Introduction

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The changes in the antitrust landscape in the Americas over the past year have been significant. New leadership is in place at the antitrust agencies in Mexico, Brazil, Peru, Canada, and the United States, among others. Chile has established its Tribunal for the Defence of Free Competition. Major reforms are being considered in Brazil and Mexico. El Salvador has enacted its first competition law, bringing the total number of nations in the Americas with competition regimes to 15.[2] Ecuador, Honduras, and the Dominican Republic reportedly will follow soon. Other countries as well are seriously considering adopting competition legislation, including Guatemala, Nicaragua, Trinidad and Tobago, Bolivia, Paraguay, and in the Caribbean. Even Cuba participates in certain international competition policy events and is reassessing the role competition policy should play in its economy.[3] Looking back further, it's clear that we have come a long way in the last 15 years. In 1990 the word 'competition' would have conjured only images of the World Cup in most of the nations in this hemisphere; now it describes one of the essentials of a vibrant economy.

Many of the competition authorities in the Americas are undertaking ever more sophisticated law enforcement and advocacy activities. Brazil, for example, has ramped up its enforcement activities against price-fixers[4], and recently took decisive action to protect competition in its crucial iron ore sector.[5] Brazil and Mexico have both reformed their merger notification regimes along the lines of the International Competition Network recommended practices.[6] The degree of cooperation, communication, coordination, and convergence among those authorities continues to grow.

One might well conclude from these developments that sound and effective antitrust policy has a rosy future in the Americas. Indeed, in many countries the indications are that this is the case. However, sound competition policy must be articulated in legislation and supported and empowered by a country's political leadership. Political leaders are likely to do so only if their constituents embrace the idea that their lives will be better off in free markets where competition rewards those that produce the things they want at prices they are willing to pay. For many of those constituents, this may be counterintuitive and may require a leap of faith that they are not willing to make. Thus, the idea does not always garner the support it deserves, and consequently in many countries the future of sound competition policy remains an uncertain proposition.

Many countries in the region have traditions of having critical industries dominated by a handful of firms whose positions are sheltered by powerful legal and political forces. Any effective competition agency will at some point have to take on anti-competitive practices that benefit those forces. In such cases, its effectiveness may well depend on whether it can muster the political support to impose and enforce remedies that place the interest of consumers ahead of those who use their dominance to shield their market power. Whether the agency will be successful in promoting and protecting competitive markets will depend heavily on whether the politicians' constituencies recognise and advocate the value of competition. Vested interests tend to be well funded and organised, while the most logical constituencies for competition, consumers and potential new entrants, tend not to be.[7]

There are plenty of cases where vested interests have come in ahead of consumers. In Colombia, for example, when the competition agency head attempted to block an airline merger that he believed would reduce competition, the government summarily removed him from the case, which provoked his resignation.[8] In Argentina, a 2001 revision of the competition law called for the creation of an independent tribunal free from direct government control, but the government has still not established the tribunal. In Jamaica, enforcement of the competition law was effectively suspended when the judiciary found fault with the separation of adjudicative and prosecutorial functions. The government has done nothing to remedy the problem, and as a result the agency has been unable to conduct adjudicative proceedings to enforce its law for over three years.[9] And in the United States, arguments that consumers would be better off if real estate brokers could compete by offering a limited service for a reduced commission sometimes fall on deaf ears.[10] These cases amply illustrate the extent of the challenge to make competition policy into something that consumers and politicians alike understand to be in their best interest.

The United States has had strong competition laws for over a century, yet efforts to influence the competition law and agencies by the politically powerful still occur.[11] What differs is that in the United States the cause of sound competition enforcement has supporters that press Congress for sound competition enforcement.[12] Those supporters have, for the most part, carried the day.

Perhaps the significance of a broad and influential pro-competition constituency can be illustrated by my own experience in the mid-1990s, when I worked in the Federal Trade Commission's regional office in Chicago. Acquaintances and neighbours, knowing that my job had something to do with antitrust, came up to me as I waited for my train to work and urged me to do something about a well-known firm that was thought by some to be monopolising a key technology sector. It was never entirely clear what they wanted me to do (especially since the case was being investigated by others), but the incidents illustrated the interest in and support for antitrust policy among ordinary Americans. When Argentine, Mexican, Peruvian, and Barbadian antitrust officials are similarly accosted on the street by ordinary citizens and urged to do more to make markets competitive, then the challenge will have been met.

In some respects, public support for competition policy reflects the electorate's belief in whether free and vigorously competitive markets are indeed aligned with their interest. Recent elections in several countries, including Venezuela, Argentina, Bolivia, and Uruguay, have reflected electoral ambivalence about the benefits of free markets. Against this background, it should not be surprising that Argentina has delayed implementation of the Competition Tribunal called for in its legislation and that Uruguay has slowed down its effort to draft a comprehensive competition law to replace the bare-bones statute enacted in 2000.

Yet it does not have to be this way. The 2002 Brazilian elections brought a populist president to power. In apparent recognition of how cartels and monopolisation hurt the well-being of the very

Brazilian consumers who put him in office, he made antitrust policy a priority. He appointed capable and energetic leadership to Brazil's antitrust agencies. Those officials have led Brazil to the forefront of the hemisphere's competition policy success stories.[13] Brazil has made the investigation of cartels a priority, has reoriented its merger enforcement programme so that resources are directed at deals that affect Brazil and away from those that do not, and begun a welcome overhaul of that country's competition law. The free market sceptics in the hemisphere would do well to pay close attention to what is happening in Brazil.

It might, of course, be unreasonable to expect that newer competition authorities will initially be able to garner this vital public and political support for competition policy by enforcing the law against well-entrenched incumbents; perhaps a more effective strategy might be to start a little closer to home by looking at how the government itself unwittingly helps firms to restrict competition.

One of the most effective strategies that incumbent firms use to protect themselves from competition is to persuade their governments to impose restrictions that will keep out competitors.[14] Such a strategy is cheap to implement, virtually risk free, and is highly effective because the restrictions carry with them the force of law. Not only that, the government picks up the tab for enforcing the restriction.[15] Consider, for example, a hypothetical manufacturer that is dominant in its domestic market and is well-connected in the capital, but fears that it will begin to lose sales to more efficient and innovative competitors that are beginning to appear. Of course, the enterprise could reduce its prices, but this will eat into its monopoly profits. It might also try to improve its product quality, but this is usually expensive and lacks any guarantee of success. It might also try to collude with its competitors to prevent market entry, or to use its market power unilaterally to exclude competitors, perhaps by acquiring control of a critical input, using exclusive dealing to block a vital channel of distribution, or engaging in predatory pricing. Schemes like this, however, carry a risk of detection, as well as a high risk of failure. Instead, our hypothetical firm might well conclude that a better plan would be to use its influence to persuade the government to do the work of shielding its market position. There are many ways a government can accomplish this, from establishing an unreasonably exclusive licensing scheme to imposing environmental, labour, or other costs that are not faced by the incumbent, to imposing restrictive distribution conditions cloaked as consumer protection measures. Such governmental restrictions are all the more likely to be successful when they can be clothed in believable justifications.

While it may be unrealistic to expect a nascent competition agency in a country with scant political support for competition policy to take on the politically-connected manufacturer who seeks such restrictions through law enforcement, a strategy of competition advocacy aimed at making the costs of government anti-competitive practices and regulation transparent to politicians and regulators may well pave the way to success.

Every anti-competitive practice and every anti-competitive government regulation imposes costs on consumers, sometimes reasonably and sometimes not. Licensing restricts entry and reduces competition, and in some cases create opportunities for corruption. Product or service standards usually impose compliance costs that will be passed on to consumers. These costs operate like hidden taxes, even though they usually are not recognised as such by consumers and politicians; instead typically they are merely accepted as part of the status quo or considered acceptable in light of the proffered justifications for the practice. In the 1980s, for examples, proponents of restrictions on commercial practices by optometrists in the United States attempted to justify those restrictions on the grounds that they were necessary to protect high quality vision care, even though they raised its cost.[16] Funeral directors have attempted to argue that only licensed funeral directors should be able to sell caskets, which would effectively exclude retail and on-line sales, because buyers of caskets somehow need special protection from fraud.[17] Traditional real estate brokers have argued that consumers will somehow be hurt if discount brokers are allowed to sell a limited package of services in return for a lower commission.[18]

Even if a competition authority decides for political, resource, or other reasons that it cannot directly challenge a given practice[19], the agency still can bring powerful tools to bear on the problem by using its economic expertise to identify publicly the practice's costs and countervailing benefits. Armed with this knowledge, politicians, consumers, and voters can then make informed choices about policy and purchases. The Federal Trade Commission has done this with some frequency during the past 25 years. It has shown Congress and the public how anti-competitive regulation increases the price of eyeglasses, real estate closing services, legal services, coffins, and other goods and services.[20] Once an agency can effectively hang a price tag on the restrictions, voters and legislators can decide whether the price is worth paying.

The competition agencies in the Americas have achieved a great deal in the past 15 years. The competence and dedication of their leadership and staff is impressive. Regardless of whether a competition agency chooses to initiate a law enforcement action, where it is feasible, or to concentrate on competition advocacy, where it is not, that agency will be taking substantial steps to build public support for competition policy and thereby help convert competition's promise of enhanced consumer welfare into a reality.

Notes

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2 Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, El Salvador, Jamaica, Mexico, Panama, Peru, the United States, Uruguay, and Venezuela.

3 See Mónica Rodríguez Gutiérrez, 'Principios Fundamentales De La OMC, Aplicación a Un Posible Acuerdo Multilateral Sobre Política De Competencia', Regional Seminar for Latin America and Caribbean Countries on the Post-Doha WTO Competition Issues, São Paulo, 23 April 2003, available at http://www.unctad.org/en/docs//ditcclp20038_en.pdf, p. 290.

4 RAC Pfeiffer, 'Recent Aspects of Hard-core Cartel Prosecution in Brazil', Submitted to Third Meeting of OECD Latin American Competition Forum, 19-20 July, 2005, available at http://www.iadb.org/europe/LACF2005/pdf/Brazil_contribution_cartels.pdf

5 'Brazil Imposes Curbs on Iron Ore Producer', *Washington Post*, 11 August, 2005.

6 International Competition Network, 'Implementation Of The ICN Recommended Practices for Merger Notification and Review Procedures (2005)', available at http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG1_Notification_Procedures/Implementation.pdf.

7 See International Competition Network, 'Capacity Building and Technical Assistance, Building Credible Competition Authorities in Developing and Transition Economies', 39-40 (2003), available at http://www.internationalcompetitionnetwork.org/Final%20Report_16June2003.pdf.

8 Avianca, 'ACES Merger Approved', *Financial Times*, 13 December, 2001.

9 'The Most Important Institutional Challenges in Promoting Competition in Jamaica', OECD Latin American Competition Forum, 14-15 June,

2004, available at http://www.oecd.org/dataoecd/52/43/32033702.pdf.

10 'Real Estate Brokers Face New Restrictions', *Kansas City Star*, 18 July, 2005, available at http://www.kansascity.com/mld/kansascity/business/12117518.htm (referring to FTC advocacy intervention available at http://www.ftc.gov/be/V050010.pdf).

11 Eg, 'Merger Review Plan Threatened; Hollings Tells FTC, Justice to Scrap Accord on Assigning Cases', *The Washington Post*, 20 March, 2002, p. E3, final edition.

12 Eg, Letter from Roxanne Busey, chair, American Bar Association Section of Antitrust Law to senators Herbert Kohl and Mike DeWine, 5 August 2002, available at http://www.abanet.org/antitrust/comments/2002/oversight.pdf.

13 'Trustbusters Take Aim in Brazil', *Wall Street Journal*, 12 July 2005.

14 'State Intervention/State Action—A US Perspective', remarks of Timothy J Muris, chairman, Federal Trade Commission, before the Fordham Annual Conference on International Antitrust Law and Policy, New York, NY, 24 October 2003, available at http://www.ftc.gov/speeches/muris/fordham031024.pdf at 2.

15 S Creighton, B Hoffman, T Krattenmaker and E Nagata,'Cheap xclusion', 72 *Antitrust Law Journal* 975 (2005).

16 Federal Trade Commission, Trade Regulation Rule; Ophthalmic Practice Rules, 54 FR 10285, 13 March 1989. The rule was eventually vacated on state action grounds. *California State Bd of Optometry v FTC*, 910 F.2d 976 (DC Cir 1990).

17 Brief amicus curiae of Federal Trade Commission, *Powers v Harris*, Case No. CIV-01-445F (WD Okla, filed 29 August 2002) at 13, available at http://www.ftc.gov/os/2002/09/okamicus.pdf.

18 See supra footnote 10.

19 For example, in the United States, challenges to certain state or private practices may be barred by the state action and Noerr-Pennington doctrines.

20 See http://www.ftc.gov/be/advofile.htm. In some cases the FTC has been able to go a step beyond advocacy and has conducted economic studies to demonstrate the true cost of these restrictions. A 1984 study, for example, showed that costs of legal services were significantly higher in states that restricted advertising by lawyers. Divorces, for example, cost an average of $33 more and bankruptcies cost $44 more in states with restrictions. FTC Cleveland Regional Office and Bureau of Economics, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984). Similarly, two FTC studies on optometry tended to show that government restrictions on the commercial practice of optometry had little impact on the quality of care that was practiced in restrictive or non-restrictive states, but significantly increased the cost of eye examinations and that opticians as well as optometrists were able to fit contact lenses to patients, but that they sold at lower prices. FTC Bureau of Economics, Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); FTC Bureaus of Economics and Consumer Protection, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).