 70-73 (1991).

161. Treaty of Rome, *supra* note 102, art. 85; *see also* KORAH, *supra* note 103, at 122. Korah notes that while article 85(3) exempts exclusivity and some territorial vertical restraints, the EEC does a poor job of distinguishing between horizontal and vertical restraints. *Id.* This suggests that vertical price restraints are especially unlikely to be exempted. *See id.* at 146.

162. For example, in Case 22/78, Hugin v. Commission, 1979 E.C.R. 1869, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8524 (1979), the court found that a firm in a dominant position with regard to spare parts for its own equipment was likely to have a duty to deal. The court ordered no action because the effects remained limited to one country. *Id.* In a number of other cases, the court ordered a firm to deal with or continue to deal with a vertically related entrant. *See* BBI/Boosey, *supra* note 119.

try by small, inefficient rivals. Thus, dominance should not be used as a basis for antitrust policy in Latin America.[163]

In conclusion, an optimal antitrust policy that considers enforcement costs and chilling effects would not focus its enforcement on vertical restrictions.[164] Such a policy could be particularly important for rapidly developing Latin American economies because many firms are relatively new and do not have business reputations. Since manufacturers cannot rely on the reputation and careful selection of retailers to ensure an optimal distribution system, they may need to use vertical agreements to control the actions of their downstream distributors.[165] Even a vertical restraint policy limited to dominant firms raises doubts. As many dominant manufacturers have recently undergone privatization or remain unprotected enterprises, hampering these manufacturers in competing against small, efficiently configured entrants and importers through a ban on vertical restraints is unreasonable. Of course, the government may still take action against vertical restraints if the evidence shows the restraints played a role in price-fixing, but such enforcement would involve a horizontal, rather than vertical, case.

6. Price Discrimination

Price discrimination consists of unilateral policies by firms to sell products to different customers at different quality-adjusted prices.[166] Firms impose these policies to increase profitability by allowing the firm to sell to marginal customers without discounting

163. Some dominance cases involve exclusive dealing where manufacturers force the distributors not to deal with entrants. Some courts are more concerned with the predatory, rather than vertical, aspects of an agreement. *See, e.g.*, Commission Decision relating to a proceeding under article 86 of the EEC Treaty (IV/31.900, BPB Industries plc.), 1989 O.J. (L. 10) 50 (holding that British Gypsum's distribution policies tended to force an exclusive distribution system and preclude entry into the market it dominated).

164. While they can be vertical in nature, franchising agreements do not raise antitrust concerns due to the efficiencies associated with franchising. The franchise system imposes a set of restraints that all franchisees agree to follow to assure consumers that the products offered by one franchisee are basically the same as the products offered by another. Thus, one can obtain many of the efficiencies of a large firm, without incurring the costs associated with managing a large business.

165. Vertical integration provides an alternative to vertical restraints. Assuming the large firms would choose a distribution system with vertical restraints, an active enforcement policy could force manufacturers to rely on less efficient integrated systems. Since vertical integration requires higher capital expenditures, a tough vertical policy could slow industrial growth.

166. An example of an extreme form of price discrimination is the refusal to deal at any price. Such behavior could be a form of predation.

to the firm's core customers. However, if the firm has sufficient market power, price discrimination may deter entry by offering discounts to customers likely to switch to an entrant.

Price discrimination may involve firms offering discounts to specific customers. These discounts may pass on efficiencies to customers, initiate competition, or meet competition. Alternatively, a firm may offer discounts to customers who threaten to deal with entrants. If the discounts deter entry, an incumbent with market power can earn monopoly profits from the customers who lack alternatives. In theory, requiring a single price will broaden the benefits of potential entry to the entire market.[167] Note, this theory only applies to monopolistic or dominant firms facing a threat from entry.

Tying, defined as a monopolistic conditioning of the sale of product A on the purchase of product B, exemplifies a sophisticated form of price discrimination. At first glance, tying appears to allow the monopolist to increase his revenues by forcing the consumer to pay supra-competitive prices for product B; however, such a pricing policy only reduces the price the consumer is willing to pay for product A. In fact, tying may act as a metering scheme to allow a manufacturer to price discriminate among its customers. The manufacturer discounts the price of product A below the monopoly level, but requires consumers that use product A intensely to purchase large amounts of the complementary input B and pay relatively high net prices. Consumers that do not use product A in such a manner may purchase small amounts of product B and pay relatively low net prices. This approach to pricing, viewed as procompetitive, generally increases output as more consumers buy the "low-priced" product A. Alternatively, tying schemes may allow the manufacturer to economize on transaction costs.

In the United States, some forms of price discrimination are per se illegal, although limitations restrict the breadth of this prohibition. The Robinson-Patman Act covers systematic price discrimination schemes that affect the price of a good (not a service) and injure rival competitors ineligible for the discount.[168] Occasional promotional pricing is not proscribed. Though firms can escape liability when the discounts are necessary to meet competi-

167. Active enforcement of regulations against price discrimination, like an active policy against predation, runs the risk of suppressing competition, rather than monopolization.

168. Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (1988); *see* BORK, ANTITRUST PARADOX, *supra* note 43, at 382-401.

tion or create efficiencies, courts narrowly construe these two defenses. Courts often infer competitive injury from systematic price discrimination,[169] although one may now present evidence that breaks the link between price differentials and lost profits to rebut the presumption of competitive injury.[170] Overall, U.S. laws tend to protect downstream competitors by ensuring their long-term equal footing. Though per se illegal, tying restrictions apply only to firms with market power and then only when the tie has an adverse impact on competition.[171] Hence, most firms may legally use tying schemes.

European antitrust policy considers price discrimination and tying per se illegal when employed by dominant firms.[172] Schemes that base price discrimination on the national boundaries within the EEC raise a particular concern.[173] Discrimination that is necessary to meet competition from other suppliers appears legal. National laws also cover price discrimination and tying. For example, Germany generally evaluates tying under the rule-of-reason approach, but applies a per se standard to dominant firms.[174]

Given the lack of experience with market economies, Latin American regulations should narrowly define price discrimination policies. Price discrimination may actually increase competition: as firms offer selected customers price discounts, other firms may respond in a similar fashion, and the general price level will fall. An active price discrimination policy would deter competition before it starts and deprive the public of lower prices. Thus, antitrust policy should limit price discrimination to situations where the target firm holds a monopoly position and uses price discrimination to deter entry. Nonetheless, even in these cases, courts should use a rule-of-reason analysis to avoid adversely affecting efficiency. Tying policies should also have limits to avoid chilling innovative marketing strategies.

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169. FTC v. Morton Salt Co., 334 U.S. 37 (1948).

170. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988).

171. Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984).

172. Treaty of Rome, *supra* note 102, art. 86. For example, in Eurofix-Bauco v. Hilti, 1987 O.J. (L 65) 19, the court ruled that Hilti tied the sale of cartridge strips for its nail gun to the sale of its nails, thereby preventing competition on its nails. For further information, see BONER & KRUEGER, *supra* note 44, at 62-63.

173. Case 27/76 United Brands Co. & Bands Continental B.V. v. Commission, 1978 E.C.R. 207, [1977-78 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429 (1978). United Brands had a policy of selling bananas for different prices in different EEC countries. The court held that the discriminatory pricing served as an obstacle to trade. *Id.*

174. BONER & KRUEGER, *supra* note 44, at 63.

IV. Conclusion

During the twentieth century, antitrust policy has evolved along two tracks, market power and dominance. In the United States, antitrust policy generally addresses the issue of market power, making illegal many activities that explicitly or implicitly lead to higher consumer prices. This analysis captures the basic monopoly issues and addresses oligopoly concepts where a group of firms behaves as a monopoly. The courts, however, often infer the adverse effect on competition from market structure, rendering empirical evidence of poor performance unnecessary. In other cases, the law precludes specific behavior, regardless of effects.

In the EEC and in a number of European countries, antitrust policy has evolved to control both agreements and the dominance of large firms. This dominance concern extends beyond monopoly behavior and potentially affects all business relationships of large firms. In effect, antitrust policy protects the commercial opportunity of small firms at the expense of the large firms. Thus, dominance policies limit the competitive tactics of large firms. Under certain conditions, such restrictions are anti-competitive.

Antitrust laws in Latin America are evolving to address the issues of market power and large firm dominance. However, widespread government ownership in the economy, the existence of price controls, and import-substitution policies have combined to reduce the enforcement of antitrust laws. As the region adopts market-oriented policies and attempts to safeguard the competitive process, the need to implement antitrust policy becomes more evident. Countries like Peru and Venezuela have recognized this need and have passed antitrust legislation.

The Latin American economies need not choose between the traditional market power and dominance approaches to antitrust policy. Instead, they can consider a hybrid policy that focuses only on the general problems of monopolies. This approach would avoid the pitfalls of a market-power-based policy in which the government attacks business practices or mergers based on speculative oligopoly theories of anti-competitive effect. Moreover, this approach would sidestep the problems associated with an over-inclusive definition of dominance, thereby limiting challenges of alleged predation, non-price horizontal restraints, and vertical restraints to those situations where enforcement is necessary to control monopoly power. Within a monopoly policy, the government must regulate itself to ensure that other governmental policies do not create barriers to entry. Thus, as part of its general advocacy role, an optimal antitrust policy must prevent monopolies, whether generated by government or business.

For Latin American countries, prohibitions on price fixing should represent the core antitrust policy. If narrowly defined to include only agreements on price and related customer allocations, the regulations could employ a per se methodology. Antitrust policies should control mergers and predation only if the behavior tends to create a monopoly without generating offsetting efficiencies. Other behavior, such as non-price horizontal agreements, vertical restraints, and price discrimination schemes could justify enforcement actions when a firm or a coordinated group of firms with monopoly power utilizes such agreements without efficiency justifications. However, analyzing these types of behavior will be complicated and will require significant enforcement resources. Given the meager benefits to be gained from blocking these activities, enforcement priorities should not include non-price horizontal agreements, vertical restraints, or price discrimination.

APPENDIX A

LATIN AMERICAN ANTITRUST LAWS

ARGENTINA

Represión de los trusts [Antitrust], Law 11,210 of Aug. 24, 1923, *translated in* LAWS OF ARGENTINA IN ENGLISH 899 (J.A. de Marval & E. de Marval trans., 1933), *repealed by* Represión de monopolios, Law 12,906 of Dec. 12, 1946, CÓDIGO DE COMERCIO Y LEYES COMPLEMENTARIAS ANOTADOS [C.C.L.C.A.], at 1071 (2d ed. 1970), *repealed by* Ley de defensa de la compentencia, Law 22,262 of Aug. 1, 1980, ANALES DE LEGISLACIÓN ARGENTINA [A.D.L.A.], at 2521 (1980).

BOLIVIA

CONSTITUCIÓN art. 134; CODIGO PENAL art. 233.

BRAZIL

CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [BRAZ. CONST.] art. 170; Lei que disciplina a repressão ao abruso do poder econômico, Law 4,137 of Sept. 10, 1962, 26 LEGISLACÃO FEDERAL E MARGINÁLIA 314 (1962); Decree No. 52,025 of May 20, 1963, 203 Revista Forense [R.F.] 422 (1963) (approving the regulation of Brazilian Law 4,137); Decree No. 92,323 of Jan. 23, 1986, 293 R.F. 592 (1986) (approving the regulation of Brazilian Law 4,137); Law 8137 of Dec. 27, 1990, DIARIO OFICIAL [D.O.], Dec. 28, 1990 (defining crimes against tributary and economic order); Law 8158 of Jan. 8, 1991, D.O., Jan. 9, 1991 (setting out rules to protect competition).

CHILE

Law No. 13,305, tit. V, arts. 172-182, DIARIO OFICIAL [D.O.], Apr. 6, 1959, *amended by* Law Decree No. 211 of 1973, D.O., Dec. 22, 1973, *amended by* Decree No. 511 of Sep. 17, 1980, D.O., Oct. 27, 1980.

COLOMBIA

PRACTICAS COMERCIALES RESTRICTIVAS, NUEVO CÓDIGO DE COMERCIO [NUEVO CÓD. COM.] arts. 7269-1 to 7299-4 (The new code of July-Sept. 1991 compiles Law 155 of Dec. 14, 1959; Law 3307 of Sept. 30, 1963; and Decree 1302 of June 1, 1964.).

COSTA RICA

CONSTITUCIÓN art. 46.

CUBA[1]

CONSTITUCIÓN art. 276 (1940).

DOMINICAN REPUBLIC

CONSTITUCIÓN art. 8, para. 12; CODIGO DE COMERCIO.

ECUADOR

CONSTITUCIÓN art. 45; Executive Decree 2840 of Apr. 28, 1987.

EL SALVADOR

CONSTITUCIÓN art. 110.

GUATEMALA

CODIGO DE COMERCIO arts. 361-67.

HAITI[2]

CONSTITUTIÓN DE LA REPUBLIQUE D'HAITI art. 190 (1987).

HONDURAS

CONSTITUCIÓN POLITICA DE HONDURAS art. 339.

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1. The 1940 Constitution was the last constitution under a free-market economy. Since Cuba has become communist, the constitution no longer reflects free-market philosophy.
2. In 1991, a military coup overthrew the government and disbanded the 1987 Constitution.

MEXICO

CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 28; Ley organica del articulo 28 constitucional en materia de monopolios [Organic Law of Monopolies], DIARIO OFICIAL DE LA FEDERACIÓN [D.O.], Aug. 31, 1934, *amended by* Decree of Dec. 27, 1979, D.O., Jan. 8, 1980, *repealed and replaced by* Ley federal de compentencia económica [Federal Law of Economic Competition], D.O., Dec. 24, 1992.

NICARAGUA[3]

CONSTITUCIÓN POLITICA DE NICARAGUA art. 67 (1974).

PANAMA

CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE PANAMA arts. 290-93.

PARAGUAY

LA CONSTITUCIÓN PARAGUAYA CONCORDA art. 95.

PERU[4]

CONSTITUCIÓN POLITICA DEL PERU art. 188 (1979); Law Decree No. 701 of July 11, 1991, [1991] NORMAS LEGALES 126.

URUGUAY

CONSTITUCIÓN art. 85, para. 17.

VENEZUELA

CONSTITUCIÓN art. 97; Ley para promover y proteger el ejercicio de la libre competencia [Law to Promote and Protect the Exercise of Free Competition], G.O. No. 34.880 of Jan. 13, 1992, GACETA LEGAL—RAMIREZ & GARAY, Jan. 15, 1992.

3. The 1974 Constitution was in effect prior to the Sandinista regime coming to power.
4. In 1992, a military coup disbanded the 1979 Constitution.