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Reflections from the north on 25 years of implementation of competition law and policy in Latin America

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Abstract: The former Associate Director of the Federal Trade Commission's Office of International Affairs looks back on 25 years of collaboration with the competition authorities of Latin America, looking at the progress that has been made and the apparent hemispheric consensus about the value of competition law and policy, but at the same time recognizing that there are significant headwinds that threaten to undermine that consensus. These include the failure to recognize the social consequences of a policy that necessarily produces losers as well as winners, the political interests of monopolists, and the need to consider the relationship of competition policy to other governmental policies. Finally, it considers some of the necessary ingredients for successful implementation of competition policy.

Resumen: El ex Director Asociado de la Oficina de Asuntos Internacionales de la Comisión Federal de Comercio reflexiona sobre sus 25 años de colaboración con las autoridades de competencia de América Latina, analizando los avances logrados y el aparente consenso en el hemisferio sobre el valor del derecho y política de competencia. Sin embargo, también reconoce que existen obstáculos significativos que amenazan con socavar dicho consenso. Estos obstáculos incluyen la falta de reconocimiento de las consecuencias sociales de una política que necesariamente genera perdedores además de ganadores, los intereses políticos de los monopolistas y la necesidad de considerar la relación de la política de competencia con otras políticas gubernamentales. Finalmente, se analizan algunos ingredientes esenciales para la implementación exitosa de la política de competencia.

CONTENTS

1. The Value of Investing in Competition Policy....5
a. Seeking Economic Growth and Fairness....6
b. Facilitating Transition from State Control to Free Markets....7
c. Complementing the Free Trade Agenda....9
d. A Remarkable Consensus, More or Less....8
2. Headwinds that Imperil Consensus....12
a. Competition Produces not only Winners but also Losers....12
b. Monopolists Like Being Monopolists....13
c. Competition Policy is Connected to Everything Else....14
d. There's no Such Thing as a Free Lunch....15
3. Making it All Work....16
a. Getting the Public on Board....16
b. Finding the Right Structure for the Country....17
c. Setting up an Agency....18
d. Getting the Right People....20
e. Making Do Under Difficult Circumstances....21
f. Building Capacity for a New Agency....22
4. Conclusion....27
References....29

When I first began working with competition law enforcers and policy makers in Latin America 25 years ago (2000), competition law was just getting on its feet, and the idea of competition policy was far from universally embraced.[1] Over the intervening years, until I retired from the Federal Trade Commission's (FTC) Office of International Affairs last year (2024), almost every country in the hemisphere had done so, often in robust fashion. A hemispheric competition law community has blossomed, with a large community of enforcers, academics, practitioners, and policy makers committed to the idea that competition for the market's favor makes peoples' lives better.

The road to implementation of competition policy in the Americas has sometimes been a rocky one that has included both dramatic success stories and a few setbacks. Implementation of competition policy can be politically challenging, as it promises long-term payoff at the cost of short-term uncertainty. Making the promises of a free market come true requires careful implementation, not only of competition law itself but of the constellation of policies and institutions that must be in place for a free market to work.[2] The road to implementation is not always politically intuitive, so the task requires good messaging, a measure of determination, political courage, and, for lack of a better term, faith in markets. None of these can be taken for granted, and there can be real temptations for policymakers to take politically palatable shortcuts that will undermine the effectiveness of competition policy.

This essay will look back at the significant changes in Latin America since 2000 and will focus on two significant and interrelated ongoing challenges. The first is the challenge of building and maintaining the public and political support that is necessary to sustain a vibrant competition policy. The second is the challenge of taking competition policy beyond an economic reformer's good idea and turning it into a legal infrastructure – a law and implementing institutions - that delivers on that good idea. My work in the region started with tackling the challenge of implementation, but I eventually came to realize that success in building the infrastructure is inextricably linked to success in building public support – which in turn translates into political support – for the idea that peoples' lives are better when they are served by free markets that are driven by real competition. I will start with a brief discussion of why the competition policy is worth pursuing (**Section 1**). Then, I'll turn to some of the headwinds that confront competition policy advocates, not only in Latin America but everywhere (**Section 2**). After that, I will provide a few observations about the challenges of building policy support and effective institutions (**Section 3**). Finally, I will conclude with a few closing observations (**Section 4)**.

I. THE VALUE OF INVESTING IN COMPETITION POLICY

When I joined the FTC's international office in 2000, it was a time of promise. The Berlin Wall had come down ten years earlier. The ideology of central planning and state control over the economy was in retreat, with Cuba being the sole outpost of that ideology in the Western Hemisphere. Some of the more advanced

1 I am deeply appreciative of many people who contributed to this narrative, especially Craig Conrath, Caldwell Harrop, Timothy Hughes, Juan Pablo Iglesias, Felipe Irrarázabal, Randy Tritell, and Spencer Waller, who offered constructive suggestions that improved this essay; and Bill Kovacic, whose insights about international competition institutions have informed much of my thinking over the years. See, e.g., W. Kovacic & D. Hyman, Competition Agency Design: What's on the Menu?, 8 European Competition J. 527 (2012). Any errors that remain are mine alone.

2 As I use them, the terms "competition policy" and "competition law" are not interchangeable. Competition policy is the wider policy of encouraging the market to allocate goods and services wherever possible, and can include regulatory, energy, pricing, trade, privatization, and consumer policy. Competition law, best thought of as a subset of competition policy, is a tool for the implementation of competition policy that seeks to prevent anticompetitive conduct that undermines the workings of a broader competition policy.

countries in the region, notably Chile, Brazil, Mexico, Peru, Venezuela, and Colombia, had passed competition laws, and their agencies were growing in strength and effectiveness. Many of the other countries in the Americas were considering emulating them. The political trends of the day seemed to favor free markets, competition, and real democracy. One of my first assignments – which I cheerfully carried out for nearly a quarter century – was to try to support this trend and do my best to make the relationships between the FTC and the Latin American enforcement agencies as strong and close as possible.

Latin America's experience with implementing competition policy has grown over the intervening quarter-century. The commitment to free markets, free competition, and the institutions that protect competition has put down deep roots, most notably in Chile, Mexico, and Brazil, but also in Colombia and Peru and other countries. New and promising institutions have come to life in places like El Salvador and Barbados. But the momentum towards competition is not inexorable. The most obvious rollback came in Venezuela, where populist governments eviscerated the Superintendence for the Promotion and Protection of Free Competition (also known as "Pro-Competencia"), which had been one of the most respected competition agencies in South America. Today another highly respected agency, Mexico's Federal Economic Competition Commission (COFECE), may be facing existential threats.[3] In other countries, such as Argentina, competition law waxes and wanes with the direction of the political winds at any given moment.

What lay behind the move to adopt competition laws across the region? I believe the motivations fall into three categories: seeking economic growth and fairness, facilitation of transition from state control to free markets, and complementing a trade agenda.

a. Seeking Economic Growth and Fairness

Competition policy has long been seen as a driver of economic growth. When they are allowed to do so, firms that do a better and more efficient job of giving consumers what they want at prices they want tend to displace those that do not.[4] The entry of new firms creates jobs – even as the exit of old firms ends others - but more importantly, the fact that new entrants must innovate to successfully compete drives the development of new technologies, new industries, new jobs, and greater prosperity. Fairness in the competitive process goes hand in hand with this goal.

The earliest antecedents of competition laws in the Americas go back to the nineteenth century. The Mexican constitution of 1857 explicitly prohibited monopolies and all practices or measures by companies, "even under cover of protection to industry," excepting only the coinage of money, the postal service, and intellectual property.[5] The political will to put that laudable objective into force apparently waned, and subsequent measures were of doubtful efficacy.[6] Chile, Argentina and Colombia passed competition legislation in the 1950s, but in some cases implementation lagged for several decades.

3 E.g., Alejandra Palacios, Mexico's Sheinbaum Walks a Fine Line on its Antitrust Reform (2024).
4 See generally William W. Lewis, The Power of Productivity: Wealth, Poverty, and the Threat of Global Stability (2004).
5 Political Constitution of the Mexican Republic of 1857, Art. 28.
6 Indeed, Mexico's 1934 law on monopolies was actually used to fix official prices for certain products! Allan Van Fleet, Competition Policy in a Developing Economy: Mexico's Federal Economic Competition Law, GLOBAL COMPETITION REV. (Apr./May 1998).

The United States was the first to go beyond good intentions. It passed the Sherman Antitrust Act in 1890,[7] which prohibited agreements in restraint of trade and monopolization, followed in 1914 by the Clayton Act,[8] which among other things prohibited anticompetitive mergers, and the Federal Trade Commission Act,[9] which broadly prohibited unfair methods of competition. We are now seeing a vigorous debate, which is beyond the scope of this article, about what these laws are supposed to accomplish. One view, which has held sway for the past 40 years, is that the purpose is to promote economic efficiency and consumer welfare. The other view is that the purpose is to promote fairness in the competitive process for producers – especially small producers – as well as consumers. Fascinating as the debate may be, it seems to affect actual enforcement only at the margins. Both camps condemn hard core cartels, and far-reaching monopolization and merger cases have been brought by proponents of both views.[10] The main difference between the two seems to be in the degree of confidence in the ability of the market to self-correct.[11] Either way, promotion of competition and suppression of monopolistic practices fit in well with the entrepreneurial economic and political culture in the United States and became deeply embedded in its policy structure. The triad of conducts through which a firm could gain market power in a way that thwarted competition – cartels, unilateral conduct, and anticompetitive mergers – has not only remained constant in the United States but has become the framework for virtually all competition laws around the world. What particularly differentiates Latin America from its northern neighbors, however, is the historical context, notably the pervasive history of state domination of markets.

b. Facilitating Transition from State Control to Free Markets

My first exposure to the international dimension of competition law was not in Latin America, but in the former Soviet Union. Following the 1989 fall of the Berlin Wall, the U.S. Agency for International Development funded the FTC and the Department of Justice to assist the nascent competition agencies in Central and Eastern Europe and the former Soviet Union in adopting the institutions of free markets, including competition policy and enforcement, with a focus on providing real-world training on investigating competition cases. I was selected to be in the first team of advisors to the competition agencies in the Baltic countries, in 1994, and later went to Romania and Ukraine on similar assignments. The challenges in those countries were immense. Under communism, productive resources were owned by the state and managed by a central planning bureaucracy that neither knew nor cared how markets worked. The state decided what consumers should want, and price had no clear relation to cost.

Once communism came to an end, competition law was thought to be a necessary tool to manage the transition from state control to a free market. The freedom to compete for greater profit and wealth would provide incentives to offer new or better products and services, to produce them more efficiently and to price them competitively. In developed economies, these incentives are what brought us smartphones, electric

7 15 U.S.C. §1 et seq. Fairness requires me to acknowledge that Canada beat the United States to the punch by one year, having passed the Anti-Combines Act in 1889. Real competition enforcement did not come to Canada until 1986, however.
8 15 U.S.C. §12 et seq.
9 15 U.S.C. §45 et seq.
10 The commonality of purpose is illustrated by cases such as U.S. v. AT&T, Inc., 552 F.Supp. 131 (D.D.C. 1982) (filed in 1974 in the Ford Administration, litigated through the Carter Administration, and settled with a breakup in 1982 in the Reagan Administration); U.S. and Plaintiff States v. Google LLC, 687 F.Supp 3d 48 (D.D.C. 2024) (filed in 2020 by the Trump Administration and successfully litigated to conclusion in 2023 under the Biden Administration).
11 Compare, for example, the minimalist approach to antitrust enforcement in R. Bork, The Antitrust Paradox (1978), with the more forceful view espoused in L. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 564 (2017). There is a consistency in views about the value of competition and what might threaten it, but less so with respect to the extent that the market can be expected to correct itself and the value of robust enforcement.

vehicles, microwave ovens, and for better or worse, artificial intelligence. Unfortunately, left unchecked, that freedom also creates incentives to preserve that profit and wealth by preventing potential rivals from competing and allowing incumbents to use market power to increase costs and decrease output.

Even economies that had not been subject to excessive state control had learned that competition laws and agencies were needed as guardrails to prevent the accumulation of great power and wealth from interfering with benefits of free, fair and competitive markets. The threat was even higher in transitional economies, where incumbents already held great power and wealth. Further, the economic transition in countries whose economies had been controlled by the state would require massive privatization. But if public monopolies were only to be replaced by private monopolies, consumers would be in an even worse position than before. Whatever control the state might have maintained over the pricing and conduct of monopolies would evaporate.[12]

Taking on these challenges was more easily said than done. When communism fell, artificially low prices typically rose to market levels, resulting in public and political dissatisfaction. Prices were not always constrained by the new entry that economists had predicted due to a host of barriers to entry that had not been anticipated. For example, incumbent operators of firms in sectors that should, in principle, have been competitive often maintained deep ties to their old colleagues in government, who found reasons to hobble new firms. Mistrust of the market, coupled with a general sense that the state should control commerce, led to regulatory barriers that kept new firms out. For whatever reason, when prices remained high, consumers began to wonder if the whole idea had been worthwhile and that life might have been better under state planning. In some countries, political pressure started to push back on reforms.

The task of dealing with an economy with dominant firms in every sector was daunting to the new competition agencies. The real challenge was finding a way to establish conditions under which real and robust competition could take place. This required changes to institutions, regulations, and government behavior that went far beyond what competition agencies in developed countries traditionally do. Traditional antitrust offered few solutions. New competition agencies were told by foreign experts to be on the lookout for cartels and anticompetitive mergers, but that was of little help when there were few competitors with which to collude or merge. Dominance was certainly a problem, but when prices rose due to inherently distorted supply and demand conditions and not due to any identifiable abusive conduct, there wasn't much a competition agency could do about it.

When I started working in Latin America, I was surprised by the similarities between Latin America and what I had seen in Eastern Europe. While the political background was certainly different, the economic situation was remarkably similar. The history of state and oligarchic control of the economy and pervasive monopolization was similar, the roots of which ran very deep. During one of my first trips to Mexico, I visited Mexico's superb Museum of Anthropology. It contained an exhibit on the Aztec economy, which explained how the Aztecs organized their economy around a system of monopolies. The system subsequently imposed by the Spanish throughout the Americas similarly depended on grants of monopoly rights for the benefit of the Spanish crown. This must have seemed perfectly natural, at least in Mexico. Not much changed after the nations of Latin America gained their independence. Strong rulers carried forward the tradition of state and oligarchic control over the economy well into the second half of the twentieth century. Whatever one's views

12 The validity of this concern was amply demonstrated by the experience of the Russian Federation, which quickly privatized most of its productive assets, handing over monopolies to politically connected private individuals who quickly became extraordinarily wealthy. This effectively turned a state-controlled economy into an oligarchy before robust enforcement of competition law ever had a chance to affect the process.

about the ability of markets in the United States to self-correct, skepticism about the ability of markets in Latin America to self-correct after years of statist economic policy would be justified.

The economic concept of competitive markets assumes that more efficient firms that produce what consumers want at prices they want to pay will displace those that do not. This isn't always allowed to happen, which makes the task for competition policy advocates daunting. I was aware of one country in which the venerable national airline was losing market share and revenue, but was nevertheless expected to remain as a major employer. Without sufficient revenue to pay for fuel or continue payments for its modern airplanes, it shed airplanes and routes. It was not allowed to cut employees, however, and I was told that at the low point, it employed thousands of people for every airplane it operated! The government ensured that the airline remained in business, undercutting the viability of more efficient new entrants to the market.[13] To me, this was a perfect illustration of the political costs of not making the kinds of reforms that were needed.

It may be unsurprising that the first competition law to be successfully implemented in Latin America was enacted by a government that did not have to consider the potential political fallout. While Chile's first competition law dated from 1959, it was not viewed as very effective, and its first comprehensive competition law was adopted during the repressive Pinochet regime of the 1970s. Having rejected the socialist goals promoted by the Allende government,[14] Pinochet brought in a group of conservative economists (referred to as "the Chicago boys" as many had been trained at the University of Chicago and most were men) to implement a series of economic reforms, including deregulation, privatization and competition law[15]. I cannot speak to how other portions of the reforms worked, but the competition law developed into a strong and effective instrument, and the enforcement agency, the Fiscalía Nacional Económica, became a model for the region. As a firm believer in democratic institutions, I have uncomfortably wondered if the success of competition policy in Chile had something to do with the absence of political opposition that allowed Chile to get past the short-term pain that accompanied free market reforms in the early years of the Pinochet dictatorship and move to the stage where the benefits of free market reforms become evident to the people. Chile's embrace of competitive markets has demonstrated real staying power, as evidenced by major reforms in 2003 that created a capable and independent Tribunal for the Defense of Free Competition and the more recent introduction of criminal sanctions for cartels.

Chile was not alone in pursuing competition law organically. Colombia passed its first competition law in 1959. After liberalization of the economy in the 1990s, a comprehensive competition law was passed in 1992, which was substantively patterned on the European Union model.[16] Brazil followed a similar trajectory, passing its first competition law in 1962, which was followed by a more comprehensive law and structure starting in 1994.[17]

c. Complementing the Free Trade Agenda

Some of the impetus behind competition laws has come from the idea that competition provisions are a necessary complement to trade agreements.[18] The North American Free Trade Agreement (NAFTA) required

13 Something akin to Europe's State Aid regime might have spoken to problems such as this, as former passengers on Malev, Alitalia, Olympic, or Balkan airlines have experienced. I am unaware of a serious effort to import EU-style State Aid law into Latin America. It may be that it would require more political will than can be mustered.
14 OECD (2011), Competition Law and Policy in Chile, Competition Law and Policy Reviews, OECD Publishing, Paris.
15 For a discussion about the reforms made by the Chicago Boys in Chile, see "Key Lessons from the 'Chicago Boys' Chile Experiment," Capitalisn't (Stigler Center, University of Chicago, Aug. 31, 2023).
16 OECD (2016), Colombia: Assessment of Competition Law and Policy 2016, Competition Law and Policy Reviews, OECD Publishing, Paris.
17 OECD/IDB (2010), Competition Law and Policy in Brazil: a Peer Review 2010, Competition Law and Policy Reviews, OECD Publishing, Paris.
18 This debate paralleled a lengthy debate carried on inside and outside the World Trade Organization, which is beyond the scope of this article. The Doha Declaration identified competition as one of several issues identified for possible inclusion as WTO disciplines. Doha

Canada, Mexico, and the United States, to "adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement."[19] The U.S.-Chile agreement followed a similar model.[20]

By the time I came on the scene in 2000, trade negotiators were trying to take this idea to a new level by negotiating a hemispheric agreement known as the Free Trade Area of the Americas (FTAA) that would cover every country in the hemisphere (except for Cuba) and which was to include a competition chapter. To that end, a Negotiating Group on Competition Policy was established with the general objective "to guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices."[21] The group met every two months or so, first in Miami, then in Panama and finally in Puebla, Mexico, to hammer out an agreement. There was considerable consensus as to what a competition chapter might look like, although the group discussed at some length how particular provisions would apply to their own legal system and economy. The competition negotiators probably could have solved these issues and agreed on a text,[22] but in the end the whole project came to naught due to impasses over issues unrelated to competition law and policy.

The extent to which competition law and policy needed to be enshrined in such trade agreements is fairly debatable, but support for including it found common ground among both developed and developing economies.[23] On the one hand, developed countries had concerns about "behind the border" anticompetitive practices in developing countries directed at foreign investors. These might include cartels among suppliers and distributors and exclusionary conduct by powerful incumbents that might threaten supply and distribution chains. Those countries wanted to be sure there was some recourse should their investors be victimized by such practices.

On the other hand, developing countries worried that multinational firms from developed countries would run rampant and victimize the developing world with a host of anticompetitive practices. Some not only wanted the FTAA to constrain those practices, but also hoped that developed countries could be compelled to constrain export cartels and other extraterritorial conduct by their own firms.[24] The argument seemed overblown to me. Only an isolated handful of such depredations were ever articulated and the effects of such an expansion of extraterritorial enforcement would be difficult to predict. In any event, it seemed that such rapacious conduct by malign actors from developed countries would not only be subject to antitrust enforcement abroad, but would also be subject to antitrust enforcement at home for any domestic effects that their foreign conduct might cause. It seemed doubtful that multinational firms would systematically engage anticompetitive conduct in foreign markets without risking the possibility of spillover effects at home, subjecting them to potential criminal penalties or treble damages in the case of the United States.

This debate proved only to be an entertaining sideshow. Most delegations consisted of representatives of both the trade ministry and the competition agency. The competition agencies knew perfectly well that the

Declaration, paragraphs 23-25 (2001). A working group on trade and competition was set up within the WTO and discussed this issue for several years, as did a working group within the Competition Committee of the Organization for Economic Cooperation and Development (OECD). In the end, the WTO decided not to embrace competition as a trade discipline.

19 North American Free Trade Agreement, Article 1501 (1993). It required the agencies to cooperate with each other and included disciplines on state enterprises and designated monopolies, but – out of apparent fear from subjecting competition decisions to review by trade authorities -- exempted most of the chapter from the NAFTA dispute resolution mechanism.

20 U.S. Chile Free Trade Agreement, Chapter 16.

21 FTAA Ministerial Declaration, Annex II (March 19, 1998).

22 See FTAA - Free Trade Area of the Americas, Draft Agreement, Chapter XIX Competition Policy (final draft text before the negotiations ended).

23 The line between "developed" and "developing" countries is blurred. I will use that shorthand, but a better way to think about it might be to think about countries whose major interest is protecting investments by their firms abroad and those in which those investments take place.

24 See, e.g., Rodas, Cartels in the Sphere of Competition Law in the Americas (Organization of American States CJI/doc.106/02 2002).

worst threats to competition usually come from domestic actors. Developing country competition delegates were also aware of the potential for enforcement to be thwarted by domestic political forces operating at the behest of local monopolists. They were happy to have competition policy enshrined in a binding treaty obligation that they could wave in the face of their own governments should the governments start to undermine competition laws. Their counterparts from more developed countries had no objection, so long as nothing in the agreement would undermine the effectiveness of their own competition systems.

The real and lasting value of the competition negotiations in the FTAA, however, was that it provided a forum for competition agencies across the hemisphere to get to know each other. Spending time together at the same hotel for a week at a time and negotiating, dining, and socializing with each other helped all of us to understand how much we had in common and created connections that have been foundations for competition agency cooperation ever since. While representing our nations' interests, most of us recognized that we all had strong common interests in preventing anticompetitive practices and in working with each other to that end. Some of the negotiators went on to become agency leaders themselves, such as Emilio Archila of Colombia, Daniel Goldberg and Mariana Tavares of Brazil, and Celina Escolán of El Salvador. Others remained active in the international functions of their agencies for many years, such as Jaime Barahona of Chile, Joselyn Oleachea of Peru, Manuel de Alemeida of Panama, Graciela Ortiz of the Andean Community, Regina Vargas of El Salvador, Caldwell Harrop of USDOJ, and myself. Others became academics who influenced policy in their own countries, such as Fausto Alvarado of Ecuador and Taimoon Stewart from the Caribbean. While the FTAA itself may have fallen short, the fact of the negotiations had an impact that reverberated for many years thereafter.

The trade and competition linkage neither began nor ended with the FTAA, of course. Canada, the United States, and the European Union include competition chapters in many of their bilateral trade agreements. Even though competition was later dropped from long-running negotiations at the World Trade Organization, a competition chapter was included in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership,[25] to which Chile, Mexico, and Peru are parties, and continue to be included in bilateral trade agreements The United States negotiated competition chapters in trade agreements with Colombia and Peru as well as a revision to NAFTA that was rebranded as the U.S.-Mexico-Canada Agreement, or USMCA. Mexico has competition provisions in several of its free trade agreements.

d. A Remarkable Consensus, More or Less

The degree to which a consensus in favor of competition law and policy has developed strikes me as remarkable, given the different economies, political values, history and cultures among the countries. In the Latin America of 2000, competition laws and agencies were in place in Argentina, Brazil, Chile, Costa Rica, Colombia, Jamaica, Mexico, Panama, Peru, and Venezuela. Since then, the map has filled in, with almost every country in the hemisphere having joined them.[26] Whether for purposes of promoting trade, supporting a transition from a command-and-control or oligarchic economy, or controlling the perceived excesses of dominant firms, the results across the region and world look remarkably similar. The condemnation of cartels is universal, including through criminalization in several countries. While single firm anticompetitive conduct is addressed using different

25 Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The agreement was a successor to the Trans-Pacific Partnership to which the United States would have been a party as well, before President Trump withdrew from it.

26 The exceptions are the Bahamas, Bolivia, Cuba, and Haiti. The Caribbean Community has a regional law and agency that covers the participants in the CARICOM Single Market and Economy, which includes all of its sovereign members except for the Bahamas and Haiti.

language – some follow the European "abuse of dominance" approach while others adopt language that tracks the American monopolization concept – enforcement is largely devoted to the same ends. Most jurisdictions now address mergers, with Peru being the most recent to add merger control to its toolkit (in 2021). A review of the merger enforcement guidelines across the region shows remarkable similarity. Non-enforcement tools such as competition advocacy and market studies find their place across the region.

If you talk to a group of enforcers at an event such as the OECD's Latin America and Caribbean Competition Forum (LACCF) or the International Competition Network, you could walk away with a rosy view that there is an unshakable consensus that competition policy is necessary to implement a wider national policy that relies on markets and competition to allocate goods and services and that competition law is a critical tool to support that policy. However, that consensus turns out to be much weaker within the larger political environment.

II. HEADWINDS THAT IMPERIL CONSENSUS

I see four forces that pull in the opposite direction of that consensus. Some, such as the fact that competition produces winners as well as losers and the problem of asking beneficiaries of monopolistic structures to support an end to those structures, are fundamental political issues. Others reflect the daunting challenges of creating institutions that can effectively support competition.

a. Competition Produces not only Winners but also Losers

The assumption that competition is superior to state control has its skeptics. Competition produces winners and losers. Free markets reward those with access to capital, education, and an entrepreneurial spirit. However, the connection between the wealth that is generated by those who have that access and the well-being of the much larger number of people who do not and who must spend the bulk of their energy simply trying to meet life's basic necessities, is not obvious to all. When an innovative new entrant, more efficient and/or creative than an incumbent, produces a product that customers want, market forces will displace the incumbent. From the point of view of economic efficiency, this is a good thing.[27] However, from the point of view of the employees of the displaced incumbent whose jobs disappear as a result, it can mean economic disaster. The economic disruption that follows the opening of markets has created political space for a range of populist leaders to question the value of free markets and to suggest a return to state control.

I remember a case in a country outside of Latin America about subsidies that were granted to a factory which employed thousands of people to make obsolete industrial products that nobody wanted to buy. At the instigation of the international financial institutions, the government ended the subsidies. While it was doubtless the right decision economically, nobody seemed to give a thought to the fate of the factory's employees. After word of the decision came out, the unhappy workers demonstrated in front of government buildings. Since much of the factory's process relied on human muscle power, they were quite capable of throwing large rocks through the windows of the city hall. This they proceeded to do, paralyzing the city in the process. The government hastily backed down.

27 See Michael Porter, the Competitive Advantage of Nations (Free Press, 1990).

This suggests that market liberalization needs to be related to social policies. If we are to encourage the displacement of an inefficient incumbent by a more efficient new entrant, it is politically impossible – and perhaps morally unwise - to ignore the effects on the workers who will lose their jobs as a result. This raises a host of critical questions. Do jobs exist that those workers will be qualified to take? Will they have to move to find them? Will there be training programs to help muscular factory workers find a place in a more technological workplace? Will there be unemployment compensation in the meantime? Policymakers who don't have good answers to those questions should not be surprised when voters sour on economic liberalization and vote them out of office.

It doesn't have to be this way. In the mid-2010s, a political backlash against free market policies was being felt in several countries in the region, including Brazil, Mexico, and the United States. Yet that backlash, which included the "Occupy Wall Street" movement in the United States, made few noticeable ripples in Canada. A coffee-break conversation on the margins of an international conference explained why. A senior Canadian official told me that Canada provides a "soft landing" for those whose jobs disappear. Canada law offers generous unemployment compensation and extensive retraining benefits, so if your job is eliminated, you can be confident that you will find another.[28] Perhaps there are lessons there for the rest of the hemisphere.

One of the biggest challenges to successful competition policy is that the benefits that competition brings accrue mainly in the long term to a wider population that may not recognize that competition had anything to do with those benefits. A Peruvian parent is glad to see bread prices come down but may not realize that it was vigorous enforcement of Peru's competition law that broke up a price-fixing cartel and brought down prices. Mexicans are happy to see electricity prices come down, but don't realize that it resulted from a market-based approach that required electricity distributors to use a competitive market to buy the cheapest electricity.

However, competition may lead to short-term pain to a smaller section of the population, and to them, the cause of that pain is identifiable and obvious. A state-subsidized factory may employ a great many people to produce substandard goods at a below-market price. Once competition is introduced and the subsidies are withdrawn, new entrants may produce better quality goods with mechanized production methods and fewer employees. If the unsubsidized prices are higher, a politician will find it difficult to assure constituents that the prices will go down in the long run, when and if competition emerges. And the politician will surely find it impossible to convince the displaced unskilled employees that they should revel in their newfound economic misery.

Competition proponents have not, thus far, adequately acknowledged the extent of this disruption and pain during a transition period, nor have they found a good way to convince the public of the long-term value of reforms or been able to persuade legislators of the need for other policies and programs to address the pain and disruption. Doing so will not only require telling the story more effectively, but ensuring that complementary policies soften the impact of those who are hurt in the short term.

b. Monopolists Like Being Monopolists

The second countervailing force is more direct. Some individuals and firms benefit greatly from market power and aren't about to surrender it without a fight. They have benefitted from the monopoly markets – often granted in

28 The United States had a program aimed at the same goals until 2022. Some studies raised questions about its effectiveness. See K.M. Reynolds and J.S. Palatucci, Does Trade Adjustment Assistance Make a Difference?, 30 Contemporary Economic Policy 43 (2012).

the first instance by the state –, some have become immensely wealthy as a result, and they have every incentive to protect their privileged positions. They can usually command financial and political resources that make the fight a one-sided affair. I was once told by an unusually candid lawmaker that he received a handsome stipend from a prominent monopolist to make sure that no competition law would pass in his country or, if it did, that it would have no teeth. While I hope that was an extreme example, it aptly illustrates the power of well-resourced incumbents to ensure that pesky competition advocates do not cut into their monopoly profit margins. I doubt that anything other than brute force political leadership will ever be enough to overcome that kind of political obstacle. With all of the issues confronting even the most civic-minded national leader, it is a rare day when competition policy ranks high enough on the priority list to justify spending that kind of political capital.

A slightly more subtle form of this kind of political pressure took place in Colombia not long after I started work in the region. Two airlines – AVIANCA and ACES – wanted to merge. The Superintendent of Competition, Emilio Archila (who was coincidentally the chair of the FTAA Negotiating Group on Competition Policy at the time) concluded that the merger would significantly reduce competition in the domestic airline sector and sought to block the merger. The airlines persuaded the government to invoke a little-known section of the competition law that allowed the Superintendent to be supplanted for a particular case. The temporary successor dutifully allowed the merger to go forward and Archila resigned in protest. The effect of the merger was not lost on Colombians, as prices went up and the cost of the government's decision became clear. I found this out myself when I needed to fly to Cartagena shortly after the merger: my flight from Washington to Bogota with a change in Miami cost far less than the connecting forty-five minute AVIANCA flight from Bogota to Cartegena. The episode ultimately strengthened support for competition policy in Colombia.[29]

c. Competition Policy is Connected to Everything Else

Competition policy is not a stand-alone discipline, and it is not enough for a government to focus on competition law alone. Successful implementation of competition policy must be coordinated with policies that affect the functioning of a market economy, the rule of law, social policy, and consumer policy. Competition law and policy cannot stand alone in the toolbox of free market architects.

Entry by new competitors in the market and the consequential innovation and potential lower prices in the long-term will only happen if other policies are in place to support new competition. These include:

- New entrants need capital, and capital requires robust systems to facilitate the granting of credit. Lenders usually require borrowers to put up collateral, and that will only be effective if there is a way to document the collateral interest and to collect on it. Lenders usually want to be able to assess the risk they are taking, which requires a credit reporting system. And if it doesn't work out, there needs to be a fair bankruptcy process. A new entrant may also seek to use capital markets to raise funds. This requires a securities regulation system.
- Attempting to enter a market to compete against an entrenched monopolist can reveal other hidden barriers to entry. A lender may view such entry as risky and possibly foolhardy and may be reluctant to risk its capital in such a venture. A landlord, supplier, or distributor may be fearful of doing business with such a new entrant for fear of antagonizing the monopolist.

29 See International Competition Network, Competition Policy in Developing Countries (Training on Demand Module VIII-3 (2013).

- Organizing a company is usually a first step to entry. In some countries, this can be done at low cost in a matter of hours. In others, it requires extensive documentation and proceedings, which can add to the costs of entry.

- Regulatory policy may create licensing barriers, may require excessive levels of investment in the name of ensuring quality, or may make needed inputs or distribution channels less available. This requires a difficult balancing act. Most regulations are intended to prevent some sort of social harm, but they impose costs. Whether the costs are reasonable in relation to the harm to be prevented may not be obvious, and the regulator typically has its eye on preventing the harm, not the economic cost. At its worst, regulation can be imposed at the behest of incumbents to keep new entrants out of the market. Some attention should be paid to whether regulations are serving their intended purpose or are unnecessarily burdening competition

- Consumer policy can be closely related to competition. A firm will have incentives to innovate only if it can advertise its products. Prevention of unfair or deceptive marketing is vital if consumers are to trust firms' claims about their products, but if firms can't promote their products, they won't introduce them.

- By definition, trade policy affects the extent to which competition will be permitted from foreign sources. Yet it also reflects other values unrelated to competition, which can be complicated to navigate.

- Corruption may rear its ugly head as an obstacle. If corrupt payments are extracted as a condition of doing business – possibly on an ongoing basis – it will deter entry.

- The rule of law must prevail – there needs to be a legal system that will enforce contracts and resolve disputes fairly and predictably. This, in turn, requires courts, competent and impartial judges, and mechanisms for the enforcement of court orders. This can challenge even well-established judicial systems.

Successful implementation of competition policy requires a constellation of policies to be in place, not just passage of a competition law. In the absence of investment in the necessary free market infrastructure, even the best competition law and agency will be like buying a Lamborghini for a country with only dirt roads.

Thus, it's not enough for policy proponents to push for a competition law. Competition law is just one arrow in a quiver of reforms that need to be implemented more or less simultaneously. That requires a substantial investment in building effective institutions that support the full array of economic governance.

d. There's no Such Thing as a Free Lunch

While competition law enforcement does not require armies of officials, it requires those that it fields to be at the top of their game. In addition to top agency leadership, a solid group of competition lawyers, economists, technologists, and supporting staff must be recruited to do the day-to-day work of the agency. Agencies must compete with law firms and economic consulting firms for that talent. Latin American agencies, like their counterparts worldwide (including, I hasten to add, the United States) have to be able to pay competition professionals a competitive wage. Agency budgets are often not sufficient for that purpose, nor to hire expert economists and technologists, nor to invest in needed technology resources.

Compared to the cost of enforcement, the benefits to the public of making these investments can be huge.

However, making this point to lawmakers can be a challenge. Voters understand the connection between hiring more police officers and reducing crime. They understand that hiring public health officials helps combat endemic diseases. They may not understand as well how hiring lawyers and economists can help bring down costs and promote innovation. Mexico's CFC (the predecessor to today's COFECE) brought a case against a group of pharmaceutical companies that had fixed prices for drugs sold to Mexico's social security system. Eduardo Pérez Motta, the CFC's visionary head at the time, argued that the resulting anticompetitive overcharges would have been sufficient to cover the CFC's budget for the next 90 years. That message ultimately went unheard. President Lopez Obrador sought to cut the salaries of COFECE's officials, to challenge its authority in court, and most recently, to end its independent status and fold it into the Ministry of Economy. Obtaining the resources needed to do the job requires a measure of political support that can be hard to muster in any country.

III. MAKING IT ALL WORK

If the successful implementation of competition policy requires more than passing a competition law and declaring victory, what are the necessary elements of successful policy implementation in practice? While a complete list will vary from country to country, I'll over a few observations about the challenges of building policy support and effective institutions for competition law enforcement.[30]

a. Getting the Public on Board

The real challenge is getting the public on board. An anecdote will illustrate the challenge. Before I joined the FTC's international office, I was the assistant director of the FTC's Chicago office. At the time the Department of Justice (DOJ) was challenging Microsoft for excluding competing browsers from the market.[31] When I was waiting for the train to work, sometimes my fellow commuters – who were vaguely aware my job had something to do with competition law – would confront me and demand to know what I was going to do about Microsoft! Leaving aside the fact that the Microsoft case was brought by DOJ and not FTC, those encounters said a lot about the acceptance of competition law and policy. I have sometimes asked my Latin American counterparts if they've ever had a similar conversation outside of the work context. The answer has always been no. Perhaps the biggest lesson I have learned is that if competition is to fulfill its economic promise, ordinary people like my neighbors on the train platform have to think it's worthwhile, not just economists and other competition professionals.

If there's a common theme to implementing a successful competition regime, it may be in persuading the public that competition policy is worth the investment in short-term disruption and government resources. Successful cartel enforcement has been a key ingredient, especially when it involves products and services that people instinctively grasp. Beatriz Boza, the first leader of Peru's INDECOPI, for example, brought several high-profile cartel cases involving basic foodstuffs – bread and chickens – that illustrated the value of competition law in the public eye. Similarly, El Salvador's Superintendence of Competition brought a high-profile cartel case involving wheat flour, and Mexico's CFC brought a case involving price fixing for tortillas. These were products that everyone

30 Studying this issue was one of the first tasks of the International Competition Network. See Capacity Building and Technical Assistance (2003), and subsequent work by the Competition Policy Implementation and Agency Effectiveness Working Groups.
31 See U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

knew well, and for this reason they lent themselves to a favorable popular narrative.
Cases like this shape public opinion in favor of robust competition policy. Chile's Fiscalia Nacional Económica has handled cartel cases effectively, including pharmaceutical products (including contraceptives)[32], fresh chicken meat[33] and toilet tissue[34] – products everyone knows. A recent article studies how public opinion in Chile has coalesced around a view that cartels deserve public condemnation.[35] A key test for Brazil's CADE came with Lava Jato, the wide-ranging bid-rigging scandal that reached far into government and required a firm and capable response by CADE.[36] CADE rose to the task, and its reputation was embellished along the way. Cases like these doubtless give political leadership more leeway to further strengthen the law, including criminalization of price fixing.

In addition to the pharmaceutical case mentioned earlier, Mexico's CFC, the predecessor to the current COFECE, brought a monopolization case that ended Mexico's landline telecommunications monopolist from extending that monopoly into the mobile telephone market.[37] According to the OECD, the estimated cost to Mexico of the telecommunications monopoly was around 1.8% of Mexico's GDP per year between 2005 and 2009. This represented a significant loss of about $129.2 billion to consumer welfare over that period due to high prices and limited competition in the market.[38] Considering Mexico's population of about 111 million at the time, this works out to about $232 per Mexican per year. No matter how you count it, that's real money, and that's the kind of story that competition advocates need to tell more.

b. Finding the Right Structure for the Country

It is tempting for policy makers to simply copy existing institutions from abroad rather than develop a system tailored to their own market and history.[39] This lesson that one size does not necessarily fit all has been twice learned in the Caribbean region.

The first of these was in Jamaica. Jamaica established its Fair Trading Commission in the 1990s, which was patterned after the FTC in the United States. It failed, however, to incorporate the background legal architecture such as the Administrative Procedure Act that allows the U.S. system to function. The Fair Trading Commission brought a seminal case against the Jamaica Stock Exchange that resulted in the court finding that the combination of prosecution and adjudication into a single entity caused a denial of natural

32 FNE c. FASA, Cruz Verde and Salcobrand, Sentencia N° 119/2012, Tribunal de Defensa de la Libre Competencia.
33 FNE c. Agrosuper, Ariztía and Don Pollo, Sentencia N° 139/2014, Tribunal de Defensa de la Libre Competencia.
34 FNE c. CMPC and SCA, Sentencia N° 160/2017, Tribunal de Defensa de la Libre Competencia.
35 Umit Ayden, Attitudes Toward Collusion in Chile, Journal of Competition Law and Economics 17(1):168-193 (March 2021).
36 E.g., Anderson, Robert D, Alison Jones, and William E Kovacic, 'Brazil: Lessons from Operation Car Wash', Combatting Corruption and Collusion in Public Procurement: A Challenge for Governments Worldwide (2024; online edn, Oxford Academic).
37 The essence of the case was that the dominant telecommunications firm hindered competition in the mobile telephone market by imposing high interconnection fees on its mobile rivals, to the benefit of its own mobile subsidiary.
38 OECD, Market developments in telecommunication and broadcasting in Mexico, in TELECOMMUNICATION AND BROADCASTING REVIEW OF MEXICO 2017 (2017).
39 I worked with one institution, elsewhere in the world, where the government decided to base the institutional structure of the competition agency on the tax authority. Staff was detailed from that authority to set up the agency. The rationale for this decision was unclear. As nearly as I could tell, it was because some facility with higher mathematics was common to both. When we were sent to see how we could help, agency officials said what they really needed was a copy of our decision algorithm. "What algorithm is that," we asked? They had assumed that just as you could create a formula to determine how much tax was due if you took into account income, deductions, depreciation, and so forth, you could do address mergers if you simply input market shares, barriers to entry, and other factors typically found in merger guidelines. Once the data was imported, they assumed, you needed only press the button on the computer and the algorithm would tell you whether to allow, reject, or condition the merger! Experience eventually taught the agency that the inquiry was more complicated than that.

justice.[40] Competition enforcement consequently was stymied for several years until a legislative solution was found that better fit Jamaica's own legal systems.

The second of these involved the Caribbean Community (CARICOM), a trade body that, like the European Union, seeks to establish a common market throughout the region. CARICOM's Single Market Economy established its own competition authority, the Caribbean Competition Commission (CCC) patterned on the European Commission. The Caribbean region consists of over a dozen small independent nations, of which only four – Jamaica, Barbados, Trinidad & Tobago, and Guyana – have set up a competition law regime. Some countries in the region are so small – St. Kitts has a population of less than 50,000, for example – that they may lack the capacity to do so.[41] The European model, however, has not served the Caribbean region as well as it did in Europe. It assumes that the agency will receive significant financial support from the regional body, but the CCC receives only meager funding from CARICOM and is struggling to find funding for more than a handful of case handlers. While the EU relies on a robust network of national enforcers, such as the Bundeskartellamt in Germany, whose enforcement powers support the regional body, most CARICOM member states have no national enforcer. Most importantly the model assumes significant economic integration and political willingness to delegate significant sovereign authority to a central competition institution. While Europe has developed a broad consensus in favor of delegating significant power to break down barriers to cross-border commerce among member states to a highly professional and well-funded Directorate General for Competition, a similar consensus has yet to develop in the Caribbean. The challenges of implementing competition policy in the Caribbean region are many, but blindly copying another institution's model without considering whether it will work in a very different environment was probably not the best way forward.

Latin America has experimented with several other regional authorities over the years with mixed success. The Andean Community, originally consisting of Peru, Colombia, Ecuador, Bolivia, and Venezuela,[42] established a competition ordinance covering cross-border anticompetitive practices and established a directorate within the Andean Community General Secretariat to carry out the law. Expectations exceeded reality, though, as few cases of note resulted other than one that nearly eviscerated cartel enforcement in the region. The case involved a cartel involving the tissue paper industry. A foreign firm applied for, and was granted, leniency by the member state authorities in Colombia, Peru, and Ecuador. For its part, Ecuador's competition agency instead referred the supposedly confidential leniency application to the Andean Community General Secretariat.[43] Outside of the Andean Community, Mercosur, then consisting of Brazil, Argentina, Paraguay, and Uruguay, subscribed to a competition protocol in 1997, but no enforcement mechanism was ever established. Discussions about a common authority for Central America have been ongoing for years. While vibrant networks have developed among the Central American authorities, the political will to cede authority to a central body has not yet evidenced itself.

c. Setting up an Agency

There is no generally agreed best way to structure a competition law enforcement system, despite efforts at the OECD to do so.[44] Options include a prosecutorial system with cases decided by a specialized tribunal

40 Jamaica Stock Exchange v Fair Trading Commission, JM 2001 CA 1 (Jamaica Ct. App. 2001).
41 The Organization of Eastern Caribbean States has been considering a regional national structure for the very small island states for some years, but without results to date.
42 Venezuela subsequently left the Andean Community to join Mercosur.
43 The case has been discussed extensively in other publications. See OECD/IDB (2021), OECD-IDB Peer Reviews of Competition Law and Policy: Ecuador 2021, Competition Law and Policy Reviews at p. 105, OECD Publishing, Paris.
44 OECD, The Optimal Design, Organisation and Powers of Competition Authorities (Secretariat Paper 2023).

(e.g., Chile), an administrative system subject to judicial review (e.g., Mexico), or a hybrid system with internal separation between prosecution and decision (e.g., Brazil). Whatever the system, it's important to have a strong system for selecting, managing, and vetting cases along with an appropriate level of independence between investigators and decision-makers.

Brazil, for example, was initially hobbled by a tripartite enforcement system through which prosecution was vested in the Ministry of Justice, economic analysis was entrusted to the Ministry of Finance, and cases were decided by a third body, the Administrative Council for Economic Defense (CADE). To an FTC lawyer, it would have been as if its Bureau of Competition, Bureau of Economics, and Commissioners were all in separate agencies. That the system worked at all seemed to be only because of the good will and strong personal relationships between the leaders of the three Brazilian agencies. Thankfully, Brazil streamlined the agency in 2012, and CADE has since transformed itself into a hemispheric leader.

In Chile, cases were at first resolved by a hodgepodge of central and regional "preventative" and "resolutory" commissions, which were eventually supplanted by an independent and highly professional national Tribunal for the Defense of Free Competition (composed of 3 lawyers and 2 economists). Colombia and El Salvador, on the other hand, each have a single Superintendent that oversees everything from investigation to adjudication, subject only to judicial review at the end. Fortunately, the competition agencies in both countries have had capable leaders, but the potential for mischief without an independent adjudicator is high if the political winds blow against free markets.

Establishing institutional independence is critical. To be sure, agency independence is a relative concept. Competition agencies depend on other branches of leadership to provide their legal mandate and to answer questions such as who investigates cases, who decides them, who enforces them, who selects and dismisses the agency leadership, and the nature and scope of judicial review. The legislative and executive branches decide on the agency's budget, civil service rules, and a host of other measures that may constrain or empower the agency. While agency independence is a vaunted concept among competition officials,[45] it is not clear that lawmakers and executives are comfortable with handing over the powers to take on important economic actors to officials who are beyond their control. A couple of examples illustrate:

- In Mexico, a major reform in 2013 elevated competition law to constitutional status and created a new Federal Economic Competition Commission (COFECE) to enforce it. In order to reduce the impact of patronage, appointments could be made only from a list of those who pass a tough examination administered by the National Bank of Mexico. Chile has a similar system. Unfortunately, Mexico has recently passed legislation that strips COFECE of its independence and subordinates it to the Ministry of Economy. It remains to be seen how this will impact the enforcement of competition law in Mexico.
- Argentina's National Commission for the Defense of Competition (CNDC) has struggled to establish institutional independence. When the law was passed, the CNDC was empowered only to recommend final outcomes to the Secretary of Competition, who is part of the Ministry of Economy, as a provisional measure until an independent tribunal could be set up. However, before the tribunal

45 Indeed, in the European Union independence is required. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Art. 4.

could be set up, the electoral reaction to the 2001 economic crises resulted in a Peronist government returning to power. The institution languished, and Congress eventually eliminated the tribunal from the law. Things changed again when reformers returned to power in 2016. A new law was passed that modernized enforcement and once again established an independent tribunal. Once again, the tribunal was not implemented before the political pendulum swung once again and brought another Peronist government to power. The lack of independence has hampered the CNDC's effectiveness. More recently, a new but unconventional reformist was elected. He appointed an agency veteran to head the CNDC. We have yet to see how the latest shift will affect competition policy.

- Looking to North America, questions have been raised in the United States about whether it is constitutional to delegate enforcement of the law to officials who are not subject to the removal power of the President.[46] The application of this doctrine to the Federal Trade Commission, an independent agency, remains to be seen.

An important part of agency independence is the ability to identify important cases and to direct resources towards them. Doing so will necessarily require deprioritization of cases of less importance to the economy as a whole. However, if application to the competition agency is the only way a victim of anticompetitive practices can vindicate its rights, it is troubling to suggest that the agency can simply put small but meritorious cases aside. One solution to this is to allow claimants to bring private cases without involving the agency. While private cases to establish damages in the wake of an agency decision on liability are possible in several countries, little enthusiasm has existed for ab initio private competition litigation[47].

d. Getting the Right People

The human capital that has been attracted to the region's competition agencies continues to astound me. Latin America has a deep bench of capable competition professionals, due in part to an excellent network of universities. Among the early leaders have been Emilio Archila and Andrés Barreto in Colombia; Fernando Sánchez Ugarte, Eduardo Pérez Motta, and Alejandra Palacios in Mexico; Gesner Oliveira, Mariana Tavares, Barbara Rosenberg, Fernando Furlan, Carlos Ragazzo, and Eduardo Frade in Brazil; Diego Petracolla and Esteban Greco in Argentina; Felipe Irrarázabal, Tómas Menchaca, and Enrique Vergara in Chile; Beatriz Boza and Ivo Gagliuffi in Peru; Ana Julia Jatar and Ignacio de Leon in Venezuela; Celina Escolán in El Salvador, and legions of others that have followed them.[48]

An important measure of success is the ability of a strong leader to pass the baton on to the next leader. I recall a conversation with a well-regarded president of Brazil's CADE as his term was nearing an end. I asked him if he worried about whether his successor would be able to continue CADE's success story. He shrugged and told me that it didn't matter, saying that CADE had developed into a strong institution and that Brazil has a wealth of professionals who could step in and do as good a job as he had. He proved to be correct. Perhaps the greatest measure of the success of an agency is the success of a handoff from a strong leader to a successor. It will be relatively seamless if the institution is well designed. If the baton is bobbled, it suggests that the institution owed its success more to the individual in charge than to its strong institutional foundations.[49]

46 CFPB v. Consumer Financial Services Association of America, Ltd., 601 U.S. 416 (2024).
47 For a report about antitrust damages in the Americas, see Michael Jacobs, Antitrust Damages Litigation in Latin America: A Comparative Study (CentroCompetencia UAI, 2024).
48 There have been many others equally as accomplished whose omission is no reflection on their accomplishments.
49 See William Kovacic, The First Decade: Challenges Facing New Competition Agencies (remarks in Belgrade, Serbia, June 2010).

Brazil's success may be due in part to the strong private sector competition community organized around IBRAC,[50] which provides intellectual, and perhaps political, support for sound competition law. Its leaders include many lawyers and economists who have served as CADE Commissioners and senior officials. I know of no other nongovernment institution that provides as solid support competition policy as IBRAC other than the Antitrust Law Section of the American Bar Association. I am aware of other such institutions developing in Colombia and Argentina as well.

Going beyond agency leadership, many of the staff people in the agencies are amazing. Among other things, I have seen this through the FTC's International Fellows program,[51] which allows the FTC to engage in staff exchanges with counterpart agencies. We have had phenomenal interns from Brazil and Argentina, but also from smaller countries. The ability of Honduras' Commission for the Defense and Protection of Competition to attract human capital was proved in dramatic form when one of its case handlers came to the FTC under the program. He was assigned to work on a merger case that was moving towards a litigation challenge as the detail neared an end. He had proven such a valuable member of the FTC's case team that the FTC reached out to the CDPC to ask if the detail could be extended until the case went to trial!

e. Making Do Under Difficult Circumstances

Otto von Bismarck is supposed to have said that "politics is the art of the possible." This could well define the enforcement agenda in several countries where political support for competition law, or the resources to support it, are in doubt. Several countries have managed to establish laws and agencies under difficult circumstances. Nicaragua's law, for example, was enacted just before the Daniel Ortega government returned to power. After Ortega took office, the committed leadership of Pro-Competencia Nicaragua showed real political agility in enforcing the law by looking for cases where it could find breathing room to take effective action, while presumably avoiding cases actions that might have been politically perilous.

In 2001 Barbados converted its natural monopoly regulator into the Barbados Fair Trading Commission, which encompassed competition as well as consumer protection. Doubts that such a small country could establish an effective agency were quicky proved wrong. The BFTC quickly proved an ability to punch far above its weight, earning a co-chair position for an International Competition Network Working Group. Its quality was such that some of its staff eventually moved to form the core of the CARICOM agency.

The newest competition law in Latin America is in Guatemala, whose Congress passed its first competition law as this essay was being written. Guatemala's economy has long been controlled by a handful of families that have been mistrustful of the effect that a competition law might have on their interests. Even after Guatemala undertook to pass a competition law as required by the EU Association Agreement, progress was slow. I attended a conference in Guatemala a decade ago in which it was debated whether it would be better to pass a toothless competition law that would meet letter of the EU requirement, or whether it would be more intellectually honest to pass no competition law at all. The idea of passing and implementing a genuinely effective competition law was not seriously put forward, as everyone in the room evidently knew that it was not then politically realistic. In 2024, after Bernardo Arévalo was elected President, a

50 Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional.
51 Federal Trade Commission, International Fellows Program. The expenses of the detail were funded by the U.S. Agency for International Development.

comprehensive competition law was passed, one which will hopefully allow an effective agency to be created if the headwinds can be overcome.

f. Building Capacity for a New Agency

Once a country decides to enact a competition law, there are significant challenges in putting it into place. Initial challenges include deciding on key organizational questions and developing the human capital to make it all work.

While many of the organizational issues will be addressed by legislation, many other decisions about the organization of the agency must be made by the initial agency leadership. How are investigations opened? Who reviews those decisions, and what systems are in place to monitor investigations and decide whether they warrant prosecution? What kinds of skills should case handlers bring to the job, and what are the roles of attorneys and economists? What kinds of training should staff receive? Those decisions are typically made early in the life of an agency, and once made, are difficult to revisit. Change tends to fall victim to the well-established bureaucratic dogma: "we've always done it this way." Thus, early thought to these questions is essential.

The question of how to encourage and assist efforts to develop the capacity of those selected to run a new or evolving competition agency has absorbed much of my career at the FTC. A short detour to explain how the FTC began doing work of this sort may be helpful.

1. The Roots of the U.S. Technical Assistance Program

The FTC and the Antitrust Division of the DOJ became involved with international technical assistance in the early 1990s, shortly after the fall of the Berlin Wall. Replacing the command-and-control economies that had dominated Eastern Europe since the communist takeover of the region following World War II required the creation of competition laws and institutions that could protect the functioning of competitive free markets. Consequently, the U.S. antitrust agencies, under the leadership of FTC Chair Janet Steiger and Assistant Attorney General James Rill, reached a series of agreements with the U.S. Agency for International Development (USAID) under which FTC and DOJ career enforcers were embedded with the nascent competition agencies of Poland, Hungary, Czechoslovakia (and later the Czech and Slovak Republics), Romania, and Bulgaria. Under this model, rotating pairs of FTC and DOJ lawyers and economists spent about six months each within the competition agencies, providing training in the context of the agencies' real cases and legal framework, thus allowing FTC and DOJ advisors to be present at the optimal teachable moments. Significantly, the deployment of career competition enforcers not only facilitated the transmission of tacit knowledge significant for competition enforcement, but also created a shared bond and rapport among fellow enforcers that might not have developed if consultants without government experience had been used instead.

Notably, the programs did not have detailed agendas of tasks and milestones. The job description of the advisor was essentially to figure out what assistance would be most useful and then to deliver it. Depending on the needs of the agency, the work tended to encompass everything from traditional training to one-on-one consultations with case handlers to providing advice to agency managers to advising on drafting of regulations and revised legislation, to meeting with other regulators to discuss how regulatory policy affected competition.[52]

52 By contrast, other donors had typically laid out detailed work programs and milestones for their advisors – many of which proved to be irrelevant in practice and left other essential programs unaddressed.

During the 1990s, the success of the program led USAID to fund an expansion of the program within and beyond Eastern Europe, including the Baltic States, Ukraine, and the Russian Federation itself. In some cases, the availability of funding and the needs of the agency dictated the use of short-term programs of a week or so instead of through long-term advisors who remained for months at a time. For those programs, agency staff developed a series of hypothetical exercises to simulate investigations of mergers and suspected cartels and abuse of dominance, each of which played out over the course of a week.[53] As mentioned at the outset, I was recruited into this effort at this stage and was soon thereafter invited to join the FTC's international team on a full-time basis.

Until 2007, all of this work was funded by USAID under a series of interagency agreements between USAID and the FTC and DOJ. USAID's goals of furthering economic growth and development depended on fostering vibrant free-market economies characterized by robust competition. USAID's view of the world meshed very well with that of FTC and DOJ, and it became a robust and natural partnership that continued in other parts of the world until the very recent dismantling of USAID by the Trump administration. In 2007, the success of this work came to the attention of Congress, which provided additional funding to the FTC to carry out additional technical assistance programs, among other priorities.[54] While Congress did not discuss its reasoning, a likely explanation is that representatives of the private sector, which had experience dealing with newly constituted competition agencies around the world, had persuaded Congress of the value of having capable enforcement partners abroad in an increasingly transnational commercial environment, promoting a shared approach to competition law, and avoiding a multipolar landscape in which the most restrictive jurisdiction effectively set the rules for all.[55]

2. Bringing the Program to Latin America

Not long after the program began, the FTC/DOJ technical assistance program extended for the first time to Latin America. A pair of resident advisors embedded with Argentina's CNDC, a small program was carried out in Jamaica, and multiple short-term programs were conducted for Venezuela's Pro-Competencia and for Brazil's CADE. After I joined the international office in 2000, I helped manage a series of USAID-funded short-term programs for the Andean region and in the southern cone of South America.[56] In the early part of the next decade, USAID's Feed the Future program funded an extensive program of capacity building for Central American competition agencies in markets that affected food security.[57]

The FTC expanded its program in the Americas once Congress encouraged it to use its own funds. Among the programs I helped organize were trainings on competition law for judges in Mexico, Central America, and

53 For a good description of the program, see T. Hughes et al, International Competition Technical Assistance: The Federal Trade Commission's Experience and Challenges for the Future, in Antitrust in Emerging and Developing Countries (2015). This program was also discussed at some length at a 2008 FTC workshop on "Charting the Future of International Technical Assistance." See also U.S. Federal Trade Commission's and Department of Justice's Experience With Technical Assistance For The Effective Application of Competition Laws (2008).

54 Proceedings and Debates of the 110th Congress, 1st Session, p154 Cong. Rec. H16054 (daily ed. Dec. 17, 2007). ("The FTC shall allocate the increase above

the President's request to high-priority activities, including . . . training and technical assistance to developing nations.").

55 See, e.g., Muris, Merger Enforcement in a World of Multiple Arbiters, address to Brookings Institution, Roundtable of Trade and Investment Policy (2001).

56 USAID funded this program on a regional basis, and it primarily focused on Argentina. Participants from Uruguay and Paraguay, which at that point lacked competition laws, were also invited to participate.

57 That program resulted in a report, A Report on Barriers to Competition in Food-Related Markets in El Salvador, Guatemala, and Honduras (2015).

the Dominican Republic; trainings in investigative techniques for mergers in Argentina during one of the pro-market swings in that country's political pendulum; consultations with Brazil on merger notification procedures; programs in Colombia on mergers and competition advocacy; trainings on merger review in Peru after Peru adopted its merger review provisions, and a final program on merger review in Central America.

Judicial training is worth special mention. Even the best-established competition agency can encounter challenges once its decisions come before courts for review.[58] The issue is that in many countries, judges have little training or experience in competition law. Many competition cases require prediction of the future effects of present conduct, which in turn requires the use of economic evidence and analytical tools. These kinds of decisions do not always match the skills of judges who normally assess how past conduct compares with established legal norms. Judges can tell if a contract was breached, but it's not as easy to know how a hospital merger will affect the cost of medical care in the future. Eduardo Pérez Motta of Mexico's CFC discussed this with leading Mexican judges, and came to us and asked if we could help train a group of Mexican judges. We responded by organizing a series of programs that included not only FTC and DOJ lawyers, but, recognizing that judges tend to appreciate the perspective of other judges, alsoleading American judges with deep competition law experience, including Diane Wood, Douglas Ginsburg, and Sarah Vance. . Eventually, Mexico's judicial training institute took over sponsorship of the training. We later did similar programs in the Dominican Republic and Central America.

3. Making Technical Assistance Work

Competition technical assistance, like competition enforcement generally, has evolved through an active process of trial and error. Having been involved with many of the successes of technical assistance – and a few of the errors – I feel than I can offer a few observations about what works and what doesn't based on over 20 years of providing antitrust technical assistance in Latin America.

To be effective and best meet the recipient's needs, the agenda must be developed in partnership with the recipient. Nothing is better guaranteed to waste everyone's time and money than for an advisor or consultant to get off a plane, deliver a lecture based on the lecturer's experience at home, and then fly back home with a feeling of self-satisfaction while the recipients try to puzzle out what the expert had been talking about. I have seen, for example, officials from my country who insisted that cartels are the highest priority, followed by mergers, and that monopolization should come in a distant third in any enforcement agenda. Whatever one thinks about the value of this approach in the United States, this can ring a bit hollow in a country where most markets have been monopolized for centuries. It is hard to imagine what a cartel-based enforcement agenda might look like in such a monopolized world – if you have a monopoly, by definition there are no competitors with whom to conspire or merge. Similarly, an advisor who counsels a common-law approach in a civil law country (as I did before I learned better) will not find a receptive audience.

A real object of technical assistance training is to recreate the kind of peer-to-peer training that the FTC and other developed competition agencies use themselves. When I started at the FTC, I learned how to

58 This is not a uniquely Latin American issue. In 1995, the FTC sought a temporary restraining order to block a hospital merger in a city in southwest Missouri. Before the FTC could offer any witnesses, the judge dismissed the motion, saying "I don't think you've got any business being in here. I don't see how the Federal Trade Commission can claim there is lack of competition when there [are] four or five hospitals in the area, and reducing it by one is not going to wipe out competition (. . .) It looks to me like Washington D.C. once again thinks they know better what's going on in southwest Missouri. I think they ought to stay in D.C." FTC v. Freeman Hospital, 69 F.3d 260 (8th Cir. 1995).

investigate cases from more experienced colleagues. Formal training was offered and welcomed, but real learning came from more experienced colleagues who could say, "here's how we really do it," or, on at least one occasion, "let's talk about how it might have gone better." A new agency starting from scratch has had no opportunity to build that kind of institutional knowledge. Placing advisors from a more experienced agency invites newer agency staff to seek out that same kind of guidance I got from my older and wiser colleagues. As a result, I often found myself responding to questions from foreign enforcers by saying, "we had a case like that once." That allowed me to discuss (while maintaining the confidentiality of the particular case from which I drew experience) what one might need to know, where one could find the needed information, and what to do with the information once we got it.

There are few quick fixes. Capacity building is a long-term process. In the case of newer agencies, the best results have come when we have been able to send an FTC or DOJ attorney or economist to embed within the agency for a period of months, during which the advisor can build rapport and trust, better understand the environment in which their colleagues work, and tailor their assistance to the legal and economic realities of the country. In addition to the early experience in Argentina, we have been able to send long-term advisors to Mexico several times, and to Peru, Colombia, and El Salvador (once each). While short term advice has its place, especially as an agency matures and better understands its own needs and where the knowledge gaps lie, at the early stages nothing beats the long-term advisors.[59]

Technical assistance providers need to understand the political environment of the host country in order to deliver effective assistance. In some more advanced countries, such as Brazil, Chile, and perhaps Mexico, political support exists for a model of economic governance based on an open economy which necessarily requires competition law enforcement against cartels and monopolistic practices. In such an environment, that political support for competition law enforcement may run deep enough that enforcers can do their jobs with little worry about the political ramifications of bringing a particular case.[60] Things look different in a country where a handful of families control not only commerce but the political dialogue as well. To suggest a cartel action against members of those families could be to counsel suicide. A better strategy may be to start small, understand where opportunities lie, and build from there.

Capacity building is a team sport. Experts in each country have insights into what is likely to work best in their own country that outsiders cannot hope to replicate. Mexico offers a good example. Recognizing the intractable nature of the monopolies that have dominated Mexican life for centuries, the CFC proposed replicating the market investigations regime that originated in the United Kingdom.[61] The Mexican version of this regime allows COFECE to investigate systemic barriers to entry and essential inputs and, if warranted, to impose remedies that will restore competitive conditions even in the absence of proof of anticompetitive conduct. When initially proposed, foreign observers were horrified, seeing it as an opportunity for Mexico to appropriate control of foreign investors' facilities – a criticism that was answered by strengthening procedural protections. Yet this approach was more likely to yield long-term success than bringing thousands of abuse of dominance

59 The International Competition Network conducted a study of what kinds of technical assistance worked best, and ultimately adopted findings on effective technical assistance that parallel this observation. See International Competition Network, Findings Related to Technical Assistance for Newer Competition Agencies (2007).

60 See F. Irrarázabal, Objetivos y Estratagias Utilzados para Consolidar a la Fiscalía Nacional Económica como un Servicio Público Confiable, Estudos Públicos 154 (otoño 2019), 125.

61 Competition Commission, BAA airports market Investigation: A report on the supply of airport services by BAA in the UK (2009).

cases that would not solve the fundamental problem of entrenched dominance. Such innovative solutions may be needed when faced with pervasive monopolies that go back to the days of Porfirio Diaz, Hernán Cortez, or even the Aztecs. It might not have been the right answer for the United States, and it would not have occurred to most American advisors. The Mexicans understood their challenges far better than we could have.

Similarly, fostering synergies within the region can effectively complement ideas imported from abroad. One example lies in what was originally known as the Regional Competition Center for Central America, which is today known as the Group of Competition Authorities in the Americas (GRACA). The idea was inspired by Mexico's Eduardo Pérez Motta, who saw value in a regional network of competition agencies that drove its own agenda as a complement to existing networks organized by the OECD and other outside groups. At various times, GRACA has focused on developing enforcement guidelines, creating databases of jurisprudence from across the hemisphere, and training events. A regional network also exists in Central America. Another similar initiative was the Inter American Competition Alliance, which is breathtakingly simple: it consists of a monthly Spanish-language telephone (now online) conversation in which agencies take turns presenting on a subject or case of mutual interest that they have selected. While FTC helped get this off the ground, it is now managed entirely within the region. The U.S. agencies role is no different now than those of the other agencies – they make presentations about cases and topics that others find of interest.

Bringing in the perspective of others allows recipients to make better use of U.S. experience. In my experience, recipients trust and respect the FTC and DOJ but are aware that the United States has its own perspectives. Working with other donors helps alleviate concerns of bias. When FTC/DOJ conducted its USAID-funded technical assistance program in Central America, we budgeted funds to bring in experts from Mexico, whose history and economy is closer to that in Central America than is that of the United States. We conducted a program to support Peru's adoption of a merger control regime in cooperation with a similar program carried out by Canada's Competition Bureau. That we reinforced each other's themes added, I suspect, to the credibility of both programs. And we have worked in cooperation with the OECD and the Inter-American Development Bank whenever we can. Because our knowledge of economics and competition policy evolves over time, it is natural that there will be some differences. When we work together, it is easier to explain why differences exist so that recipients can decide what makes the most sense in their own environment rather than to puzzle out for themselves whether the "American" or "European" approach would best fit their own needs.

If we limit our attention to the competition agency itself, we risk missing the big picture. Ministries and regulations dictate who may enter a market, who may compete, and how they compete. If regulatory policy that renders markets uncontestable is not addressed, then it may not matter how effective a competition agency is. These policies can manifest themselves in many ways: Is the licensing process too onerous? Do banking regulations make it impossible for a new firm to obtain credit? Are there advertising restrictions that prohibit a firm from marketing its products effectively? Are there corrupt actors who extract rents from new entrants that will keep them out of business? Are there systems in place, such as collateral laws, that will allow a firm to invest in equipment? How will trade policy affect competition? Will the courts enforce contracts? The list can go on endlessly. While these issues are all outside of the competition agency's formal remit, an agency that doesn't pay attention to them will not achieve its ultimate objections.

Advice needs to extend to the operation of institutions. For a long time, foreign advisors focused on the substantive content of competition laws and paid little attention to organizational or procedural matters,

assuming them to be baked into the local administrative culture. However, institutional issues affect substantive outcomes. If case handlers are paid on the same scale as plumbing inspectors, can we expect them to understand diversion analyses and cross-elasticities of demand? If the agency gets to keep fines it imposes, will it be perceived as fair? If there are no systems in place to review investigations as they unfold, will bureaucratic momentum propel a poorly conceived case over the finish line? If economists are brought into a case only at the final review stage, will the investigation reflect appropriate analysis? I have seen each of these issues, and it is critical that attention be paid to these issues at an early stage. Otherwise, the momentum of "this is how we have always done it," becomes hard to overcome.

The benefits of a technical assistance program do not flow only from north to south. We at the FTC have benefitted as well. Over the years, dozens of FTC and DOJ attorneys and economists have participated in capacity-building events across the region. The process helps develop collegial relationships and understandings that pay immense dividends when we have occasion to cooperate on cases in common.[62] Beyond that, anyone who has ever taught knows that the best way to learn something is to teach it, and advisors return with a much deeper knowledge themselves. Moreover, as I have learned firsthand, the experience of working in an environment with legal, political, administrative, economic, and practical features different from what we assume from our domestic experience gives us greater insight into our own systems and their own assumptions or preconceptions.

One of the biggest challenges lies in trying to measure the results of competition technical assistance. It is hard enough to measure the effect of competition enforcement in any country – what harm was avoided as a result of the cartels that were never formed because of the deterrent effect of cartel enforcement, or as a result of the merger that never made it out of the boardroom once the likelihood of merger enforcement was factored in? When trying to measure the effect of technical assistance on competition policy and enforcement, the questions become even harder. What ultimately matters is how well a competition agency is able to help make its economy function in the long run. Ind it is nearly impossible to know whether improvements were due primarily to technical assistance, the agency's own experience, improvements in the economic environment, or just plain luck. And in a particular enforcement matter, it is difficult to measure the effect of foreign advisors, as one would need a detailed understanding of the matter file to know if the agency got it right. When donors insist on proof of efficacy,[63] it is difficult to give a credible answer, as not everything that is measurable is important and not everything that is important is measurable. It is tempting to simply measure inputs (number of seminars conducted, number of participants trained) or participant surveys, which are almost always positive and not especially revealing. In the end, the best measure may be the subjective opinions of knowledgeable observers who can tell how things have improved.[64]

IV. CONCLUSION

Competition law is an inherently political concept. It can only be as successful as the country's political commitment to making it work. If that commitment isn't baked into a common societal understanding, which cannot be taken

62 The workings of case cooperation are beyond the scope of this article. An excellent discussion can be found at OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement, OECD Publishing, Paris.

63 The U.S. government now requires this. See Foreign Aid Transparency and Accountability Act of 2016, Pub. L. No. 114-191 (2016)

64 Indeed, this is the approach that the FTC has taken when this has been required by funding agencies. The approach taken mirrors to some extent that of the Centro Competencia in its very interesting survey of perception of the institutions of free competition in Latin America.

for granted anywhere, we are left with two choices. We either tailor competition law and policy to what the political consensus is prepared to accept, which may mean settling for a boiled-down version of competition policy that satisfies few, or, we commit ourselves to a robust transformative policy in which competition law supports the function of a free market. If we choose the latter, we must be aggressive and resolute about telling the story to our stakeholders so as to build a political and public consensus. We must also ensure that the surrounding economic, social, and regulatory policies are working with competition policy and not undermining its potential success. Otherwise we risk inventing the governmental equivalent of a car with a BMW engine, a Ford chassis, a Toyota body, and a Renault starter. Nothing much will happen when you turn the key.

Above all, making competition policy work requires a broad vision and paying attention to many things at once. In my free time, I enjoy flying small airplanes, partly because it requires me to do many things at the same time. To successfully land an airplane, I must think about where I am in relation to the runway, whether a crosswind is pushing me off course, maintaining the proper airspeed, setting the flaps and power controls correctly, being aware of other airplanes flying nearby, communicating with air traffic controllers, look out for deer or other wildlife that might be crossing the runway, and ultimately pulling back on the control wheel so that the main wheels contact the runway with appropriate grace. Applying competition policy with grace and success requires attention to an equally broad constellation of factors – a well-designed law, capable institutions and courts, credit and bankruptcy laws, social policies, and so forth. They must all be done correctly at the same time, or the results will be embarrassing at best or catastrophic at worst.

The implementation of competition policy in Latin America has been a story populated by real heroes. It is easy to be a promoter of real competition reform if you come from a country, as I do, in which the values of free markets are supposedly baked into our very being. It is much harder to do that in a country characterized by mistrust of free markets and a history of state domination of the environment. The men and women who have built and maintained the architecture of competition policy and enforcement in challenging environments and who have found ways to tell the story to the public and political leaders are the real heroes – people like Eduardo Pérez Motta, Esteban Greco, Felipe Irrarázabal, Beatriz Boza, Andrea Marván, Celina Escolán, Emilio Archila, Danilo Sylva, and many others. It has been the privilege of a lifetime to be associated with them.

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