

4-1-1982

# Latin American Antitrust

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## Recommended Citation

Rafael German, *Latin American Antitrust*, 14 U. Miami Inter-Am. L. Rev. 1 (1982)

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# **LATIN AMERICAN ANTITRUST**

**RAFAEL GERMAN\***

## **I. OVERVIEW**

Most Latin American countries treat business practices associated with market power and the competitive relations which emerge and develop within the national economy differently than restrictive practices which develop and operate in the context of international economic relations. There has been a definitive, though often implicit, tendency to distinguish between the treatment of "domestic" and "imported" market power. Generally, direct control of restrictive business practices through anti-monopoly legislation has been of marginal significance. Judicial and administrative decisions have neither defined nor developed the concepts of "market power" and "dominant position," and seldom have such concepts served as a basis for governmental action. The anti-monopoly laws of Latin America have been applied primarily as instruments directly protecting consumers against specific price rises rather than as devices for controlling market structures and situations of concentrated economic power.

The inefficiency of Latin American anti-monopoly laws is due principally to changing economic circumstances and priorities as well as to insufficient enforcement of the existing laws. These laws serve more as guidelines for the application of governmental policies rather than as a basis for direct governmental action. However, laws which encourage competition or directly control abusive use of economic power may, in the future, result in certain changes in the present developmental conditions in Latin America.

Laws pertaining directly to the control of market power have been developed in the areas of price control, industrial promotion, state enterprises, and industrial concentration. Although these laws are not designed specifically to control restrictive business practices, their scope and increased application indicate not only a

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present but potential regulatory impact on the formation and exercise of market power. The Latin American countries have tended to adopt a "pragmatic approach" to the existence of dominant power of domestic enterprises. Control is essentially exercised only when such power adversely affects national economic policies relating to autonomous development, social welfare, and industrial efficiency. Governmental policies in Latin America regarding the control of international restrictive business practices are based on a deliberate process of harmonizing legislation and existing policies as well as a variety of approaches and procedures used in different countries in the international community. The range of mechanisms used reflects the government's awareness of the varying types of restrictive practices and the search for appropriate methods of control through the system of learning by doing.

During the past decade, a majority of Latin American countries have enacted and enforced new laws for the regulation of foreign investment in their respective countries, with particular attention placed on the control of restrictive business practices. Attention has also been given to the monopolistic consequences of the influx of foreign capital on the control of take-overs of national enterprises, on the regulation of access to foreign firms, and on the domestic credit and industrial development incentives. Governments have the tendency to intervene directly in negotiations involving foreign enterprises. A common feature of these laws is the aim of controlling the dominant power of foreign enterprises through the formation of mixed enterprises, consisting of domestic (state and/or private) and foreign capital, thereby achieving domestic control over the decision-making of such enterprises. Latin American countries have placed specific emphasis on the search for a new approach aimed at controlling the dominant power and practices of transnational corporations in transfer pricing policies and territorial market allocation arrangements. Some governments have dealt with these two areas by exercising control of royalties and intra-company loans. Most Latin American countries prohibit royalty payments between related enterprises on the theory that these enterprises form only one "economic unit." Transnational corporations are given minimum individual export levels in order to control territorial market allocation arrangements. In addition, eligibility for tax and other incentives is frequently linked to specific export commitments.

No systematic or self-contained policy aimed primarily at the

over-all control of restrictive business practices exists in Latin America. What could be termed as policies to control restrictive business practices are essentially the "by-products" of a series of governmental policies in a number of areas. Furthermore, "by-products" do not always harmonize with one another, nor do they collectively form a coordinated approach to the question of restrictive business practices. Which practices should be controlled or how the best control can be effected is, in general, an open question in the anti-monopoly field. Specifically, in the case of Latin America, it is important to recognize the wide differences that exist between the various countries regarding fundamental aspects of their economies and institutions as well as their over all policies.<sup>1</sup>

Since the beginning of the industrialization process in Latin America, and particularly since the emergence of import substitution policies, oligopolization, resulting in significant barriers to competition and development in many sectors, has characterized the national economic systems.<sup>2</sup> In a majority of countries in Latin America, a small group of enterprises control a large portion of total production. This has enabled these enterprises to determine the behavior of the other small units, and has provided a wide field of maneuverability for restrictive business practices through such devices as buying and selling arrangements, and financial and technical assistance operations. In addition, the use of vertical restrictive practices such as tied purchasing arrangements, resale price fixing, and exclusivity agreements has been encouraged. The expansion of large unity through diversification and capital centralization has led to the formation of conglomerates involved in industrial activities, finance, trade, and commerce. The result has been an accumulation of economic power.

During the early 1970's, the most important industrial sectors in Latin America were largely controlled by foreign firms. Foreign capital was invested mainly in the most dynamic branches of industry, reinforcing the oligopolistic structure of these industries. The expansion of foreign subsidiaries frequently involved extensive use of local financial resources. The objectives of the development

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1. White, *Control of Restrictive Business Practices in Latin America*, UNCTAD ST/MD/4 G.E. 75-45034 (1975) at v-xi.

2. *Estudio de la Problemática Industrial de la Zona*, ALALC/SEC/PA/17, reprinted in 102 *SINTHESIS MENSUAL* 7 (1973); White, *supra* note 1, at 3; Bd. of CARTAGENA AGREEMENT & INT'L DEV. RESEARCH CENTER, *ANDEAN PACT TECHNOLOGY POLICIES* (1976), chaps I & II [hereinafter cited as *ANDEAN PACT TECH*].

plans and industrial incentives based on the protection of "Infant Industry" were distorted.<sup>3</sup> Global strategies of transnational corporations related to territorial production and marketing allocation arrangements, pricing policies, and the use and movement of funds have a vital impact on an affiliate's operations. In many Latin American countries, the volume of intracompany transactions is substantial and growing, especially in the importing and exporting of manufactured products. It is in this area that the known cases of abuses of economic power in the transfer pricing mechanism have occurred.<sup>4</sup>

The following analysis of the Latin American laws of monopolization, abuse of economic power, and competition includes criticisms and conclusions concerning these laws.

## II. ANTI-MONOPOLY LAWS

The constitutions and legal systems of Latin American countries prohibit both private monopolies and abuses of economic power which tend to eliminate free competition.<sup>5</sup> Several countries do provide, however, for state created monopolies which serve national interests exclusively.<sup>6</sup>

3. E. ANAYA, *PERU Y LAS GRANDES EMPRESAS MULTINACIONALES* (1974); Sauret, *La Denacionalización del Control de la Economía Argentina y la Legislación Antimonopolio*, 3 REVISTA DEL DERECHO COMERCIAL Y DE LAS OBLIGACIONES 349 (1970); White, *supra* note 1, at 6; ANDEAN PACT TECH., *supra* note 2, at 9.

4. A. RUIZ-EDREDGE, *LA CONSTITUCIÓN CORRENTADE* (1979) at 277; ANDEAN PACT TECH., *supra* note 2, chap. I.

5. CONSTITUCIÓN art. 10 (Argen. 1853); Law 22.262 of 1980; CONSTITUCIÓN art. 134 (Bol. 1967); CONSTITUIÇÃO art. 157 (Braz. 1967); Law 4.137, 10 Sept. 1962; Law 1.521, 26 Dec. 1951; Decree Law 869, 18 Nov. 1938; Decree 52.025, 20 May 1963; CONSTITUCIÓN arts. 19-25 (Chile 1980); Decree Law 2.760 of 1979; Decree Law 211 of 1973; CONSTITUCIÓN art. 31 (Colom. 1886, amended 1979); Law 155 of 1959; Decree 1302, 1 June 1964; CONSTITUCIÓN (Costa Rica 1949); Law 18 of 9 June 1915; Law 2468 of 13 Nov. 1959; CONSTITUCIÓN art. 45 (Ecuador 1978); CONSTITUCIÓN art. 142 (El Salvador 1962); Decree 279, 12 Mar. 1969, art. 14; Decree 2725, 6 Oct. 1958. COMMERCIAL CODE, (Guat.) arts. 361, 362, 663; CONSTITUCIÓN art. 263 (Hond. 1965); Decree Law 91, 13 Nov. 1973; COMMERCIAL CODE art. 423; CONSTITUCIÓN arts. 4, 5, 28 (Mex. 1917); Organic Law of 31 Aug. 1934; CONSTITUCIÓN art. 67 (Nicar. 1974); Decree of 20 July 1979; CONSTITUCIÓN arts. 254, 257 (Pan. 1972); CONSTITUCIÓN art. 95 (Para. 1967); CONSTITUCIÓN arts. 16, 40 (Peru 1979); Law of 11 Jan. 1896; CONSTITUCIÓN arts. 97, 100 (Venez. 1961). The above countries prohibit both private monopolies and abuses of economic power which tend to eliminate free competition. All of the provisions of the Nicaraguan Constitution are currently suspended.

6. CONSTITUCIÓN art. 134 (Bol. 1967); CONSTITUCIÓN art. 31 (Colom. 1886, amended 1979); Law 155 of 1959; Decree 1302, 1 June 1964; CONSTITUCIÓN art. 263 (Hond. 1965); Decree Law 91, 13 Nov. 1973; COMMERCIAL CODE, art. 473; CONSTITUCIÓN art. 85, §§ 17, 50 (Uru. 1966); Law 9585 of 20 Aug. 1936. These countries provide for state-created monopolies. Although the Honduran Constitution outlaws monopolies, it permits agreements, not to

The "market power" concept is considered a specific prerequisite for state intervention only in the laws of Brazil, Mexico, and Colombia. There are no precise criteria, however, for determining the geographical and product markets, or for defining "market domination" or "restrictive practice."<sup>7</sup> The laws govern only the conduct of the dominant enterprises, rather than their structure. Those monopolies regulated by the state because of the type of activity in which the company engages, or because of a need to control prices or industrial development in a given industry, are generally excluded from the application of the anti-monopoly laws in these countries. In order to enforce these laws, there must be specific evidence of definite effects, market domination or suppression of free competition.

The new Argentine anti-monopoly law prevents, rather than cures market monopolization, thereby improving the traditional Latin American method of dealing with monopolies.<sup>8</sup> Argentine law defines a "dominant position" as one held by a person who exclusively offers or demands a particular product in the national market. The law also refers to a "dominant position" when two or more persons agree not to compete with each other, or with a third party.<sup>9</sup> Monopolistic acts include price fixing, limiting or controlling technical development of production of goods or services, limiting distribution, making exclusive rights tied to purchasing agreements, fixing resale prices (either above or below cost), and reducing production in order to increase prices.<sup>10</sup> The new Argentine law provides the government with a flexible policy tool which will allow it to react to changes in the market. The law provides for a public agency to both study and repress monopolization and restrictive business practices.<sup>11</sup> In Brazil, the law defines abuse of economic power as domination of national markets, or a total or par-

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exceed ten years, which restrict certain commercial activities to a particular region. The Uruguayan Constitution recognizes the validity of monopolies by the state, departmental governments, or private persons. In addition, the legislative branch of government has the authority to grant monopolies. De facto monopolies such as trust cartels are under state control.

7. C. CORREA, *EL DERECHO LATINOAMERICANO Y LA PROPUESTA DE REGULACIÓN INTERNACIONAL DE LA TRANSFERENCIA DE TECNOLOGÍA: UN ANÁLISIS PRELIMINAR* (1981) [hereinafter cited as *EL DERECHO LATINOAMERICANO*].

8. Law 22.262 of 1980; Law 12.906 of 1946; Christensen, *La Nueva Ley de Monopolio*, 13 *REVISTA DEL DERECHO COMERCIAL Y DE LAS OBLIGACIONES* 513 (1980).

9. Law 22.262, art. 2 of 1980.

10. *Id.* at art. 41.

11. *Id.* at arts. 6-10.

tial elimination of competition. The key element in the Brazilian law centers on whether an enterprise's activities have "a preponderate influence on prices." An enterprise is presumed to be in a dominant position when a number of firms cannot compete with it in a given market. Monopoly activity, however, is only considered abusive when prices are raised without justification.<sup>12</sup> Specifically related to the laws on competition are those portions of the constitution concerning cooperation and the relationship among business enterprises. These provisions are aimed at preventing intention to dominate certain sectors of the market, repression of competition, arbitrary profit increases without corresponding production increases, or price increases without justification. These actions and any others should be prohibited when they are carried out with the intention of abusing economic power.<sup>13</sup>

Chile's new anti-monopoly law is based on the principle of free competition in the market structure. This new law has not changed Chile's traditional method of applying anti-monopoly laws. Chile's first law dealing with restrictive practices<sup>14</sup> was very conventional and fell into disuse not long after its promulgation.<sup>15</sup> The reasons for lack of success with this first law foreshadow possible problems with the new law: deeply rooted official practices of using price control mechanisms, direct subsidies to producers, protective tariffs, negative real interest credit, discriminatory exchange rates favoring importation of primary materials and capital goods, and cooperation between producers to "protect" themselves.<sup>16</sup> Chile does allow for restriction of free competition when it is necessary for the stability or growth of national investment.<sup>17</sup>

Colombia's anti-monopoly law is designed to control any restrictive business practice which bars free competition or causes maintenance of unfair prices. The law describes a "dominant position" as one where an enterprise is in a position to fix market prices because of its size. The Colombian system is directed at preventing dominant positions in the market when they result in undue restriction of free competition.<sup>18</sup>

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12. Law 4.137, arts. 2-4, 10 Sept. 1962; P. NETO-CIA, *BRAZIL IN WORLD LAW OF COMPETITION* (1981).

13. CONSTITUIÇÃO art. 157 (Braz. 1967).

14. Law 13.305, 6 Apr. 1959.

15. Furnish, *Chilean Antitrust Law*, 19 AM. J. COMP. LAW 464 (1971).

16. *Id.*

17. Decree Law 2.760 (1979); Decree Law 211, arts. 2, 4 (1973).

18. Law 155, arts. 1, 4 (1959).

Since 1915, Costa Rica has outlawed any act that restricts free trade either occurring within the country or when an abuse of economic power occurring in a foreign country gives rise to an effect in the national economy. The law established that any person, natural or juridical, who sells industrial products at prices equal to, or less than production costs will be considered as illegally monopolizing the particular business or industry.<sup>19</sup> This law also pertains to those who effectively achieve the same result but through the offering of premiums, gifts, payments, rebates, or discounts.<sup>20</sup>

In Guatemala, the Commercial Code outlaws unfair competition. Acts of unfair competition include: deceiving or confusing the public through false statements regarding origin or quality, or false indications of honors or prizes; releasing false information in order to influence purchasing decisions; and damaging another company by imitating its products, brands, or trademarks. The code also requires that a seller of a business abstain from opening a similar enterprise which is situated such that customers might be diverted from the sold enterprise.<sup>21</sup>

In Mexico the ability to fix the price of goods or services constitutes market power, and is prohibited. The existence of monopoly is a rebuttable presumption when price-fixing, sales below cost, or other restrictive practices are involved. When an activity executed from a dominant position is deliberate and detrimental to the public interest, the activity is subject to control by the State. However, the government can authorize agreements which permit either price fixing or production quotas.<sup>22</sup> The anti-monopoly laws referred to above involve a wide variety of restrictive business practices, some of which are beyond the scope of this article. In general, Latin American laws deal with the concentration and merger of enterprises, monopolization, abuse of economic power, and restrictive agreements.

### III. RESTRICTIVE PRACTICES

The prominent role of the state in Latin American economies is not the result of any deliberate plan but an example of a mixed economy. The circumstances prompting state intervention range

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19. Law 18 of 9 June 1915; Law 2468 of 13 Nov. 1959.

20. *Id.*

21. COMMERCIAL CODE arts. 361-62, 663.

22. CONSTITUCIÓN art. 28 (Mex. 1917); Organic Law of 31 Aug. 1934, arts. 3-5, 50.



from the need to react to international economic crises, to check foreign capital domination, to strengthen industrial growth, and to encourage the formation of local enterprises. Most of the Latin American countries apply such economic policy methods as price control, control of entry into the different markets, control of activities of production units in various sectors, participation of state enterprises in non-traditional areas (including basic industries), and promotion of growth of national enterprises. The administration of a national economic policy has a considerable impact on economic relations. The access of outside competitors to domestic markets is a principle recognized in almost all Latin American constitutions, which guarantee freedom of trade and industry. However, the right to engage in economic activities is normally subject to a number of restrictions which amount to a system of prior approval. It is mainly in the industrial sector, which is regulated by general and sectorial laws for the promotion and protection of domestic production, that the major control systems are to be found.

Today the majority of countries in the region have organic laws for industrial promotion.<sup>23</sup> Such systems of laws are policy instruments devised by each country to carry out the import substitution process. This policy includes the need to stimulate industrial growth by direct incentives such as tax relief, credit facilities or subsidies, and the protection of infant industries against foreign competition. These laws reflect an important change in approach towards the industrialization process and method of state intervention. This change is particularly due to the recognition of the adverse effects of the former industrial promotion system based on large scale indiscriminate protection.<sup>24</sup> The new trends in indus-

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23. Argentina, Law No. 21,608 of 1977; Bolivia, Decree-law 10,045 of 1971; Supreme Decree 12,509 of 1975 (Law of Investments); Brazil, Decree 1137 of 1970; Decree 65,106 of 1969; Consulta Previa ATO Normative 32 of 1978; Chile, Decree 17, March, 1971; Decree No. 180, 2 Feb. 1971; Consejo Nacional de Desarrollo; Colombia, Decree 602, 15 Nov. 1977; Decree 1649 20 Oct. 1977; Costa Rica, Law 5862, 9 Dec. 1975; Law No. 5162, 22 Dec. 1972; Dominican Republic, Law No. 79, 31 Dec. 1970, Law No. 299, 23 Apr. 1968; Ecuador, Law 1414 of 1971; El Salvador, Decree-Law 279, 19 Mar. 1969 (Law of Commercial Industry), Decree 81, 5 Sept. 1974, Decree 64, 18 Jan. 1961; Guatemala, Decree 1317, 30 Sept. 1959; Honduras, Decree-Law 57, 30 Apr. 1958; Decree 681, 23 Oct. 1978, Decree 16, 2 April 1966, Decree 494, April, 1960; Mexico, Industrial Promotion Law of 1955; Nicaragua, Decree 317, 20 March 1958 (*Ley de Protección del Desarrollo Industrial*); Panama, Law 92, 22 Dec. 1977; Peru, Decree-Law 18,350 of 1971; Paraguay, Law No 216 of 1970; Uruguay, Industrial Promotion Law of 1974; Venezuela, Decree 2979 and 2919 of 1979; Decree 2151, 3 Mar. 1977; Decree 1146, 16 Sept. 1975; Decree 135, 4 June 1974.

24. Radway, *Transfer of Technology to Colombia: A Proposal to Modify Decision 24*, 12 LAW AM. 321, 324 (1980).

trial promotion are not a change in approach to the existence of dominant positions or to competition in domestic markets, but are instead an adoption of objectives and instruments for programming economic structures, and a selective and conditional application of governmental incentives and benefits on the basis of the efficiency and qualitative aspects of the type of production promoted. Positions of dominance and monopolistic structure are not rejected in themselves, but made subject to direct regulation by the state.

The major consideration underlying this practical approach to economic power is the small size of domestic markets for certain products and the excessively large economic size of production facilities in relation to those markets which bring the objective of competition into conflict with that of achieving maximum scales of production. Moreover, the government's aim is to promote the growth of domestically owned enterprises, expanding their participation in the economy to ensure that the most important microeconomic decisions are made by local concerns. Prior approval for the establishment of new enterprises or the expansion of the existing ones is always required. For instance, Peruvian law requires prior authorization for establishment, diversification, or expansion of any industrial undertaking. Moreover, such authorization may involve the granting of the total market in exceptional circumstances.

In Argentina, the new law of Industrial Promotion is designed to be a flexible instrument of national policy. The pragmatic position of the law can go so far as to grant a monopoly of the market to a given industry, if such industry satisfies the law's requirements and purposes.<sup>25</sup> In other countries, the prior authorization requirement is imposed indirectly. The emphasis of the systems currently in force is on efficiency in industrial production through state intervention. Government policy is based mainly on direct control of enterprises and more or less mandatory application of development and sectorial reorganization plans. Another characteristic of industrial policy which has an important bearing on access to markets is the support granted to domestic capital goods industries through legal requirements to purchase domestically made goods, and other controls on the use of imported machinery and equipment.

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25. Law 21-608 of 1977 (statement of purposes).

To select the investments and incentives necessary to encourage enterprises, some countries have established a system of agreements between them and the government. In Latin America, there is limited use of "competition" as a means of allocating productive resources. The notion of competition as known in the United States is not mentioned in the Latin American industrial and anti-monopoly laws except in the context of improving the ability of enterprises to compete in the international market, which can usually be achieved, it is argued, only through the existence of monopolies in the domestic market.<sup>26</sup> Current methods of state intervention clearly take the existence of dominant positions into account and are designed to prevent or eliminate abuses, or to modify the behavior of dominant enterprises by exercising direct control over them.

A set of laws that play an important role in the regulation of market power in Latin America are the customs laws, regulations, and policies, price stability laws, and monetary laws.<sup>27</sup> Because of the scarcity of capital in developing countries and the need perceived by their governments to direct the application of available resources toward national planning goals, the degree of control on capital movement is substantial. Another equally strong motivation for control is the deep desire to avoid or eradicate foreign dominance of the local economy.

The principal connotation of the term "controls" is one of limitation rather than promotion of foreign investment. Adept as some of the Latin American countries are at "controlling" foreign investment, there are some that consider private foreign capital an indispensable adjunct to their own efforts to meet their economic goals. These countries have adopted measures designed to encourage the migration of such capital to their economies. The limitations or restraints generally employed are:

1. Outright proscription of foreign participation in a sector of the economy or a particular industry.
2. Limitations upon the percentage of foreign equity investment in all concerns, or in concerns engaged in particular enterprises.
3. A requirement that the foreign investor divest himself of a

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26. Schill, *The Mexican and Andean Investment Codes: An Overview and Comparison*, 6 L. & POL'Y IN INT'L BUS. 437, 467 (1974).

27. Brazil Law 4595, 31 Dec. 1964; Law 3244, 14 Aug. 1957; Decree 83,955 of 12 Sept. 1979; Dec. 63,196 of 29 Aug. 1968; El Salvador, Decree Law 2725 of 1958; See also ALLISON, *Capital Controls in Latin America*, in INTERNATIONAL FINANCIAL LAW (R. Rendell ed. 1980).

prescribed percentage of an interest within a fixed time frame, even though he may have initially been permitted to acquire either 100% or a majority interest in the given enterprise.

4. Limitations upon the amount of earnings that may be remitted by the foreign investor, and upon the amounts of capital that he may withdraw from the country.

5. Limitations upon the amount of earnings that may be reinvested in local enterprises by the foreign investor.

Normally, when foreign exchange is required for remittance of earnings, capital, payment of bills for imported goods and other purposes, the foreign currency must be obtained through and approved by the nation's central bank. This requires the deposit of local currency, sometimes on rather onerous terms such as non-interest bearing deposits for a number of months in advance of the actual availability of the foreign currency. Mexico, Guatemala, Honduras, Nicaragua and Panama have been able to avoid exchange controls for varying but considerable periods of years. Most of the remaining Latin American countries have a form of exchange control, and in some instances the system of controls is very complex and involves several parallel foreign exchange markets using different exchange rates for different types of remittances. It is characteristic of exchange control regulations in Latin America that they are subject to relatively frequent modifications.

Restrictive business practices resulting from the conclusion of contracts between two or more enterprises operating at the same (horizontal) or different (vertical) level of the production process are of special interest. The Argentine law covers horizontal agreements such as price agreements, market sharing and production limitation agreements, and vertical agreements such as exclusive rights agreements, tied-purchasing agreements, and price fixing. Exclusive rights agreements have only rarely been questioned under the old legal system, and the new law has not yet been challenged. However, sales contracts prohibiting distributors from selling competing products are common in Argentina, and apparently infringe upon the monopoly laws. Tied-sales and imposition of sales prices have been considered as likely to create a monopoly with the purpose of increasing profits and eliminating competition.<sup>28</sup> Brazilian law prohibits enterprises from entering into agreements if they lead to market domination. It constitutes an abuse of the right to form an economic group to make a sale conditional

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28. White, *supra* note 1, at 19.

upon acceptance of an unrelated obligation, or to engage in unfair competition. The rationale behind the Brazilian law is that such activities prevent or prejudice freedom of decision in the market place.<sup>29</sup>

In Chile, prices of products must be freely determined in the market by the sole operation of supply and demand. The Chilean courts have declared price agreements illegal. Agreements to fix maximum prices have been sanctioned though, as they do not interfere with competition, and are likely to benefit the consumer. Decisions concerning market allocations are subject to governmental examination and control. In addition, no economic system may be set up which tends to limit free competition by a contract to reduce the output of any product, particularly if it meets a vital need. The law prohibits exclusive distribution rights where a number of producers entrust the distribution of their products to a single entity or person. Practices which abolish discounts, agreements to limit publicity, and the organization of large numbers of producers and dealers to sell their products in accordance with uniform rules also fall within the anti-monopoly laws.<sup>30</sup>

The ban on restrictive business practices and activities is not absolute. Conduct must be such that it hinders free competition before it is illegal. The conceptual problem with these laws is that restrictive practices are not necessarily abolished even when their effect clearly may be to impede competition. The executive power may authorize acts or agreements otherwise illegal whenever it is necessary to stabilize and develop domestic investment which is threatened by foreign capital, or when the state has a public interest which needs to be served.

In Latin America, the systems in force to control restrictive business practices form an integral part of the laws regulating the international transfer of technology, and its enforcement is entrusted to special governmental agencies. The various types of restrictive clauses are classified into categories including tie-in clauses, price fixing, and other types of vertical arrangements. Contrary to the approach adopted in the antitrust legislation, the definition of conduct to be controlled is descriptive and declaratory. In analyzing the systems for controlling restrictive clauses, it is neces-

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29. Law 4.137, art. 2, 10 Sept. 1962.

30. ERNESTO OPAZO BRULL, *LA COMISION ANTIMONOPOLIOS Y ESTUDIO DEL TITULO V DE LA LEY NO. 13.305* (1962).

sary to consider the legal frame of reference and the policy that has developed in administrative practice. There are gaps in the rules, as in the case of restrictions continuing after the expiration of licensing agreements. The largest number of prohibitions and controls relate to clauses restricting exports and to the various types of tie-in clauses, especially those affecting the licensee's purchases and sales. The control systems tend to use mixed methods combining both strictness and flexibility.

The principle of flexibility permits the competent agency to fix the prices of agreements without a precise regulation on the subject. The need to correct excessive prices for foreign technology was one of the determinative factors in the establishment of rules regarding technology transfer in Latin America. In the majority of Latin America countries, control has been achieved through administrative practices. These administrative practices have established guidelines for the percentages and ways of making payment according to the object of the contract or the final destination of the technology transferred.

Latin American legislation of the transfer of technology views the regulation of "restrictive clauses" as a question of national interest. In particular the goal of these laws is to avoid the negative effects on economic policies. Furthermore, because of the imposition of such "restrictive clauses," the real control of local enterprises is performed from abroad. "Restrictive clauses" are defined in Latin American law without keeping in mind the real or potential effects of such clauses on competition. Such effects on competition are not part of the definition of "restrictive clauses" in Latin American law and are not part of their application.<sup>31</sup> "Restrictive clauses" are those which can affect the productive, technological, or commercial activities of enterprise, or those that prejudice the economic and technological development of the nation. The control of "restrictive practices" is formal and is performed through documents signed by the parties. The control is not determined by the "conduct or practice" of a juridical person as it is in the U.S. and in Europe.<sup>32</sup> In this context, the new Argentine law on transfer of technology<sup>33</sup> signals a departure from the traditional Latin American way of dealing with "restrictive" business practices. In effect,

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31. C. CORREA, *REGIMENES DE CONTROL DE LA TRANSFERENCIA DE TECNOLOGIA EN AMERICA LATINA* 41 (1979) [hereinafter cited as *REGIMENES DE CONTROL*].

32. *Id.* at 42.

33. Law 22.426 of 1981.

according to this law, the control of such restrictive practices is within the sole dominion of the new law on competition.<sup>34</sup> This alteration in the Argentine law is still too new to allow any comment.

The "restrictive business clause" is viewed by Latin American legislation more as a "vertical" restraint on commerce rather than a "horizontal" one. None of the Latin American legislation excludes agreements between parent and subsidiary. However, because of the formal application of laws, only documents are subject to control in the sense that these documents should not contain objectionable restrictive business clauses. In Brazil, for instance, the management of a subsidiary is a matter of private law that concerns only the parent company, provided there is no "abuse" by the controlling power.<sup>35</sup> Clauses which limit exports are generally prohibited with some exceptions. The Argentine provisions refer to prohibitions on exports and clauses subjecting the right to sell to foreign authorization. An export prohibition is valid provided that it refers only to the markets in which the licensor produces the goods licensed.<sup>36</sup>

In Mexico, the prohibition of exports in a manner contrary to the national interest is interpreted to mean the total prohibition of exports. Also, the obligation to export only to certain areas where the licensor has not granted exclusive licenses to other enterprises is permitted. Limitations on the volume of exports, the obligation to pay higher royalties on exports sales, and the obligation to export exclusively through licensor channels are prohibited.<sup>37</sup> In Brazil, the restriction or prevention of the effective use of the technology transferred, such as marketing restrictions and especially restrictions on exports, has been prohibited.<sup>38</sup> A declaration by the licensee that there are no other exclusive licenses which preclude exports is required. The legal prohibition is an instrument for negotiating more favorable positions for domestic enterprises.

Tie-in clauses usually require the licensee to perform acts which, although not necessarily connected with the object of the

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34. Law 22.262 of 1980.

35. Law 6404; Lamy, *O Accionista Controladore a Novalei de Sociedades por Acciones*, 13 REVISTA DE DIRIETTO ECONOMICO 61.

36. 24 INTEGRACIÓN LATINOAMERICANO (1978).

37. J. ALVAREZ SOBERANIS, *LA REGULACIÓN DE LAS INVENCIONES Y MARCAS Y DE LA TRANSFERENCIA TECNOLÓGICA* 510, 567-70 (1979).

38. Acto Normativo 15/75.

contract, may entail an additional financial or administrative cost for the receipt of the technology. Tie-in provisions are illegal unless they are granted by the technology itself. They also can be allowed when prices correspond to world market prices, or when there is reasonable justification for the clause.<sup>39</sup> The obligation to sell all production to the licensor or to use the licensor's distribution channels is in general prohibited.

#### IV. APPLICATION OF THE LAWS

The Latin American laws described aim to prevent the abuse of dominant positions and restrictions on free competition. There are only a limited number of provisions which prevent the formation of monopolies or allow for the dissolution of large enterprises or group enterprises. Generally, restrictive practices are prohibited, subject to some specific qualification before such practices are declared illegal.

In Argentina, either a private individual or the government has a cause of action to stop a restrictive business practice or to claim damages. The National Commission for the Protection of Competition is in charge of enforcing the anti-monopoly law, and its actions can be either preventive or curative. This new law is designed to apply when the equilibrium provided by competition in the market is in danger; it acts to restore competition. This is a significant change from the old law, which mainly pursued criminal punishment of the transgressor. The Brazilian law is applied by the Administrative Board for Economic Defense (CADE). CADE determines if something is an abuse of economic power. An action may be initiated by the accusation of either a public body or a private person. Once enough evidence is collected, CADE may order the end of the restrictive practice and also impose a fine. Furthermore, all acts and agreements between enterprises are subject to registration and prior prior approval. This system was created to balance production against consumption in order to regulate the market.<sup>40</sup>

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39. ANDEAN PACT TECH., *supra* note 2, at 128-29.

40. Law 4.137 of 10 Sept. 1962.

Brazilian antitrust laws are exceptional; the principles of antitrust can be seen first in the Brazilian Constitution of 1934. Constituição art. 117 (Braz. 1934). In 1945, a law was passed creating the Administrative Committee for the Defense of the Economy, which empowered the government to expropriate enterprises which might be detrimental to the national economy such as trusts and cartels. The fundamental antitrust concept was fully out-



In Chile, restrictions on free competition are criminal offenses punishable by imprisonment and dissolution of the guilty enterprises. The scope of administrative action is wide. The administrative agencies in charge have the power to order the end of the restrictive practices and to either reform or dissolve the enterprise found guilty. The administrative agencies also have the power to authorize acts limiting free competition when they involve matters of public interest.<sup>41</sup> Colombian anti-monopoly laws establish a system in which the original prohibition is subject to either modification or alteration. To attain this purpose, acts such as mergers are subject to prior approval. Dominant enterprises are required to submit information such as accounting, financial, commercial, and technological data to the appropriate agency. That agency must then determine the effects of such acts on the economy, and whether such effects should be suppressed. The penalties include fines, prohibition of activities, termination of restrictive practices, and special governmental supervision.<sup>42</sup>

Mexican law provides a total ban on monopolies and establishes a number of presumptions concerning the existence or the possibility of a monopoly, yet there is no unified machinery to enforce the law. Specific penalties include fines, closing the establishment, fixing maximum prices, and requiring the sale of the products or service to the public. Price fixing is legally possible if

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lined in the 1946 Constitution. It repressed abuses of economic power in the form of acts intended to dominate the domestic market, eliminating competition and arbitrarily increasing prices and profits. Constituição Art. 160 (Braz. 1967); Law 4.137, 10 Sept. 1962; Decree Law 7666, 22 June 1945.

Brazilian antitrust legislation is basically interpretative. It sets forth principles rather than specific rules, and must therefore be read in its spirit of protection of free competition for the benefit of society in general. Brazil's laws deal with offenses allegedly committed by companies but not by individual people, perhaps because the main penalties at the government's disposal are intervention and possible dissolution. It is believed that fines will have little or no effect. P. NETO-CIA, *supra* note 12, at 3-17.

Recently, antitrust legislation has begun to take on more importance. According to the law there are five basic forms of abuse of economic power. 1. The domination of domestic markets, or partial or total elimination of competition. 2. The increase of prices without due cause, with the intent of arbitrarily increasing profits without increasing production. 3. The provocation of monopolistic conditions or speculation on the market to such an extent as to temporarily increase prices. 4. The formation of an economic group by an association of companies in order to jeopardize the freedom of action of other buyers and sellers. 5. Unfair competition. The Brazilian antitrust laws do not consider company growth as being potentially dangerous. What is suspect are multiple corporations which through their constant growth (to giant proportions) specifically intend to bring the market under their control.

41. Decree Law 2.760 of 1973.

42. Law 155 of 1959, arts. 3, 13-14, 17.

authorized by the government. The criterion for authorization is the "economic efficiency" of the acts of practice involved.

The policy seeking to control market power through the orthodox mechanism of antitrust legislation, as developed in the industrialized countries, has not been particularly effective in Latin America.<sup>43</sup> The types of restrictive practices which have prompted the rare instances of governmental intervention, and the criteria applied and approach adopted by the appropriate authorities, do not appear to reflect the scale of the specific form of monopolistic patterns existing in Latin America. Given the political and economic circumstances in Latin America, the body of anti-trust law is small. The impairment and restrictions of competition practiced by larger enterprises have produced very few instances of intervention, compared with the number of cases in which action has been taken against restrictive practices which, while limiting free competition, do not necessarily affect market structure or arise out of situations marked by economic power. Rather, a substantial proportion of state action is related to production activities, particularly the supply of goods such as food stuffs, and patent medicines, which are of prime social necessity. The laws apparently are used more to directly protect the consumer by control of particular prices, rather than as devices for controlling the functioning of the underlying economic structures. The administrative infrastructure responsible for applying national legal standards has not been developed to any significant degree.<sup>44</sup>

The legislatures have devised systems designed to exercise preventive control over restrictive practices either by requiring registration and prior approval of contracts, or by providing hearings or supervisions. However, the scope and complexity of the procedures provided by the laws makes it practically impossible for current governmental agencies to put them into effect. At the same time, except in Chile and under the new Argentine law, the control schemes make no provision for informal negotiations with enterprises.<sup>45</sup> One of the reasons, seldom mentioned, for this lack of effectiveness of the Latin American antitrust legislation is that the

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43. Ebb, *Transfer of Foreign Technology in Latin America: The Birth of Antitrust Law?* 43 FORDHAM L. REV. 719, 722 (1975); C. CORREA, *REGIMENES DE CONTROL*, *supra* note 31, at 9.

44. Comment, *United States Antitrust Laws and Mexican Foreign Investment Laws: A Comparative Survey*, 13 Hous. L. REV. 571 (1976).

45. White, *supra* note 1, at 24-28.

concept of a "market" is not yet developed, as it is in the United States and Europe. In Latin America, therefore, disintegration is the result of the existence of monopolization and restrictive business practices.

The traditional Latin American economic problems, such as inflation, foreign exchange, balance of payments, and unemployment, historically have not been solved by either a pure free market economy or by a pure state run economy. Neither of these economic theories have ever had control of the whole economy in any Latin American country, except in Cuba. Economic programs of fiscal responsibility, credit restrictions, a unified exchange rate, free access to imports of capital goods and raw materials necessary to keep wholesale prices down, and a free market competition with price controls removed on most items have traditionally failed. The objective of bringing economic stability through growth and a free market pricing system has proved to be inappropriate or impracticable in Latin America, at least up until now.

The process of Latin American integration has changed somewhat the concept of competition. It was said that competition in its full meaning would only be reached in the context of economic integration. However, the history of antitrust laws in Latin America is the story of legal measures out of time and place, rendered ineffective by the force and flow of events around them. For instance, the Mexican scheme for the regulation of monopolies and restrictive trade practices is relatively unsophisticated and of very limited application. While the constitution lays down broad principles for the protection of free and unrestricted competition, those principles have been largely sacrificed in favor of what are considered more compelling economic policies and the requirements of Mexican economic development. Some government policies have, in fact, deliberately limited competition and fostered monopolies by protecting domestic producers against competing imports and even, in some cases, against the establishment of additional local producers. Lack of competition is also an unavoidable consequence of the realities of the Mexican economy. In many cases, the market is simply too small to support more than a few producers. Consequently, the existing legislation is directed more at maintaining order and stability in the economy than at safeguarding competition in a free market economy.

Despite the language of the Mexican Constitution, the law of monopolies clearly indicates that government concern for restric-

tive trade practices is centered on prices, and that the constitutional prohibitions against protection of industry and tax exceptions are not to be taken too literally. It is a fundamental premise of the law that not only should the public be protected against excessive prices, but also that unlimited competition may be equally harmful in that it may result in price reductions that jeopardize employment and wage levels, and impede industrial development.<sup>46</sup> All the restrictive practices regulated by the Latin American anti-monopoly laws may also occur in an international economic context, with acquisition and concentration of enterprises, and horizontal and vertical agreements being fairly typical. Legislation is by definition national in character; thus, acts occurring abroad may be considered punishable when they produce adverse effects within the country concerned. Such extraterritorial effect of the principles of jurisdiction is generally applicable to the antitrust laws.<sup>47</sup> In addition, Latin American laws may be easily construed to cover restrictive practices arising from imports or exports where these practices may produce adverse effects within the particular country.

## V. FUTURE TRENDS

In Argentina, it appears that there has been a change towards transfer of foreign capital and technology. The purpose of the new law on competition is to control restrictive business practices in licensing agreements. The new law regarding practices in the transfer of technology area is no longer concerned with restrictive business practices. This change in attitude towards licensing and control of the national market could be the signal of a change in the scope of government involvement. Economic efficiency of the market mechanism is the current trend. Argentina's new law has been framed, however, to avoid the vindictive attitude which characterizes the antitrust laws. It is important to note cultural values regarding technical and economic progress in dealing with the enforcement of the law. In addition, it is necessary to determine whether free competition has been affected by technical and economic progress, or by the illegal actions of some participants in the market. In this context, a capitalistic society makes perfect competition impossible. Accordingly, following the Argentinian view, per-

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46. Law of 1934 (monopolies' statement of purposes).

47. Ebb, 43 *FORDHAM L. REV.*, *supra* note 43, at 724.

fect competition is no longer a model of economic efficiency.<sup>48</sup>

A similar trend can be found in Brazil, where the government is trying to place more emphasis on the laws that concern competition and abuse of economic power. This new trend implies that restrictive business practices in licensing agreements will be viewed more as a matter of creating and protecting competition in the market rather than as a matter of controlling the activities of foreign licensors.<sup>49</sup> In Chile, a recent move towards enforcement of the antitrust laws is also noticeable.<sup>50</sup> It is essential, however, to keep in mind that in general the Latin American markets are not yet developed and are, therefore, subject to imperfections and disintegration. In these markets, a pure economic theory based on competition cannot operate fully. In Latin America, laws on competition are relatively new, and the case law is limited or non-existent. An interest in these laws is awakening, and it is possible that in the future they will be administered more forcefully. If this occurs, the attention currently placed on restrictive business practices concerning transfer of technology will take second place.<sup>51</sup>

The notion that efficiency, the ultimate protection for the consumer, would never be fostered so long as producers responded to factors other than competition, seems to have finally been taken into consideration. However, the menace of an economic structure based on price and other controls still exists. The majority of Latin American nations operate as unitary markets, and their individual economic potentials will not justify many production and distribution operations on the scale currently necessary for viable economic efficiency. Moreover, if we consider the conformation of Latin American society where the executive class is limited in number, traditional in composition, and often related by blood and marriage, asking for competition in such an environment may be asking for the impossible. The executive class encourages cooperation, not competition. Perhaps this is why the concept of "competition" comes to Latin America only in the form of foreign capital and technology by companies unencumbered by the allegiances and customs of the domestic economy. The Latin American na-

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48. Christensen, 13 *REVISTA DEL DERECHO*, *supra* note 8, at 513-29.

49. P. NETO-CIA, *supra* note 12, at ch.2.

50. *BUSINESS IN LATIN AMERICA* 265, 267 (1981).

51. I.M. PAUL, *DERECHO INTERNACIONAL ECONOMICO, DERECHO DE LA INTEGRACIÓN*, Title 5, ch. 2 (1980); P. NETO-CIA, *supra* note 12; Christensen, 13 *REVISTA DEL DERECHO*, *supra* note 8.

tions have taken a protective stance vis-à-vis domestic producers. Foreign investors are permitted access to the domestic economy only under strictly limited situations. The system of laws and official practices is an interventionist one. More important than the theory involved in the notion of intervention is the existence of the bureaucracy. People learn to live within the system by various means, including cooperation among industrialists for purposes of dealing with the government.

There has been an increased awareness in Latin America that the conflict between private commercial interests and the general social and economic interests of the country as a whole has long been regulated in the industrial world through anti-monopoly legislation as well as by the establishment of public regulatory agencies.<sup>52</sup> Given this, and the fact that the laws on transfer of foreign technology are in constant revision and change,<sup>53</sup> there is reason to suspect that there will be more emphasis on anti-monopoly laws in the future. The question that several Latin American nations will face during the decade ahead regarding international licensing is whether they should regulate economic problems through the use of laws on competition, as do most countries in the industrial world, rather than through nationalistic laws dealing with transfer of technology.

The industrialization process will be eased only if competition takes priority over nationalistic principles. Nationalism and protectionism are the fundamental rule in economic development in Latin America, while competition is the rule on the international level. If Latin American products are to compete with other products in the world markets, protectionism and nationalism should be made the exceptions, and not the foundation of development. Laws on competition should be developed and enforced in the region reversing the present trend of considering competition a secondary principle. Additionally, the rule of competition should be equally applicable to foreigners, as well as to national concerns. The distinction between national and foreign concerns directly conflicts with competitive principles. If competition is not created on the national and regional markets, the international economic position of regional and local enterprises and their governments

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52. Board of Cartagena Agreement, *Policies Relating to Technology of the Countries of the Andean Pact: Their Foundations*, UNCTAD TD/107 (1971), at 126-27.

53. Law 22,426, 12 Mar. 1981 (transfer of technology); Law 22,362, 1981 (trademarks); CONITE Res. 002-NG-81-EFC/35 (modifying rules on foreign investments).

will always be weak. The lack of uniformity in the enforcement of Latin American laws is the reason for their lack of success. Economic inequalities among the Latin American countries and citizens and among regional or national enterprises and foreign multinationals must be taken into account. However, principles of segregation and protectionism can only take a secondary position in the overall regulation of economic activity. If Latin America, as a community of countries, is to live as a democratic society and share the profits and responsibilities of the international community, principles of segregation and protectionism can only be enforced according to areas of economic activity, and not according to the character of the individuals, or enterprises to whom they are applied. Equality and competition are actual foundations of a democratic society, and they are proclaimed as such by all the Latin American constitutions. These principles should be implemented into actual legislation in order to cure the deficiency currently existing in the regulation of the Latin American economy.<sup>54</sup>

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54. E. DE LA TORRE & J.M.G. LAGUARDIA, *DESAROLLO HISTORICI DEL CONSTITUCIONALISMO HISPANOAMERICANO* (1976); *EL CONTROL CONSTITUCIONAL DE LA POLITICA EXTERIOR EN AMERICA LATINA* (D. de la Pedraja ed. 1973).