

## THE INVESTMENT CLIMATE, COMPETITION POLICY, AND ECONOMIC DEVELOPMENT IN LATIN AMERICA

R. SHYAM KHEMANI AND ANA CARRASCO-MARTIN\*

### INTRODUCTION

This article discusses the role and importance of the investment climate and especially competition (antitrust) law-policy in fostering sustainable, broad-based competitive economic development. While the discussion is focused primarily on Latin American countries, the arguments advanced are generally applicable to developing economies in other regions as well.

The quality of a country's investment climate or business environment determines the risks and transaction costs of investing in and operating a business. These risks and costs are, in turn, determined by the legal and regulatory framework; barriers to entry-exit; and conditions prevailing in markets for various goods and services, including labor, finance, basic infrastructure services, and other productive inputs. The quality of the investment climate essentially determines the mobility and speed with which resources can be redeployed from lower to higher productive uses. For this to occur effectively, the nature and degree of competition in markets plays a pivotal role. There is significant economic evidence suggesting that private investment has grown faster in countries with better investment climates. Also, economies with competitive domestic markets tend to attract more domestic and foreign direct investment, have higher levels and rates of growth in per-capita GDP, and have lower rates of poverty.<sup>1</sup>

\* The authors are, respectively, Advisor, Competition Policy and Consultant in the Foreign Investment Advisory Services of the World Bank Group; and Financial and Private Sector Development Vice-President of the World Bank Group, in Washington, D.C. The research assistance and significant data inputs provided by Ms. Giuliana Cane are gratefully acknowledged. The views expressed in this paper are those of the authors and do not necessarily reflect the position of the World Bank Group, its staff, or its officials.

1. See DEV. PROSPECTS GROUP, WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2003 ch. 3 (2003), <http://siteresources.worldbank.org/INGEP2003/Resources/gep2003complete.pdf>; THE WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE, ch. 1 (2004) [hereinafter WORLD DEVELOPMENT REPORT 2005] [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf).

Promoting effective competition is often supported on grounds that it pressures firms to focus on efficiency and improve consumer welfare by offering greater choice of higher quality products and services at lower prices. However, it also promotes greater accountability and transparency in government-business relations and decision-making, and contributes to reducing opportunities for engaging in corruption, lobbying, and rent-seeking behavior. Additionally, by lowering barriers to entry it provides opportunities for broad-based participation in the economy and for sharing in the benefits of economic growth. Without effective competition, firms are more likely to possess considerable market power, which enables them to earn excess profits and wield the political influence to tilt public policy in their favor. There are also likely to be distorted price and profit signals and increased risks of misguided investment and output decisions, all of which can lead to economy-wide repercussions.

The merits and benefits of fostering competitive markets have been recognized in many countries that have adopted various macro- and micro-economic reforms. There are presently about 100 countries that have adopted competition legislation. More than half of these nations have adopted or strengthened their respective competition policies since the early 1990s. Relative to other regions, developing countries in Latin America have been at the forefront in embracing pro-competition measures, such as deregulating industries, liberalizing trade and investment, and enacting competition (antitrust or antimonopoly) laws. Chile, for example, passed a specific decree relating to anticompetitive business practices in 1959. However, effective implementation of competition policy appears to vary across Latin American (and other) countries, due to such factors as inadequate resources, administrative capacity, and political support.<sup>2</sup> Casual observations indicate that there is a wide variation in the nature and extent of competition prevailing within and across different Latin American countries. There also exists wide variation in the economic growth and development of different countries in the region. Although the differential degrees of competition cannot purport to explain wholly the differences in the economic growth and development of nations, this article argues that it is one of the most important, if not the, critical factor. While many of these economies may be encumbered by limitations on human and physical capital, governance and institutional structures, and other resources, they are also prevented from achieving their potential by various types of public policy-based and private sector anticompetitive practices. The primary message of this article is that developing countries in Latin America (as

2. WORLD DEVELOPMENT REPORT 2005, *supra* note 1, at 4-6.

well as in other regions) need to promote effective competition policy as part of their overall government economic and regulatory framework.

The term “competition policy” refers to government measures that directly affect both the extent of rivalry between enterprises and the structure of industry. Typically, it includes policies that can enhance competition in local and national markets (such as economic deregulation, liberalized trade policy, relaxed foreign investment, and ownership requirements), as well as competition law (also referred to as antitrust or antimonopoly law), which is designed to prevent anticompetitive business practices by firms and unnecessary government interventions in the marketplace.<sup>3</sup>

While many of the suggested policy measures (such as simplifying and reducing the costs of regulation, and trade and investment liberalization) are pro-competitive, they are insufficient to maintain and encourage effective competition. Although these measures primarily change the role of the public sector in the organization and conduct of economic activity—and appropriately pave the way for an increased and less-encumbered role of the private sector—they do not address the restrictive business practices by the private sector; these practices can adversely impact the benefits that flow from competition, which other regulatory reforms promote.

Some commentators have argued that private sector firms cannot engage in anticompetitive business practices in openly competitive markets with low barriers to international trade, investment, and entry. Any rents that incumbent firms may earn will be rapidly eroded by the emergence of new competitors that are also seeking to earn high profits. There are cross-section industry studies which indicate that, with tariff reductions and increased import competition, the profit (price-cost) margins of domestic firms decrease. However, case- and industry-specific studies indicate that domestic firms and markets can remain insulated from international competitive pressures due to such factors as high transportation costs, nontradable products and services, perishable goods, and business strategies such as exclusive dealing, foreclosure of important sources of inputs and distribution channels, domestic regulations, and international cartels. In addition, many developing countries lack an enabling physical and business infrastructure, adequately developed financial (debt-equity) markets, access to relevant commercial information, and the like. Moreover, there often exist a wide range of anticompetitive situations arising from lobbying by large

3. R. Shyam Khemani & Mark A. Dutz, *The Instruments of Competition Policy and Their Relevance for Economic Development*, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 16 (Claudio R. Frischtak ed., 1995).

incumbent firms that are closely connected to the government and politicians.

In this context, an effective competition law-policy has an important role to play in *protecting and promoting* the competitive process. It provides for a system of checks and balances against restrictive business practices that may emanate from both private and public sector entities and allows for pursuit of legitimate commercial interests. The effective application of competition law-policy entails not only enforcement and sanctions against anticompetitive business practices by private sector firms, but also “competition advocacy,” so that government policies and regulations do not unnecessarily impede the competitive process. It buttresses a healthy investment climate, thereby contributing to investment, productivity, and broad-based economic development. To further elaborate on these points, the ensuing discussion is organized as follows: Part I discusses some aspects of the business environment prevailing in several Latin American countries bearing on business firms’ operations and investment decisions. Part II presents empirical information on the importance of competition and competition (antitrust) law-policy in reducing market dominance and fostering competition and business competitiveness. Part III provides a brief overview of the experience and issues confronted in the implementation of competition law-policy in select Latin American countries.

### I. THE PREVAILING BUSINESS ENVIRONMENT

The degree to which the business environment allows entrepreneurs to engage in profitable and productive economic activity varies considerably across countries. A survey conducted by the World Bank indicates that the principal factors adversely impacting firms conducting business and investing in Latin America relate to corruption, the judicial system, policy instability, and anticompetitive policies and practices.<sup>4</sup> On corruption, the “core survey questionnaire” posed questions such as the extent to which “businesses have to pay some irregular ‘additional payments’ to get things done” to overcome bureaucratic red tape, and whether there is access to superior officials to “get correct treatment without recourse to unofficial payments.”<sup>5</sup> Questions on the legal system and judiciary relate to resolution of

4. Taxes and regulations were identified as the leading constraint, followed by policy instability. However, taxes and regulation are generally complained about world-wide, including in industrialized countries. See GEETA BATRA, DANIEL KAUFMANN & ANDREW H. W. STONE, INVESTMENT CLIMATE AROUND THE WORLD: VOICES OF THE FIRMS FROM THE WORLD BUSINESS ENVIRONMENT SURVEY 4, 32 fig.2.6 (2003).

5. *Id.* at 98–99; see also *infra* Annex I.

business disputes in a fair, consistent, affordable, and expeditious manner, and whether there is reasonable protection of contractual and property rights. On policy instability, the questions sought responses regarding advance knowledge and information; consultations; predictability; coherency and consistency in the application of existing rules, or in the development of new rules; regulations; and policies by government. Questions on competition focused on the number of competitors (including state-owned enterprises), unfair pricing practices by domestic and foreign firms, subsidies, and favoritism, among other factors.

In Latin America, the percentage of firms identifying corruption are particularly high (greater than 60%), and include Bolivia, Dominican Republic, Panama, Peru, Ecuador, El Salvador, Mexico and Venezuela (see Table 1). A high percentage of firms in some of these countries also identified other factors that constrained business, such as the quality of the judiciary (Bolivia, Ecuador, Mexico) and anticompetitive policies (Mexico, Peru). It appears that in most countries, policy instability was most frequently mentioned as constraining business (fourteen of twenty countries surveyed in the region). It should be noted that not all of these countries have enacted competition law-policies. Specifically, Bolivia, Dominican Republic, Ecuador, El Salvador (at the time of the survey), Guatemala, and Haiti are among such countries. It seems that the degree of corruption also appears to be high in these countries—though, of course, having a competition law-policy does not necessarily mitigate such problems. The case of Mexico is especially notable, as a high percentage of respondents identified all four problem areas as affecting their business (see Table 1).

TABLE 1: GENERAL CONSTRAINTS TO BUSINESS OPERATION AND GROWTH<sup>6</sup>

Country	Corruption	Judiciary	Policy Instability	Anticompetitive Policies
Argentina	52.0	42.9	73.7	51.6
Belize	30.0	17.0	38.0	32.6
Bolivia	88.7	61.9	73.0	54.7
Brazil	50.0	53.3	90.1	49.7
Chile	24.5	23.5	55.0	23.0
Colombia	59.0	42.0	87.1	38.1
Costa Rica	48.0	30.0	59.0	43.2
Dominican Republic	69.7	49.1	68.5	55.5
Ecuador	87.9	76.5	88.9	51.4
El Salvador	70.3	57.4	71.8	44.9
Guatemala	52.0	46.1	74.3	37.6
Haiti	75.5	44.4	80.0	72.0
Honduras	58.6	37.2	44.4	62.2
Mexico	80.6	66.0	87.0	65.7
Nicaragua	59.6	39.0	65.0	50.5
Panama	64.7	51.6	63.0	52.0
Peru	62.1	47.1	75.5	60.4
Trinidad and Tobago	18.0	11.9	20.8	24.8
Uruguay	29.4	28.6	56.3	22.3
Venezuela	72.9	58.3	94.0	59.8

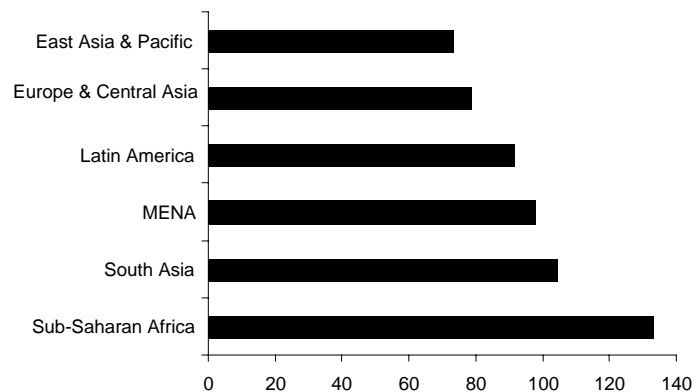
The World Bank also publishes an annual report on “doing business” indicators. Included is a composite “Ease of Doing Business Rank” (see Figure 1). This index is computed by taking into consideration a number of factors: (1) the time (in days) and number of procedures (including license requirements) involved in starting a business, (2) problems in obtaining credit, (3) exporting and importing, (4) closing a business, and (5) difficulties and costs involved in hiring and firing workers.<sup>7</sup> A low ranking on this index indicates that the regulatory environment makes entry and conduct-

6. See BATRA ET AL., *supra* note 4, at 111 tbl.A2.1.

7. E.g., THE WORLD BANK GROUP & THE INT’L FINANCE CORP., DOING BUSINESS IN 2006: CREATING JOBS 77–93 (2006) [hereinafter THE WORLD BANK GROUP, CREATING JOBS], [http://www.doingbusiness.org/documents/DoingBusiness2006\\_fullreport.pdf](http://www.doingbusiness.org/documents/DoingBusiness2006_fullreport.pdf).

ing business more difficult.<sup>8</sup> The Latin American region ranks third in the ease of doing business rankings among developing countries. This index varies significantly in many of the Latin American and Caribbean countries. Chile is the most business-friendly economy in the region and globally ranks high in the ease of doing business ranking (28), after economies such as Korea (23) and Germany (21) (see Figure 2).<sup>9</sup> However, the good record of Chile is overshadowed by other countries in the region, such as Argentina (101), Brazil (121), Suriname (122), Ecuador (123), Bolivia (131), Haiti (139), and Venezuela (164), all of which are at the bottom of the scale.<sup>10</sup>

FIGURE 1: EASE OF DOING BUSINESS AVERAGES ACROSS REGIONS, 2006<sup>11</sup>



It requires 694 days to start a business in Suriname and 8 years to close a business in Ecuador.<sup>12</sup> In Haiti, it requires 203 days to start a business and up to 683 days to register property. The corresponding statistics in Chile are 27 days and 9 procedures to start a business; however, it requires 171 days for licenses, 5 years to close a business, and 31 days to register a property. In Costa Rica and Brazil, it requires 77 and 152 days to start a business and 11 and 17 procedures, respectively. In Colombia, it requires 44 days and 13 procedures to start a business, 150 days for licenses, 3 years to close a business, and only 23 days to register property. In most jurisdic-

8. *Id.* at 92.

9. THE WORLD BANK GROUP & THE INT'L FINANCE CORP., *DOING BUSINESS IN 2007: HOW TO REFORM* 6 tbl.1.2 (2007) [hereinafter *THE WORLD BANK GROUP, HOW TO REFORM*], [http://www.doingbusiness.org/documents/DoingBusiness2007\\_FullReport.pdf](http://www.doingbusiness.org/documents/DoingBusiness2007_FullReport.pdf).

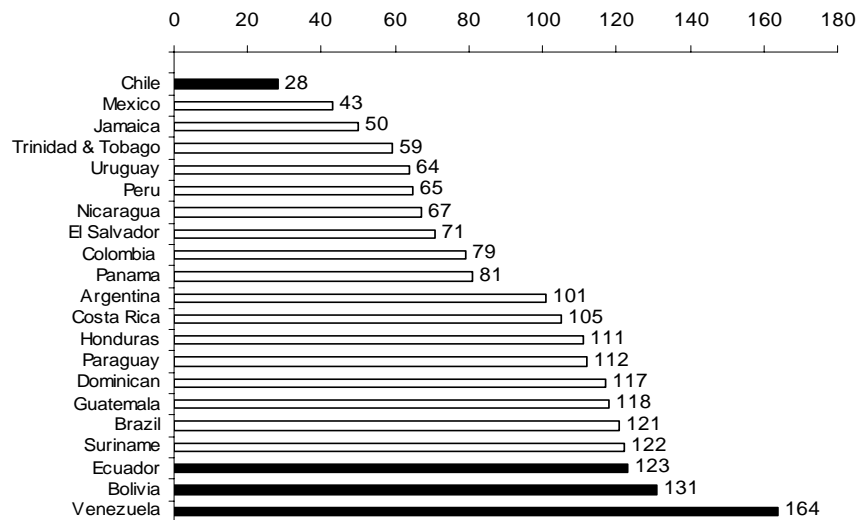
10. *Id.*

11. THE WORLD BANK GROUP, *CREATING JOBS*, *supra* note 7, at 1, 110–61.

12. THE WORLD BANK GROUP, *HOW TO REFORM*, *supra* note 9, at 95–153.

tions, unless a business is formally registered, it cannot qualify for commercial loans, obtain tax filing numbers, or apply for various licenses and permits to start its operations. It is not surprising that many developing countries, including some in the Latin American and Caribbean region, have large “informal” economies.

FIGURE 2: EASE OF DOING BUSINESS GLOBAL RANKINGS FOR LATIN AMERICA & THE CARIBBEAN<sup>13</sup>



The “Ease of Doing Business” indicator is limited, as it addresses only business regulations. Nonetheless, the regulatory burden—especially in developing countries—does not bode well for fostering new entry, competition, and re-deployment of resources from lower to higher valued uses. Barriers to entry and the possibility of an increased supply both play a critical role in evaluating the potentially substantial lessening of competition, such as in cases of abuse of dominant market position or in mergers and acquisitions. Clearly, in these countries and regions, there is considerable room for expanding competition advocacy. Competition agencies could promote competition by focusing equally, if not more, on questioning the underlying economic rationale and time required for many of the regulations pertaining to starting a business and licensing.

13. *Id.*

Governments across regions are taking action. At the forefront are the Eastern European and Central Asian economies, both of which are inspired by the prospect of joining the enlarged European Union.<sup>14</sup> While Latin America ranks second in terms of total share of positive reforms (see Figure 3), overall, the countries lag behind those in other regions.

FIGURE 3: COUNTRIES THAT MADE AT LEAST ONE POSITIVE REFORM IN 2005–2006 (%) (BY REGION)<sup>15</sup>

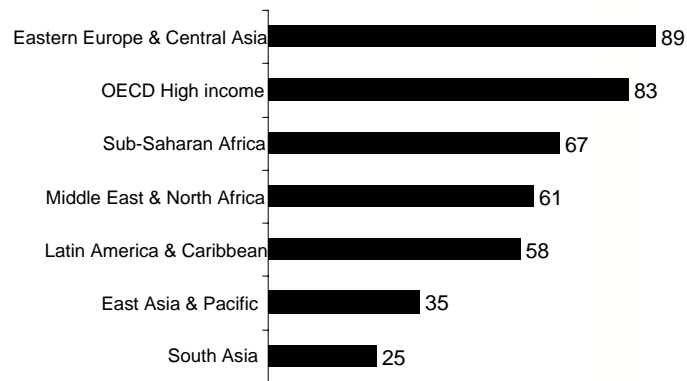


FIGURE 4: COUNTRIES THAT MADE AT LEAST ONE POSITIVE REFORM IN 2005–2006 (%) (BY REGION)<sup>16</sup>



14. *Id.* at 3.

15. *Id.* at 2 fig.1.2. Figures 3 and 4 are reprinted with the permission of the World Bank from the Doing Business in 2007 Report. Copies of current and archived Doing Business Reports are available for purchase at [www.worldbank.org/publications](http://www.worldbank.org/publications).

16. *Id.* at 30 fig.6.2.

Within the Latin American region, El Salvador has led in the reform process for the second consecutive year; it reduced the number of procedures to register a business from twelve to ten, and the time required to register a business from forty to twenty-six days.<sup>17</sup> Other countries, including Honduras, Guatemala, and Mexico, have also adopted significant reforms for business start-ups. For instance, “Honduras cut 18 days from the process by delegating company registration to private chambers of commerce. Guatemala linked commercial, tax, and social security registration[, and] Mexico allows entrepreneurs to obtain the tax registration number through the notary at the time of incorporation—saving 3 weeks.”<sup>18</sup> However, several countries—including Bolivia and Venezuela—have regressed. Specifically, Venezuela made it more difficult for businesses to get credit, register property, or trade across borders.<sup>19</sup>

## II. THE ECONOMIC DEVELOPMENT BENEFITS OF COMPETITION POLICY

The data in Figures 5–8 (see below) provide evidence of the importance of competition and competition (antitrust) law-policy in fostering higher incomes, broad-based markets (comprised of less-dominant firms), and global competitiveness. The data are derived from “perception surveys” of opinions of policymakers, business executives, and various officials in public and private sector organizations, such as industry and trade associations, academic research and policy institutions, various nongovernment bodies, and the like.<sup>20</sup> The responses, collated and computed into various indicators, do not actually measure factors such as volume of trade, magnitude of intensity of local competition in terms of prices, investment, turnover of firms, and effectiveness of competition (antitrust) law-policy implementation (in terms of number of cases investigated and resolved, fines imposed, etc.). These indicators are useful, however, as they are based on the views of key and well-informed individuals who are aware of the array of issues and their impact.

17. *Id.* at 7 & fig.1.4, 10.

18. *Id.* at 10.

19. *Id.* at 3.

20. Michael E. Porter, Christian Ketels & Mercedes Delgado, *The Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index*, in GLOBAL COMPETITIVENESS REPORT 2006–2007, at 58 (Augusto Lopez-Claros ed., 2006).

FIGURE 5: INTENSITY OF LOCAL MARKETS COMPETITION AND PER CAPITA GDP<sup>21</sup>

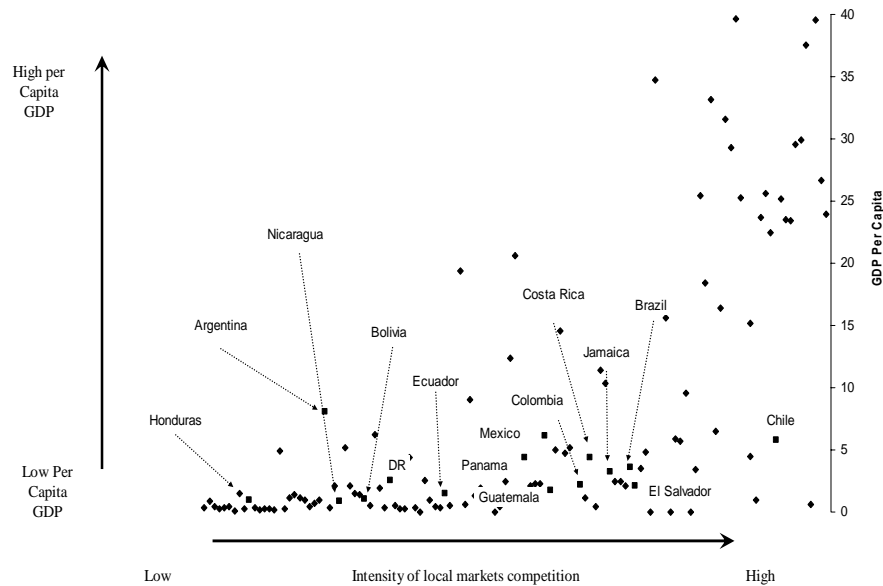


Figure 5 indicates that least-developed countries generally tend to have low intensity levels of competition in local markets, and also low levels of per capita gross domestic product (GDP). These countries are mainly International Development Association (IDA) member countries,<sup>22</sup> and cluster around the horizontal axis, whereas other middle income and industrialized countries are more widely distributed. Latin American countries mostly fall into the middle-income category. There is a wide variation in their per capita GDP and in the intensity of competition in domestic markets—Argentina has a higher per capita GDP than Chile, but less vig-

21. The data represented in Figures 5–8 were derived in part from information found in the Global Competitiveness Report for 2006–2007, and from the Porter, Ketels & Delgado article therein. *See id.* at 60 tbl.1; GLOBAL COMPETITIVENESS REPORT 2006–2007, *supra* note 20, at 123–564. The following Latin American countries are IDA countries: Nicaragua, Honduras, and Bolivia. No data was available for Haiti, Dominica, and St. Lucia, also IDA countries. Bolivia, located on the low end of the scale, does not have a competition law; Honduras and Nicaragua only enacted competition laws recently.

22. The World Bank provides IDA members, which are the poorest developing countries, with low- or interest-free credits and grants in order to boost their economic growth and living standards. *See* The World Bank, Annual Report 2006—Low-Income Countries, <http://go.worldbank.org/5GKWZZVSG0> (last visited Nov. 15, 2007). The list of IDA countries can be obtained by visiting The World Bank, Annual Report 2006—List of Part I and Part II IDA Member Countries, <http://go.worldbank.org/0KNEYU1JK0> (last visited Nov. 15, 2007).

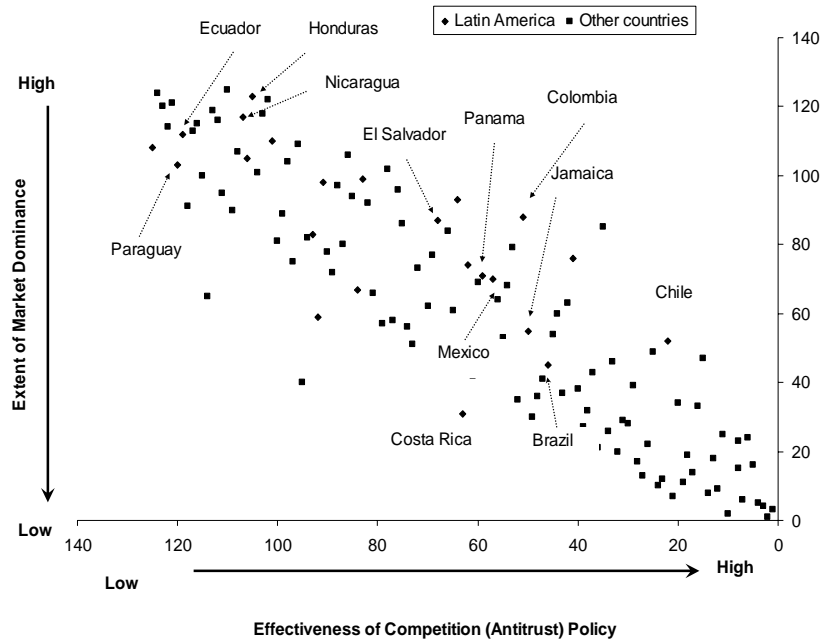
orous domestic competition. Chile, in fact, has a better record of enforcing its competition law-policy than other countries in the region.<sup>23</sup>

Figure 6 charts the indicators relating to the effectiveness of competition (antitrust) law and the extent to which domestic markets are dominated by a few large firms. Many developing countries, including Latin American countries, tend to have high levels of ownership and product market concentration; when coupled with insufficiently-developed financial markets, related legal-regulatory framework and business infrastructure, and close government-business relations, this has resulted in a few elite corporate groups and firms dominating the economy.<sup>24</sup> The indicators in Figure 6 suggest that effective competition (antitrust) law-policy can mitigate the degree of dominance and contribute to less concentrated market structures, thereby opening up opportunities for broad-based participation in the economy. Chile has a lower incidence of markets dominated by a few large firms than Ecuador, Honduras, and other economies that have not yet adopted and implemented competition law-policy. However, firm dominance can also arise due to the small size of the domestic markets relative to scale of production, among other factors. Sifting out the different factors resulting in dominance requires more analysis than is presented here. It is still noteworthy, however, that the rank correlations between competition policy and dominance indicators are weaker in cases of least-developed and Latin American countries than for the more developed or industrialized countries.

23. *See infra* Part III.

24. *See* R. Shyam Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries* 9–10 (Foreign Investment Advisory Services, Occasional Paper No. 19, 2007), available at [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/OccasionalPaper19\\_CompetitionPolicy/\\$FILE/FIAS+Competition+Policy+final.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/OccasionalPaper19_CompetitionPolicy/$FILE/FIAS+Competition+Policy+final.pdf); *see also* Raghuram G. Rajan & Luigi Zingales, *The Road to Prosperity: Saving Capitalism from Capitalists*, TRANSITION (The World Bank, Washington, D.C.), Jul./Aug./Sept. 2003, at 1–3.

FIGURE 6: EFFECTIVENESS OF COMPETITION POLICY AND MARKET DOMINANCE<sup>25</sup>



Information presented in Figure 7 suggests that effective competition (antitrust) law-policy is also associated with higher rankings in the business competitiveness index. Finally, Figure 8 indicates that the effectiveness of competition (antitrust) law-policy and the intensity of competition prevailing in local markets are positively associated. Again, among the Latin American economies, Chile ranks high in terms of these indicators, whereas economies such as Bolivia and Ecuador rank quite low. While more in-depth research would need to be conducted—taking into account and controlling for several other factors—these charts nonetheless clearly suggest the role and importance of competition law in fostering economic growth, reducing market dominance, and enhancing competitiveness through the mechanism of increasing intensity of competition.

25. See sources cited *supra* note 20–21 and accompanying text. For Latin America,  $n = 22$  and  $rs = -0.55$ ; for other countries,  $n = 103$  and  $rs = -0.83$ ; for IDA countries,  $n = 43$  and  $rs = -0.72$ ; for non-IDA countries,  $n = 82$  and  $rs = -0.86$ ; and for all countries combined,  $n = 125$  and  $rs = -0.79$ .

FIGURE 7: EFFECTIVENESS OF COMPETITION POLICY AND BUSINESS COMPETITIVENESS INDEX<sup>26</sup>

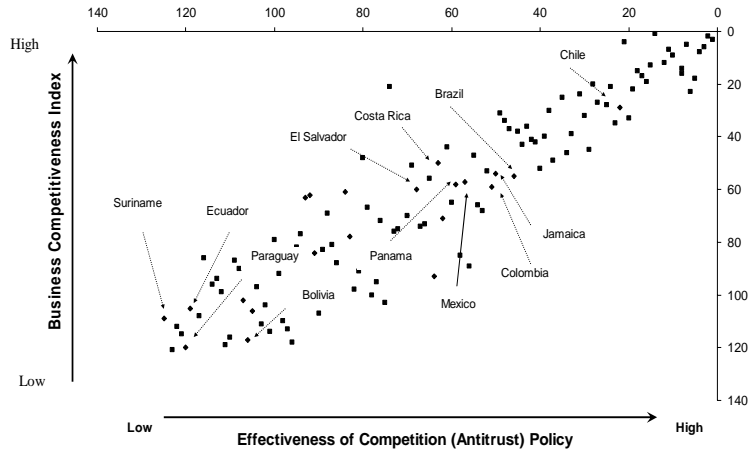
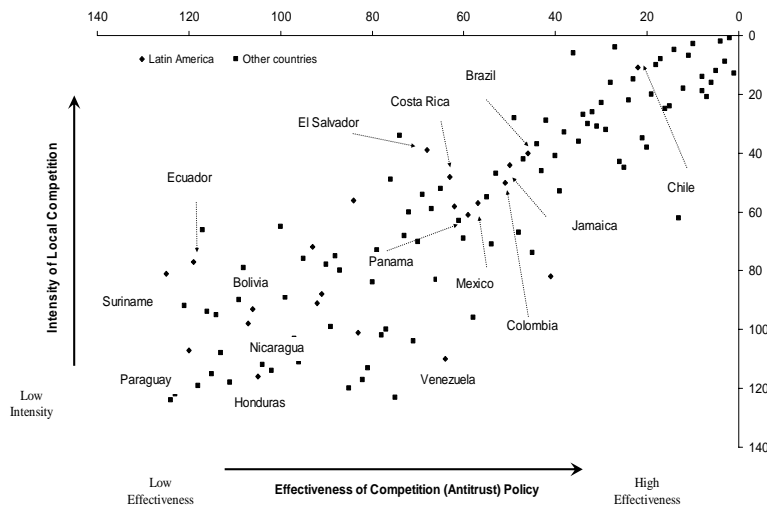


FIGURE 8: EFFECTIVENESS OF COMPETITION POLICY AND INTENSITY OF LOCAL MARKET COMPETITION<sup>27</sup>



26. See sources cited *supra* note 20–21 and accompanying text. For Latin America,  $n = 22$  and  $rs = 0.80$ ; for other countries,  $n = 97$  and  $rs = 0.85$ ; for IDA countries,  $n = 39$  and  $rs = 0.61$ ; for non-IDA countries,  $n = 80$  and  $rs = 0.90$ ; and for all countries combined,  $n = 119$  and  $rs = 0.92$ .

27. See sources cited *supra* note 20–21 and accompanying text. For Latin America,  $n = 22$  and  $rs = 0.39$ ; for other countries,  $n = 102$  and  $rs = 0.78$ ; for IDA countries,  $n = 42$  and  $rs = 0.18$ ; for non-IDA countries,  $n = 82$  and  $rs = 0.70$ ; and for all countries combined,  $n = 124$  and  $rs = 0.74$ .

It has been noted that

[f]ew roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. Rivalry at home is not only uniquely important to fostering innovation, but benefits the national industry . . . . In fact, creating a dominant domestic competitor rarely results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad. Economies of scale are best gained through selling globally, not through dominating the home market.<sup>28</sup>

The role of government in promoting competitive rivalry has been, and continues to be, debated among policy makers and advisors, academic researchers, and others—especially with regard to the degree of protection and direct support that governments should provide to businesses. A commonly cited example is the success of the East Asian “miracle” economies of Japan, Korea, Malaysia, and Singapore, where governments provided “administrative guidance,” and departments such as Japan’s Ministry of International Trade and Industry (MITI) encouraged cartels and mergers and granted export credits to stimulate productivity and dynamic efficiency. However, even proponents of fostering competitiveness and economic growth recognize that maintaining oligopolistic rivalry instead of concentrating resources and subsidies on a single or few selected “national champions” was a critical part of the industrialization strategy.<sup>29</sup>

The “government-led model” has been revisited through an in-depth examination of a sample of twenty internationally competitive sectors and seven uncompetitive sectors in terms of the nature, timing, and extent of government interventions. As it turned out, the government-led model with major subsidies was almost entirely absent, and there was little evidence of interventions in competition.<sup>30</sup> Indeed, even casual observations in products such as electronics, automobiles, and consumer durables indicate that there is vigorous inter-firm rivalry between Korean and Japanese firms in their respective home markets, as well as abroad. And in recent years, in both these economies as well as Singapore, vigorous enforcement of competition law-policy has become central to reviving their economies.

Scholars have recently reiterated the importance of inter-firm rivalry and competition in domestic markets, among other dimensions of the busi-

28. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662 (1990).

29. Alice H. Amsden & Ajit Singh, *The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea*, 38 *EUR. ECON. REV.* 941, 941–50 (1994) (recognizing that, in Japan, MITI fostered oligopolistic rivalry and investment races; while the antimonopoly laws were weak, this government stimulated rivalry and increased competition, resulting in decreased industry concentration).

30. MICHAEL E. PORTER, HIROTAKA TAKEUCHI & MARIKO SAKAKIBARA, *CAN JAPAN COMPETE?* 44–65, *tbls.2-2 & 2-4* (2000).

ness environment, such as quality of infrastructure, removal of trade barriers, protection of property rights, and regulatory standards for promoting competitiveness and economic growth.<sup>31</sup> These and other microeconomic factors combined are found to account for more than 80% of the variation in per capita GDP (on a purchasing power parity basis).<sup>32</sup> Deconstructing the Global Competitiveness Index and applying bivariate analysis, researcher Michael E. Porter and others report several interesting results. The intensity of local competition accounts for about 42% (adjusted R-squared) of the variation in GDP; effectiveness of competition (antitrust) law-policy accounts for 65%; presence of demanding regulatory standards accounts for 78%; property rights account for 72%; judicial independence accounts for 59%; and trade accounts for 33%.<sup>33</sup> Clearly, while competition and competition (antitrust) law-policy are important, so are other factors—which, combined, form the physical and business infrastructure of a modern economy. And, as one would expect, variation exists across countries, depending on their income and stage of economic development. Thus, the analysis of country and economy groups conducted by Porter indicates that factors such as the intensity of local competition, effectiveness of competition (antitrust) law-policy, trade, the efficiency of legal framework, and the presence of demanding regulatory standards are insignificant in low-income countries, less so in middle-income countries, and have no impact in high-income countries. These results should not be interpreted as indicative of the unimportance of policies (and institutions) relating to competition; quite the opposite. As mentioned earlier, inherent ownership, industrial and financial market concentration, and governance structures in least-developed countries, coupled with inadequate physical and business infrastructure, make it difficult to foster competition. Also, the adoption or existence of effective implementation of competition law-policy in many developing and Latin American economies is often lacking. The process of competition is not automatic and takes time to develop, even in more developed economies; competition is dependent on both business environments and institutional factors.

### III. IMPLEMENTATION OF COMPETITION LAW-POLICY IN LATIN AMERICA

As previously mentioned, not all countries in the Latin American region have legislated competition (antitrust) laws. Annex I to this article

31. See Porter, Ketels & Delgado, *supra* note 20, at 53–58.

32. *Id.* at 74.

33. *Id.* at 63 tbl.2.

provides more information on the countries that do and do not have such laws. Also, while some countries have yet to adopt competition laws, others have amended and strengthened their laws over the years to take into account changing legal and economic circumstances. However, some countries have not always consistently or vigorously applied their laws. Competition law-policy is an evolutionary process, and even in advanced industrialized countries there appear to be ebbs and flows in its administration, depending on the government and politics of the day.

A brief overview of the implementation of competition law-policy indicates that, among the Latin American nations, Chile has been a quiet pioneer over the past thirty years. However, the OECD noted that strong enforcement action by Chile's competition enforcement authority, the National Economic Prosecutor, has not been in the traditional areas of monopolistic practices and anticompetitive mergers and acquisitions; instead, enforcement largely pertains to infrastructure services such as telecommunications and electricity.<sup>34</sup> In one such case, the telecom regulator was prohibited from allocating spectrum to two firms it had chosen, and instead a competitive auction was ordered.<sup>35</sup> In the electricity and telecom sectors, the regulator cannot set tariffs unless it has shown that the market is non-competitive.<sup>36</sup> The competition authority has been very active in competition advocacy by arguing for adopting pro-market principles in these sectors. However, the OECD recommends that competition advocacy activities need to be broadened to other areas of the economy as well, and that legal standards and policies should be clarified to guide business.<sup>37</sup> Other recommendations relate to reconsideration of Chile's approach to merger control, increased funding for the prosecutor's office, and broadening the enforcement of the law to cover other types of anticompetitive situations.<sup>38</sup>

At the invitation of the government, the OECD has also conducted "peer reviews" of competition law and policy of other Latin American countries—notably Argentina, Brazil, and Mexico.<sup>39</sup> In each case, a num-

34. See Organisation for Economic Co-operation and Development [OECD] & Inter-American Development Bank [IDB], *Competition Law and Policy in Chile: A Peer Review* 68 (2004), available at <http://www.oecd.org/dataoecd/43/60/34823239.pdf>.

35. *Id.* at 49.

36. *Id.* at 11–12.

37. *Id.* at 56–63.

38. *Id.* at 61–63.

39. OECD & IDB, *Competition Law and Policy in Latin America: Peer Reviews of Argentina, Brazil, Chile, Mexico and Peru* (2006), available at <http://www.oecd.org/dataoecd/38/15/37976647.pdf>. Peer reviews of other countries can be found at OECD, Competition Law and Policy: Publications & Documents, <http://www.oecd.org> (select the "By Department" hyperlink under "Browse" on the left side of the page; select the "DAF Directorate for Financial and Enterprise Affairs"

ber of recommendations have been put forward to enhance competition policy. For example, in Argentina, the OECD singled out areas such as the budgetary resources of the competition agency, anti-cartel enforcement, efficiency in conducting investigations and merger review, the role of competition in regulated sectors, the independence and insulation of the agency from political interference, and the increase in knowledge of judges in competition analysis as needing more work.<sup>40</sup> Similarly, a widely-ranging set of actions has been recommended for Brazil. The OECD recommends that Brazil address anticompetitive restraints by state and local governments; increase competition advocacy with respect to federal legislation and regulatory programs; consolidate investigative, prosecutorial, and adjudicative functions spread across different competition bodies; strengthen the autonomy of the Commission for the Defense of the Economy (CADE—the main adjudicative body) by extending the terms of the commissioners; step up enforcement actions against cartels; and the like.<sup>41</sup> In both Argentina and Brazil, the governments have taken steps to amend their laws or policies to take into account some of the OECD recommendations.

In addition to such matters, the nature and coverage of competition laws varies across countries. For example, relative to other Central American countries, Costa Rica has been characterized as the economy with the most exemptions and exceptions from the application of its competition law.<sup>42</sup> Since its law was passed in 1998, not a single merger and acquisition transaction has been reviewed and restructured for anticompetitive effects. Most recently, a cartel case involving real estate commissions was successfully investigated and prosecuted, but the total fines imposed amounted to less than \$2,500. In many other countries, the fines for infractions of competition law are so low as to have no deterrent effect. The maximum fine is \$800,000 in El Salvador and \$1.5 million in Mexico. The maximum fine is \$10 million or more in several industrial nations.<sup>43</sup> In essence, the picture

link, then select “Competition Law and Policy” from the left menu, followed by “Publications & Documents” on the top menu; choose “Country Surveys/Reviews/Guides”) (last visited Dec. 7, 2007).

40. OECD & IDB, *supra* note 39, at 46–54.

41. *Id.* at 65–69.

42. See Gloria Rodríguez et al., *Libertad Para Competir*, ESTRATEGIA Y NEGOCIOS, June 2006, at 150–53.

43. *Id.* In jurisdictions such as Canada, the European Union and the United States (among others), the competition (antitrust) laws allow for significant imposition of fines. For example, in the U.S., the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 was passed by both the House of Representatives and the Senate. This Act increased the maximum corporate fine from \$10 million to \$100 million, and the maximum fine for individuals from \$350,000 to \$1 million. In addition, maximum prison sentence was increased from three to ten years for criminal antitrust violations such as price fixing and bid-rigging. In Canada similar offenses carry a fine of \$10 million per count and up to

that emerges is that significant strengthening of competition law-policy is required in Latin American countries to reap the full benefits that accrue from promoting effective competition.

#### CONCLUSIONS AND RECOMMENDATIONS

The preceding discussion has highlighted the benefits of promoting competition in domestic markets in Latin American and other developing economies, and, in particular, the adoption and effective implementation of competition law-policy. It has been argued that an effective competition law-policy fosters economic efficiency, increases consumer welfare by making goods and services more affordable, and enhances business competitiveness. It also reduces market dominance by large incumbent firms, which is conducive to encouraging broad-based economic growth.

Competition law-policy has a wide interface with various other government economic and regulatory policies that impact prices, output, entry and exit of firms, trade, and investment. To enhance greater coherency and consistency in these policies, competition law-policy needs to be integrated as a central platform. Doing so will improve and buttress the investment climate prevailing in a country. To attain this requires increased efforts to promote better understanding of the instruments, requirements, and benefits of encouraging competition—in government economic policy formulation, private sector business decisions, and civil society at large.

Although many Latin American and developing economies in other regions have adopted competition law-policy, effective implementation and potential beneficial impacts tend to vary significantly. This is undoubtedly due to a number of factors, such as strongly vested interest groups and close government-business relations, as well as inadequate resources, technical skills, supporting institutions, and political will. However, if Latin American and other developing countries seek to foster sustainable competitive economic growth, increased emphasis on strengthening their domestic competition law-policy is required, and increasing the intensity of competition in local markets is advisable. In addition to enforcement of competition law, competition advocacy is advisable for removing unnecessary public policy-based impediments to “doing business.” The benefits that accrue from enhanced competition are clear.

ANNEX I: COMPETITION LAWS IN THE LATIN AMERICAN AND CARIBBEAN  
REGIONS\*

COUNTRY	COMPETITION LAW NUMBER	FIRST ENACTMENT	AMENDMENTS	MEMBERSHIP TO REGIONAL AGREEMENTS
<b>Antigua &amp; Barbuda</b>	Protection Against Unfair Competition Bill, 2001 (regulates competition policy in Antigua and Barbuda).	2001		CARICOM
<b>Argentina</b>	Law No. 22262 of Unfair Competition, 1980; Law No. 25156 Defense of Competition Act, 1999 (as amended by Decree 396 of 2001, which abrogated Law No. 22262). The law established the National Commission on Defense of Competition (CNDC).	1980	1999, 2001	MERCOSUR
<b>Barbados</b>	Fair Competition Act No. 200219, 2003 (enforced by Fair Trading Commission).	2003		CARICOM
<b>Belize</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Bolivia</b>	<b>No Competition Law yet in force</b>			Andean Community Treaty, MERCOSUR
<b>Brazil</b>	Antitrust Law No. 8.884/94 (as amended by Law 9781 of 1999 and Law 10,149 of 2000)	1994	1999, 2000	MERCOSUR

\* See International Bar Association, Global Competition Forum, <http://www.globalcompetitionforum.org/> (last visited Dec. 5, 2007); SICE Foreign Trade Information System, Trade Agreements in Force, [http://www.sice.oas.org/agreements\\_e.asp](http://www.sice.oas.org/agreements_e.asp) (last visited Nov. 15, 2007); World Bank, Competition Law Database, <http://go.worldbank.org/WMPL8EHVE0> (last visited Dec. 5, 2007).

COUNTRY (CONT.)	COMPETITION LAW NUMBER	FIRST ENACTMENT	AMENDMENTS	MEMBERSHIP TO REGIONAL AGREEMENTS
<b>Chile</b>	Law for the Defense of Free Competition 211 of 1973; Decree with Force of Law 1 of 2005.	1959	1973, 2005	EFTA, MERCOSUR
<b>Columbia</b>	Law No. 108/05 of 2006.	1992 (competition principles are found in the Constitution of 1991, Art. 333).		Andean Community Treaty, CARICOM
<b>Costa Rica</b>	Law No. 7472 of 1994.	1994		DR-CAFTA, CARICOM
<b>Dominica</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Dominican Republic</b>	<b>In the process of adopting and debating draft legislation on the issue of competition law.</b> A bill on a Market Administration Code is forthcoming. The provisions of the Criminal Code are applied in the courts.			DR-CAFTA
<b>Ecuador</b>	<b>No Competition Law yet in force.</b> A competition law draft passed a first round of discussion in Congress in 2006.			Andean Community Treaty

COUNTRY (CONT.)	COMPETITION LAW NUMBER	FIRST ENACTMENT	AMENDMENTS	MEMBERSHIP TO REGIONAL AGREEMENTS
<b>El Salvador</b>	Decree No. 528 of 2004.	2006		DR-CAFTA
<b>Grenada</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Guatemala</b>	<b>No Competition Law yet in force</b> (draft in discussion).			DR-CAFTA
<b>Guyana</b>	Competition and Fair Trading Act. (The Competition Commission has not been established, thereby limiting the full effect to the Competition and Fair Trading Act)	2006		CARICOM
<b>Haiti</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Honduras</b>	Law No. 357-2005 of 2005.	Enacted December 16, 2005; entered into effect February 2006.		DR-CAFTA
<b>Jamaica</b>	The Fair Competition Act of 1993, enacted on March 9, 1993 and entered into effect on September 9, 1993.	1993	Fair Competition Act of 2001.	CARICOM
<b>Mexico</b>	Federal Law of Economic Competition of 1992.	1993	Amendments published in the Official Gazette in June of 2006.	NAFTA, EFTA, MERCOSUR
<b>Nicaragua</b>	Law No. 601 of 2006. The law will come into force eight months after its publication in La Gaceta on October 24, 2006.	2007		DR-CAFTA

COUNTRY (CONT.)	COMPETITION LAW NUMBER	FIRST ENACTMENT	AMENDMENTS	MEMBERSHIP TO REGIONAL AGREEMENTS
<b>Panama</b>	Competition Defense Law No. 29 of 1996.	1996	Legislative Decree No. 9 of 2006 (authority for protection and defense of competition).	
<b>Paraguay</b>	<b>No Competition Law yet in force</b>			MERCOSUR
<b>Peru</b>	Legislative Decree No. 701 of 1991 (ordering elimination of monopolistic, controlling and restrictive practices affecting free competition).	1991	Decree No. 25868 and Decree No. 26004 of 1992, Legislative Decree No. 788 of 1994, Legislative Decree No. 807 of 1996.	Andean Community Treaty, MERCOSUR
<b>St. Kitts and Nevis</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>St. Lucia</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>St. Vincent &amp; the Grenadines</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Suriname</b>	<b>No Competition Law yet in force</b>			CARICOM
<b>Trinidad &amp; Tobago</b>	Protection Against Unfair Competition Act, 1996	1996		CARICOM

COUNTRY (CONT.)	COMPETITION LAW NUMBER	FIRST ENACTMENT	AMENDMENTS	MEMBERSHIP TO REGIONAL AGREEMENTS
Uruguay	<p><b>No Competition Law yet in force.</b> <i>Ley de Urgencia</i> No. 17.243 of 2000 (Art. 13, 14 and 15). It is composed of few articles that refer to competition protection and avoid anticompetitive behaviors. Mergers control provisions are not explicitly included in the provisions of the Law.</p>	2000		MERCOSUR
Venezuela	<p>The Government of Venezuela adopted three laws to promote free market competition and prevent unfair trade practices: an Anti-Trust Law (Gazette No. 34,880 of 1992), an Antidumping Decree (Gazette No. 4,441 of 1992), and a Consumer Protection Law (Gazette No. 4898 of 1995).</p>	1992		MERCOSUR