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ABUSE OF DOMINANCE ENFORCEMENT UNDER LATIN AMERICAN COMPETITION LAWS

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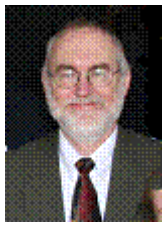

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ABSTRACT

The spread of competition laws in Latin America has been accompanied, as in Central and Eastern Europe , by warnings against over-enforcement, and in particular against enforcement of provisions against the “abuse of a dominant position” in a market that may discourage legitimate, procompetitive actions and strategies. We examine all instances of competition agency findings of abuse of dominance for eight Latin American countries over the period 2001-2003. We find a) that there have been relatively few such rulings in most countries, b) that roughly half of such rulings have been in traditionally “regulated industries”, which suggests that the number of rulings may fall as sectoral regulatory agencies gain more capability and experience, c) that many rulings have arguably targeted government-imposed restrictions on competition as well as privately imposed restrictions, and d) that a majority of rulings have attacked exclusionary rather than exploitative abuses.

The widespread adoption of competition laws in the 1990s was accompanied by controversy, especially in the US , regarding the importance and even the appropriateness of introducing such legislation early in the transition to a market economy [1] . Critics feared that active competition law enforcement would introduce too many false positive regulatory actions, becoming yet another avenue for inefficient government intervention and naïve enforcement of the law that might retard economic development by restricting productive business arrangements and otherwise reducing incentives for investment [2] . For many of these critics, one way to limit the anticipated negative effects of a competition law would be to introduce “a competition policy system that emphasized advocacy and enforced prohibitions on naked trade restraints. [Critics] would not establish competition laws that prohibit the full range of behavior – abuse of a dominant position, mergers, vertical restraints, and price discrimination – commonly subject to antitrust oversight in older

Nota:

1 Russell Pittman (2004), Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out? (hereafter “AODEE”), 27 World Comp. 245 (2004) at 246. See also, Roger Boner & James Langenfeld, Liberal Trade and Antitrust in Developing Nations, Reg., Spring (1992); Paul E. Godek, A Chicago-School Approach to Antitrust for Developing Economies, 43 Antitrust Bull. 261 (1998); Paul E. Godek, One U.S. Export Eastern Europe Does Not Need, 15 Regulation 20 (1992); A.E. Rodriguez & Mark D. Williams, The Effectiveness of Proposed Antitrust Programs for Developing Economies, 19 N.C. J. Int’l L. & Com. Reg. 209 (1994); and Armando E. Rodriguez & Malcolm B. Coate, Limits to Antitrust Policy for Reforming Economies, 18 Hous. J. Int’l L. 311 (1996).

2 Rodriguez and Coate explain, “[b]y reducing the ability of firms to commit

to investment contracts, active antitrust activity may result in reduced growth rates for reforming economies." Rodriguez and Coate (1996), *supra* note 1 at 347.

Western competition systems" [3] .

Nota:

3 William E. Kovacic, Institutional Foundations For Economic Legal Reform In Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 Chi.- Kent L. Rev. 265, 290 (2001). Rodriguez and Coate clarify, "Widespread perceptions of the virtues of antitrust policies diverge significantly from actual problems with the operational aspects of these policies. Challenging allocative distortions due to market power is an unassailable theoretical position. This premise constitutes the basis of our confidence in recommending an antimonopoly component to a liberalization program. However, in the developed world, antitrust has grown far beyond a simple attack on monopoly. While there may be some narrative linking each aspect of antitrust enforcement to the monopoly problem, the underlying assumptions of the typical enforcement program are so extreme as to render the constituent concept almost useless. Taken as a whole, antitrust as practiced in the developed world may have adverse effects on a reform policy in the developing world, and may stunt growth" (italics added), Rodriguez and Coate (1996), supra note 1 at 358.

No other part of a comprehensive competition law was as subject to criticism as the prohibition against abuse of dominance. It was feared that abuse provisions were particularly likely to be overenforced, thereby chilling growth-enhancing business conduct and causing considerable harm to consumers. These critics argued that the abuse of dominance provisions of new competition laws in developing countries could act as "a Trojan Horse for the smuggling in of price controls and other dubious government harassment of successful enterprises" [4] . By limiting freedom of contract, enforcement of abuse of dominance provisions would inhibit the market economy that liberalization seeks to foster [5] .

Nota:

4 AODEE, *supra* , note 1 at 246. Commenting on competition policies recently inaugurated in emerging market economies, the Antitrust Section of the American Bar Association noted that abuse of dominance law could, if applied unwisely, effectively restore price control under the guise of antitrust, thus taking back the freedom and rewards that the market gives. Introduction and Recommendations of ABA Antitrust Law Section's Special Committee on International Antitrust, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1551, at 171 (Feb. 6, 1992). In Rodriguez and Coate (1996), *supra* note 1 at 338, the authors emphasize that "[p]redation and dominance provisions would facilitate use of government process to attack successful business."

5 Rodriguez and Coate offer a detailed explanation of how prohibitions against a variety of abuse of dominance conducts, including exclusive dealing, refusals to deal, price discrimination and tying, could be harmful. "Exclusive dealing agreements may reduce the profitability of opportunism by linking more tightly the prospects of the two businesses…. By precluding downstream firms from signing exclusive contracts, regulators may make various business relationships untenable. …the antitrust regulators could attack the upstream firms for refusal to deal with various other downstream firms…. Such an antitrust policy creates a number of problems for a market economy….[a]n active refusalto-deal policy could degenerate into price setting by the government regulators….Naive enforcement of antitrust regulations against price discrimination may preclude [certain] sophisticated contract[s] by mandating a single price for each type of business relationship. Although manufacturers could claim an efficiency justification for its pricing behavior, the firm is likely to have problems proving its policy is efficient, because enforcers usually take a narrow view of efficiencies… Thus, efficient contracting solutions are lost under active antitrust enforcement. …tying schemes often offer customers a low price for the purchase of a product in exchange for a commitment to buy related products from the firm at higher prices. … this type of tying is generally considered to be a price discrimination scheme…. Tying is often considered illegal per se, so no efficiency defense could be mounted. If enforcement activity prevents the partners from using tying, other less efficient contractual terms would have to be devised to make the contract self-enforcing. In some situations, no terms may exist, so the contract would not be

viable." Rodriguez and Coate (1996), *supra* note 1 at 354-357.

Even proponents of the adoption of comprehensive competition laws expressed concerns about abuse of dominance provisions [6] . They questioned whether in enforcing abuse provisions new agencies would focus on "questionable" anticompetitive practices, *i.e.* excessive pricing, price discrimination, or other "exploitative" practices, as opposed to bringing actions against exclusionary practices that are generally considered more likely to be harmful to competition [7] .

Nota:

6 With respect to Latin America, Coate et. al. recommend the following: "For Latin American countries, prohibitions on price fixing should represent the core antitrust policy….enforcement priorities should not include non-price horizontal agreements, vertical restraints, or price discrimination". Malcolm B. Coate et al., Antitrust in Latin America: Regulating Government and Business, 24 U. Miami Inter-Am. L. Rev. 37, at 81.

7 Compared to other areas of competition law, where there is considerable convergence, if not harmonization, of enforcement practice, "proper" enforcement of dominance provisions remains under consideration. The United States and Europe still have not yet achieved consensus on sound enforcement of abuse of dominance, or monopolization, provisions. This debate may create a degree o f tension for jurisdictions in the process of adopting new competition laws, or revising their existing dominance provisions.

This paper explores whether fears of over-enforcement of dominance provisions have been borne out in the experience of Latin America, and examines both the types of conduct ("exploitative" or exclusionary) that have been sanctioned and the particular sectors of economies where abuse enforcement has been focused. Abuse of dominance, as used in this paper, includes, *inter alia* , excessive pricing, price discrimination, predatory pricing, refusals to deal/sell, exclusive contracts, tied selling or bundling, and raising rivals' costs. The principal analytical approach employed in this paper is a comparison of abuse of dominance legal provisions and enforcement actions across eight jurisdictions, using a similar methodology to that of AODCEE.

Latin America provides an interesting case study because although the trend may now be reversing, over the past twenty years it has been a region of neoliberal, pro-market, Washington consensus reforms, and the question of whether governments that have given lip service to free markets have also refrained from large-scale economic intervention is a real one [8] . Latin America also provides a rich set of experience for examination because of its diversity – seen in the dominance provisions themselves, the institutional structure of the competition agency, and the wide range of the economic importance of each country [9] . For example, some jurisdictions prohibit practices such as excessive pricing while others do not. With respect to institutional structure and caseloads, Latin America offers a variety of experiences. Panama and Peru , for example, generally initiate fewer than 15 cases per year, while Mexico handles upwards of 200 cases each year. Similarly, in 2003, Costa Rica 's agency had fewer than 20 professionals, and operated on a budget of approximately US$ 200,000; in the same year the Mexican agency had 120 professionals dedicated to competition, and had a budget of approximately US$ 15 million.

Nota:

8 So, conversely, is the question of whether reforming governments have adequately protected their populations from the downsides of liberalization and globalization. See, for example, Amy Chua, World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability [2002].

9 Coate et. al. highlight these differences in greater detail in Coate et al., supra note 6, at 50 & Table 1. See also Rodriguez and Coate (1996), supra note 1 at 338, where they note, for example, that " Brazil , Mexico , Peru , and Venezuela restrict various activities of dominant firms, with some countries focusing on vertical restraints and/or price discrimination".

I – HAVE FEARS OF OVER-ENFORCEMENT OF DOMINANCE PROVISIONS BEEN BORNE OUT?

Commentators concerned about over-enforcement of the antitrust laws in Latin America have been concerned principally about the unilateral intervention of the antitrust agency in markets, in the context of broader governmental tendencies and temptations to intervene in market processes [10] .

Nota:

10 The fears mentioned supra with respect to other areas of the globe, or to a specific region other than Latin America, may have been even more valid with respect to Latin America than elsewhere. Decades of import-substituting industrialization consisting of high levels of trade protection, heavy-handed regulation, and active state involvement in the productive process led

industrial and labor groups to become the dominant forces in Latin American policy-making. Privatisation, trade liberalization and deregulation changed this pattern, and isolated politically the domestic industrial elites. This generated enourmous pressures from the elites for state intervention.

This fear is related at least in part to the particular historical relationship between business and government in Latin America, where the private sector developed not in partnership with governments (as, for example, in Asia) but rather with the "favors" of government [11] . As far back as colonial times, when a relationship with the Spanish crown was essential for succeeding as entrepreneur, government intervention has played a paramount role in shaping the economic institutions of the region. Government has dictated how the entrepreneurs must behave, what to produce, and so forth [12] . It is not surprising that the initial opponents to the adoption of competition laws in Latin America were the business communities [13] . The business communities feared that in negotiating business deals, the competition law would become an additional bargaining tool for the government, rather than being used as it should, to attack government and private restrictions on competition.

Only five or ten years ago companies reached cartel agreements supervised by the government, while now governments seek to prohibit such agreements [14] . Ironically, the very fact that the forms and appearances are not much changed while the philosophy has changed – in the direction of liberalization and the support of markets – may make competition law enforcement and regulation more difficult in Latin America than in Central and Eastern Europe , where it is more obvious that nothing is as it was.

Nota:

14 While historically in both Asia and Latin America cartels and collective market arrangements were promoted by governments, in Asia the government sanctioned the arrangement and then actively participated in it, nurturing the conglomerates to ensure their s trength. In Latin America , by contrast, government tended to sanction the arrangement in a less transparent fashion, and never monitored the results.

Table 1 presents the number of abuse of dominance, or monopolization, cases completed for 2001, 2002 and 2003; the number of anticompetitive conduct cases for the same years [15] , as well as the total number of competition cases (*i.e.* , including mergers) for each year.

Nota:

15 Anticompetitive conduct cases include, *inter alia* , abuses of dominance, cartel agreements, noncartel horizontal agreements, and vertical agreements.

Table 1.Number of cases completed, 2001-2003 [16]

Nota:

16 Data compiled from responses to a survey conducted for a project of the International Competition Network's Competition Policy Implementation Working Group. Survey is available at: http://www.internationalcompetitionnetwork.org/effectivenessta.html, "Agency Data Sheet" survey, questions 52, 53, 54, 70, 71, 72, 94, 95, and 96.

country	Dominance 2001	conduct 2001	total 2001	dominance 2002	conduct 2002	total 2002	dominance 2003	conduct 2003	total 2003
Argentina	11	*	*	16	*	*	28	*	*
Brazil (CADE)	8	30	614	17	31	549	16	51	577
Colombia	1	22	143	2	31	136	3	17	79
Costa Rica	6	25	26	4	18	18	3	28	29
Mexico	30	64	375	34	68	328	14	38	234
Panama	0	1	2	0	4	5	3	3	3
Peru	2	9	12	4	8	8	4	8	8

Venezuela	3	18	19	3	14	15	1	11	13

It is clear that abuse of dominance investigations do not generally account for a large share of agency caseload [17] . For example, abuse of dominance investigations accounted for less than two percent of all investigations in Brazil and Colombia , and approximately eight percent of all investigations in Mexico . As a proportion of all conduct investigations, dominance cases were low for some jurisdictions (e.g., seven percent for Colombia), higher in others (e.g., 38 percent in Brazil , 45 percent in Mexico).

Nota:

17 Another recent study offers support for a relatively few number of abuse of dominance allegations. Clarke, Evenett and Lucenti (2005) created a database of allegations of anticompetitive acts in Latin America and the Caribbean (LAC) by compiling English-language news articles from October 1, 2004 through January 31, 2005. In the database, specific accusations of abuse of a dominant position accounted for 11.7 percent of cases, as opposed, for example, to 40 percent of allegations that were related to cartelization. See Julian L. Clarke, Simon J. Evenett and Krista Lucenti (2005), “Anticompetitive Practices and Liberalising Markets in Latin America and the Caribbean”, Journal of World Economy, vol. 28, no. 7 at 1041.

If attention is shifted from the number of investigations to actual enforcement actions against the alleged anticompetitive conduct by the dominant firm, it becomes clear that the number of such actions is generally low in absolute terms **.** Table 2 presents findings of abuse in each country, by year.

Table 2. Number of abuse findings 2001-2003

Country	2001	2002	2003
Argentina	3	4	6
Brazil	0	1	1
Colombia	1	2	2
Costa Rica	2	0	0
Mexico	13	17	4
Panama	0	0	0
Peru	0	2	0
Venezuela	0	2	0
Total	19	28	13

The number of abuse findings is minimal, and even these may reflect more the competition agencies’ need to act as sectoral regulators in the absence of strong independent regulatory institutions than any tendency to intervene indiscriminately in the everyday business decisions of private firms.

A decade ago, Janusz Ordover, Paul Clyde, and Pittman (Ordover and Pittman 1993; Ordover, et al. 1994) noted that many Central and Eastern European countries were setting up competition agencies but were not yet setting up agencies for regulating the behavior of the “natural monopoly” enterprises in sectors like energy, telecommunications, and transport. They argued that in the (perhaps temporary) absence of such regulatory agencies, the competition authorities were the only government bodies able to protect the citizenry from monopoly abuses, and that these authorities should act as “quasi-regulators” of these “natural monopoly” enterprises, using as their regulatory weapon the abuse-of-dominance provisions of the competition laws, until regulatory agencies were created to take their place.

Table 3 shows the industries that were designated as “regulated” or “borderline regulated” by Pittman (2004) when he examined this hypothesis for the countries of Central and Eastern Europe for 1996 and 2001. He found that indeed a large percentage of abuse findings had been in these regulated sectors, where one would expect much of the enforcement energies to be devoted by traditional regulatory agencies rather than the antitrust agencies of more general jurisdiction.

Table 3. Regulated industries

Regulated Sectors	Borderline Regulated Sectors
Postal services	Air transport
Electricity	Medical and health services
Telecommunications	Funeral, cremation, and cemetery services
Internet services	Waste disposal
Natural gas distribution	Local bus transport
Banking and financial services	Insurance

Cable television	
Water transport	
Water supply	
Local heating services	

Interestingly, Table 4 suggests that the same pattern found for the Central and Eastern European countries has held true for Latin America in the early years of the 21st century as well. Despite the fact that in general the Latin American countries have moved further than the Central and Eastern European countries in setting up independent regulatory agencies [18] it is clear that the antitrust agencies retain a good deal of responsibility for protecting customers from abusive behavior by these traditional “natural monopolies”: between one quarter and one half of the abuse findings may be characterized in this way, depending on the definition of “regulated sectors” used [19] .

Nota:

18 For example, an independent telecommunications regulator exists in seven of the eight countries examined. In only two of the countries, however, does the competition agency share jurisdiction over competition issues with the independent regulator (Brazil and Colombia); in the others it has sole jurisdiction. An independent regulatory body for energy exists in six of the eight countries examined; the competition agency has concurrent jurisdiction over competition issues in only two countries (Brazil and Panama), while in the rest the competition agency has sole jurisdiction over competition issues.

19 The Clarke, Evenett and Lucenti (2005) study, op. cit, found that many of the allegations of any type of anticompetitive conduct were in regulated industries. For example, in reporting the lines of business where allegations were made in two or more jurisdictions in LAC, the authors found that nearly one third were in the telecommunications sector and another 18 percent were regarding air transport. See Clarke, Evenett and Lucenti at 1042.

Table 4. Number of abuse findings in regulated industries, 2001-2003

Country	Abuse findings	Regulated (narrow)	Regulated (broad)
Argentina	13	3	9
Brazil	2	1	1
Colombia	5	2	3
Costa Rica	33	–	–
Mexico	0	17	18
Panama	0	–	–
Peru	3	2	2
Venezuela	2	–	–
Total	59	25 (42%)	33 (56%)

A recent case in Brazil highlights the role the competition agency must sometimes play in these countries. The case involved charges that Matec, an affiliate of Ericsson, had unlawfully refused to sell component parts for an Ericsson MD 110 Telephone System [20] . Independent companies offering telephone system maintenance contracts claimed that they would be unable to compete effectively in the MD 110 market without access to replacement parts. In a 2003 decision, CADE found that Matec had unlawfully foreclosed competition in the market for system maintenance services, because competing companies could not operate without access to replacement parts. The foreclosure reduced consumer welfare because the affected telephone system purchasers were “locked-in” to the MD 110 phone system by high switching costs. Competition at the point of sale for telephone systems was not adequate to forestall a market failure in the case of the federal government – which was a prime MD 110 customer – because government procurement rules disabled the government from selecting any bid but the lowest, without regard for post-purchase servicing costs.

Nota:

20 Inter-American Development Bank and Organization for Economic Cooperation and Development, Competition Law and Policy in Brazil: A Peer Review, Paris (2005) at 25.

In Mexico , the CFC has brought a series of dominance cases against Telmex, the dominant telephone services provider.

One example in 2000 involved a proceeding in which the CFC found an unlawful refusal to deal. Consumers calling 800 "toll free" numbers operated by long distance companies had to purchase a Telmex pre-paid "Ladatel" card if they wished to make the call using a Telmex public phone. Customers using public phones to call 800 numbers operated by Telmex were not subject to this expense, and Telmex refused to contract with competing operators so that they could absorb directly the cost of public phone access. The competitors, of course, could not effectively market 800 number services to companies because companies did not want callers to pay for public phone access when making a "toll free" call. As a result of the case, callers no longer have to pay for public phone access when the 800 number is operated by a long distance provider with whom Telmex has signed an agreement [21] . If, however, Telmex does not have a signed agreement with the long distance carrier that operates an 800 number, Telmex charges $ 1.00 per minute.

Nota:

21 For example, during the CFC investigation, Telmex had agreements with ATT, MCI, and Sprint and others. Today, with those carriers the service is toll free for the callers. Telmex does not have agreements with many national long distance providers.

As with the CEE countries, one may predict that in Latin America the antitrust agencies will have fewer enforcement responsibilities in the traditionally regulated sectors of the economy – hence more resources to devote to enforcement in the traditionally unregulated sectors – once the regulatory agencies become more effective.

An equally important observation is that, at least in some countries, the competition authorities appear to be challenging some forms of government intervention in markets. For example, three of the five findings of abuse in Colombia appear to be related to government restrictions on competition. More than 20 of the 33 Mexican cases appear to involve government restrictions, with cases against Telmex, concessions in transportation, Pemex, syndicated unions, and so on. Many of the findings of abuse in non-regulated sectors likewise appear to involve other types of government restrictions. While a more detailed analysis would be necessary, it seems likely that many of the government restrictions being attacked are restrictions put in place at the request of powerful business interests with the aim of restricting competition [22] . Under those circumstances, attacking government restrictions would be an especially procompetitive use of a competition agency's scarce resources [23] .

Nota:

22 Robert Bork and others have argued that "[m]isuse of courts and government agencies is a particularly effective means of delaying or stifling competition." Bork, The Antitrust Paradox, at 159 (1978, rev. 1993). Competitors may rely on government restrictions for a variety of reasons. "Abuse of government processes presents a very different tradeoff of risks and benefits than aggressive price cutting for several reasons. First, unlike predatory pricing, it frequently is likely to succeed, because the exclusionary effect often operates by force of law. Second, by comparison with predatory pricing, it may cost little to attempt. Finally, and most fundamentally, the conduct does not in any way resemble 'competition on the merits.' False statements to government agencies are not susceptible to any justification. They cannot be explained in terms of the defendant's effort to increase output or improve product quality, innovation or service. …Some staff members of the FTC have described abuse of government processes as an example of 'cheap exclusion' – exclusionary conduct that is "cheap" both in the sense that it is inexpensive to attempt, and that it has little positive value to consumers because it lacks any cognizable efficiencies". See Round-table on Competition on the Merits, Note by the United States, OECD (May 2005), at 4, 7; citing Creighton, Hoffman, Krattenmaker and Nagata, Cheap Exclusion, 72 Antitrust L. J. 975 (2005).

II – DESIGN AND ENFORCEMENT OF DOMINANCE PROVISIONS

Analysts have distinguished between two types of monopolistic practices prohibited by abuse-ofdominance provisions in competition laws. First, there can be prohibitions against certain practices in which the dominant firm uses its monopoly power to exploit other market participants without directly affecting the structure of the market, by, *inter alia* , charging high prices to customers, discriminating among customers, and paying low prices to suppliers. This conduct is sometimes referred to as "exploitative" conduct. Second, there are prohibitions against conduct that is aimed directly at the preserving or exacerbating anticompetitive aspects of the structure of the market: conduct that creates or maintains the monopolist's power, in which the firm tries to suppress competition by, for example, refusing to deal with a competitor, through predatory pricing, or by raising rivals' costs. Since such conduct seeks to exclude competitors and competition from the market, it is often referred to as "exclusionary" conduct [24] .

Nota:

23 The Federal Trade Commission in the U.S. , for example, has brought several cases in recent years that involve the alleged abuse of governmental processes to obtain market power shielded by law. See at Roundtable on Competition on the Merits, Note by the United States, OECD (May 2005), at 4, 7.

24 The Supreme Court described exclusionary conduct as conduct that contributes to the acquisition or maintenance of market power by means other than competition on the merits. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985); Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406*408 (2004); cited in Creighton et al., supra note [ ] at 975.

For many scholars, the difficulty in determining what is an acceptable exercise of market power, necessary for a determination of whether an exploitative abuse has occurred, suggests that competition agencies should "seek to minimize the extent to which they regulate prices of individual firms and focus more on seeking to prevent firms from engaging in exclusionary acts that threaten competition" [25] . Others argue that dominance provisions should prohibit *only* exclusionary conduct, not exploitative conduct. With respect to Latin America , Coate and others urged the countries adopting laws to focus on exclusionary practices [26] . In the U.S. , violations of §2 of the Sherman Act generally apply only to exclusionary conduct [27] . Exploitative acts, such as charging monopolistic prices, are not attacked by enforcers because, *inter alia* , this type of enforcement is considered impractical and, it is feared, may discourage firms from competing as vigorously as they otherwise would [28] . Proponents of this view frown on prohibitions of excessive pricing, for example (prohibitions included in the competition laws of Brazil and some other countries), which is a purely ex-ploitative act. Laws which prohibit practices that might be called exclusionary, such as price discrimination, but in fact are exploitative [29] , may also be deemed problematic according to this thinking. (Furthermore, while discrimination may appear "unfair", its implications for economic welfare are generally ambiguous. Possible welfare benefits of discrimination include the supply of customers who would not pay a nondiscriminatory higher price and improving the ability of sellers to recover high levels of fixed costs.) Certainly, jurisdictions are encouraged by both commentators and fellow enforcers to bring exclusionary conduct cases as opposed to exploitative conduct cases [30] . Regardless of whether critics argue that exploitative behavior should not be prohibited at all or in part, many agree that enforcement actions against this type of behavior should be limited [31] .

Nota:

25 Organisation for Economic Cooperation and Development and The World Bank (1998), "A Framework for the Design and Implementation of Competition Law and Policy", ed. R. Shyam Khemani, at 73.

26 With respect to Latin America, Coate et al. make the argument for focusing on exclusionary practices. Coate et. al., supra note 6. They suggest, "an active predation policy must carefully focus only on exclusionary tactics of would-be monopolists, rather than on interactions associated with robust competition…Antitrust policy should screen cases to eliminate those where predation cannot explain the market behavior…." at 67; "an optimal antitrust policy that considers enforcement costs and chilling effects would not focus its enforcement on vertical restraints" at 77; "Given the lack of experience with market economies, Latin American regulations should narrowly define price discrimination policies." at 79. Instead they encourage, "Initially, Latin American governments could define a set of exclusionary practices…." at 80.

27 Unlawful monopolization requires, inter alia, proof of exclusionary conduct: "[i]n order to satisfy any conduct component of the monopolizing offense, the conduct in question must be capable of making a significant contribution to the creation, maintenance, or expansion of monopoly power." Areeda and Hovenkamp, 3 Antitrust Law (2nd ed.), 650a.

28 Areeda and Hovenkampf explain, "Many hesitate to condemn mere monopoly as such for the following reasons: a. Condemnation of all market power is impractical because varying degrees of power are pervasive in the economy. b. Condemnation of mere monopoly is unfair because the characterization of market power as monopoly is inevitably arbitrary, because bad conduct cannot be presumed, and because even equitable relief deprives the innocent monopolist of 'just' rewards. c. Some monopolies are economically inevitable or governmentally licensed. d. Condemnation of the monopolist that achieved its position solely by fair and vigorous competition could discourage others from vigorous competition that antitrust law seeks to encourage." Id. at 630b.

29 There exist statements that practices such as price discrimination are exclusionary, but the authors generally agree with Posner, who argues, "some of the practices deemed exclusionary, mainly price discrimination in its various

guises (including most tie-in agreements), are monopolistic but not exclusionary….They enable the monopolist to extract higher profits without preventing equally or more efficient new entrants from challenging his monopoly". Richard A. Posner, "Antitrust Law", 2nd ed., at 41-42.

30 See Coate et. al, supra note [ ]. Even exclusionary cases are subject to heated debate. See Trinko, 540 U.S. at 414 ("under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' …The cost of false positives counsels against an undue expansion of § 2 liability.") (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)), cited in Creighton et al., supra note [ ] at [ ]. The current debate regarding exclusionary and other practices centers on whether the exclusionary conduct need have an exploitative effect. While in the past, and even in some cases currently, courts have been willing to find purely exclusionary conduct to be a violation, recent scholarly opinion in the U.S. has favored requiring the plaintiff also demonstrate the likelihood that these limitations will ultimately allow the dominant firm to exploit its position. See Robert Pitofsky, "The Essential Facilities Doctrine Under U.S. Antitrust Law," 70 Antitrust L.J. 443 (2002); Brian A. Facey & Dany H. Assaf, "Monopolization and Abuse of Dominance in Canada, the U.S. and The EU: A Survey," 70 Antitrust L.J. 513 (2002); Timothy J. Muris, "The FTC and the Law of Monopolization," 67 Antitrust L.J. 693 (2000); David A. Balto & Ernest A. Nagata, "Proof of Anticompetitive Effects in Monopolization Cases: A Response to Professor Muris," 68 Antitrust L.J. 309 (2000); Timothy T. Muris, "Anticompetitive Effects in Monopolization Cases: Reply," 68 Antitrust L.J. 309 (2000). Professor Eleanor Fox has pointed out that the EC prohibits "limiting production, markets, or technical developments" even where such limitation will not necessarily lead to exploitation. See Eleanor Fox, "What is Harm To Competition? Exclusionary Practices and Anticompetitive Effect", 70 Antitrust L. J. 371 (2002).

31 While EC law on abuse of dominant position addresses both exploitative and exclusionary types of behavior, increasing emphasis has been placed on exclusionary behavior. See, e.g., Hoffman-La Roche & Co. v. Commission of the European Communities, (Case 85/76) [1979] ECR 461, 3 CMLR 211, 91 (13 February 1979).

In keeping with the European civil law tradition of spelling out in detail what is prohibited [32], most of the Latin American competition laws have enacted dominance provisions that list a series of behaviors by a dominant firm or firms that are prohibited, and despite the widespread skepticism regarding various "exploitative" practices, most prohibit, *inter alia* , price discrimination or the imposition of discriminatory conditions, and about half prohibit excessively high prices. All have restrictions on tying, which may arguably be used for either exploitation (as a pricing strategy) or exclusion (making competitive entry more difficult) [33] . Table 5 presents the types of conduct that are most frequently specifically prohibited in the legal provisions of Latin American competition laws.

Nota:

32 See Malcolm B. Coate et al., Antitrust in Latin America: Regulating Government and Business, 24 U. Miami Inter-Am. L. Rev. 37, at 53-54. "However, under the civil code, the law must be more specific. Governments must write regulations to identify when a firm has a dominant position".

33 See, e.g., Pittman, Tying Without Exclusive Dealing, 30 Antitrust Bull. 279 (1985).

Table 5. Types of Abuses Prohibited

country	law	excessive pricing	price discrimination	predatory pricing	refusalts to deal/sell	tied selling	raising rival's costs	open-ended (catch-all) provision
Argentina	2001	yes	yes	yes	yes	yes	yes	no
Brazil	1962; 1994	yes	yes	yes	yes	yes	yes	no
Colombia	1959; 1992	no	yes	yes	yes	yes	no	no
Costa	1994	no	yes	yes	yes	yes	no	yes

Rica								
Mexico*	1992	no	yes	yes	no	yes	no	yes
Panama	1996	no	yes	yes	yes	yes	no	yes
Peru	1991; 1996	yes	yes	yes	yes	yes	yes	yes
Venezuela*	1991	yes	yes	yes	no	yes	yes	yes

As the above table demonstrates, only a limited number of laws explicitly prohibit excessive pricing (Argentina , Brazil , Peru and Venezuela), and, as explained below, these provisions are infrequently used. All of the laws do prohibit other conduct that may be considered exploitative, *i.e.* price discrimination and tying. As the data below demonstrate, however, the inclusion of specific conduct prohibitions do not appear related to the pattern of actual enforcement actions, *i.e.* , where the defendant is found guilty. For example, 80 percent of the enforcement actions in 2001-2003 in Colombia , which prohibits fewer exploitative activities than other jurisdictions, involved exploitative conduct. On the other hand, while four jurisdictions prohibit excessive pricing, only one has actually enforced the provision in recent years.

Table 6 categorizes each country's enforcement actions from 2001-2003 where the defendant was found guilty of abuse of dominance into "exploitative" or "exclusionary" practices. While findings of price discrimination account for a quarter of total abuse findings from 2001-2003, nearly 40% of enforcement actions involved either refusals to deal or exclusive dealing.

More specifically, the majority of enforcement cases (60%) during 2001-2003 focused on clearly exclusionary types of abuses. Within the exclusionary cases, the greater part of the cases involved refusals to deal (34% of exclusionary cases, or 21% of total abuse findings) and exclusive dealing (26% of exclusionary cases, 16% of total cases.) In Mexico , for example, 16 of the total abuse of dominance findings involved telecommunications, and of those, seven were refusals to deal, and two were exclusive dealing. In our sample there were only two findings of predatory pricing, or 3% of total abuse findings during that period. One of the predatory pricing cases involved telecommunications (Colombia), and the other the food industry (Mexico).

Table 6. Enforcement actions by type of conduct

Country	Exploitative	Exclusionary
Argentina	8	5
Brazil	1	2*
Colombia	4	1
Costa Rica	2	1
Mexico	7	26
Panama	0	0
Peru	0	2
Venezuela	2	0
Total	**24**	**37**

Exploitative conduct cases, which comprised 40% of the enforcement actions from 2001-2003, were focused on pricing practices: price discrimination accounted for 65% of the exploitative conduct cases, or 26% of total abuse findings. There was only one finding of excessive pricing, in Argentina in 2003, in the gasoline industry (retail petroleum).

While a closer examination of the cases, which is outside the scope of this chapter, is necessary for concluding definitively that these Latin American agencies are not seeking to regulate the prices or discriminatory acts of individual firms, it does appear that they are focusing more on exclusionary acts.

III – CONCLUSION

Enforcement actions against abuse of a dominant position appear to be of relatively low frequency in Latin America , and in many cases the competition agency appears to be compensating for ineffective institutions in regulated industries [34] . Importantly, in many cases the competition agencies appear to be attacking government restrictions, far from using the "government process to attack successful business" [35] . In Latin America , government restrictions remain a core component of restrictions on market competition, and it is a positive development if the competition agencies are seeking to dismantle them. Finally, the majority of enforcement actions involve "exclusionary" practices, suggesting that the abuse of dominance cases are not restoring price controls under the guise of antitrust, as skeptics feared [36] .

Nota:

34 It is also the case that in some countries where no comprehensive antitrust law exists but sectoral laws have competition provisions, e.g., Bolivia and until recently El Salvador, the competition provi sions of the sectoral laws have inspired the development of standards for future regulation in non-regulated sectors.

35 Rodriguez and Coate (1996), supra note 1 at 338. It is possible that many countries are achieving similar effects (of overregulation) through other means. Certainly, the imposition of price controls in many countries, including one of theleading reformers in the 1990s, Venezuela, suggests that this is the case.

36 Introduction and Recommendations of ABA Antitrust Law Section's Special Committee on International Antitrust, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1551, at 171 (Feb. 6, 1992).