"THIS DOES NOT MATTER IN MEXICO"[1]: MEXICO-U.S. COMPETITION LAW—CONFLICTS AND RESOLUTIONS

1. Mario Emilio Gutierrez-Caballero, *Mexico's Congress Approves Important Amendments to the Competition Law Which Will Force Companies Operating in Mexico to Review and Change Their Business Practices in Mexico*, MONDAQ, May 9, 2006, http://www.mondaq.com/article.asp?articleid=39608 (describing the traditional attitude against competition law in Mexico and how that attitude must change to avoid the strict enforcement regime of Eduardo Pérez Mota, Mexico's Chairman of the Federal Competition Commission).

I. INTRODUCTION

In 1993, as Mexico was preparing to enter into the North American Free Trade Agreement (NAFTA),[2] it enacted the Ley Federal de Competencia Económica (L.F.C.E.), or the Federal Law Governing Economic Competition.[3] Prior to enacting the law, even though Mexico had a general ban on anticompetitive behavior, the heavy involvement of the federal government in all facets of the economy made the administration of the law ineffective.[4] While Mexico's new competition law is similar in language and structure to that of the United States, the two statutory schemes have significant differences in their application and enforcement.[5] The differences become particularly meaningful when the enormous volume of trade between the two countries is considered.[6]

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2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 107 Stat. 2057; s*ee also* Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149, 1156–57 (1995) (elaborating on the reasons behind Mexico's becoming a party to NAFTA).

3. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.), *translated in* http://www.cfc.gob.mx/english/index.php?option=com_content&task=blogcategory&id=180&Itemid=296; *see* Allan Van Fleet, *Mexico's Federal Economic Competition Law: The Dawn of a New Antitrust Era*, 64 ANTITRUST L.J. 183, 183–84 (1995) (describing the antiquated and ineffective competition laws the L.F.C.E. replaced and the effects of the new legislation).

4. Van Fleet, *supra* note 3, at 184.

5. *See* Santiago Gonzáles Luna, *A Comparative Review of Regulation of Economic Competition in Mexico and the United States*, 9 U.S.-MEX. L.J. 41, 41–43 (2001) (highlighting the underlying differences in the genesis and implementation of Mexico's and the United States' respective competition laws).

6. Mexico is the United States' third largest trading partner and represents 11.1% of total U.S. trade as of December 2007. U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, TOP TRADING PARTNERS, TOTAL TRADE, EXPORTS, AND IMPORTS (2007), http://www.census.gov/foreign-trade/statistics/highlights/toppartners.html; *see also* Stephen J. Weber, *In Mexico, U.S., and Canada, Public Support for NAFTA Surprisingly Strong, Given Each Country Sees Grass as Greener on the Other Side*, WORLD PUB.

This Comment will highlight the manifestation of those differences and will suggest that Mexico and the United States should strengthen bilateral cooperation and coordination to resolve the impact those conflicts have on trade between the two countries instead of the current trend of relying upon the dispute panels of multilateral trade organizations, such as the World Trade Organization (WTO), to resolve those conflicts. Part II of the Comment will explore key provisions of Mexican competition law. It will then highlight and analyze the differences in competition law between Mexico and the United States in regards to both countries' enforcement methodology, substantive law, economic culture, and their legal systems and traditions.

Part III will illustrate how those conflicts have manifested themselves in trade relations between the two countries and how multilateral organizations are becoming more active in adjudicating competition law conflicts. It will do so by analyzing two WTO decisions involving competition law conflicts. One involves a significant conflict in the telecommunication industry between Mexico and the United States. The second involves an agricultural dispute between Canada and the United States that may impact Mexico- U.S. relations and further shows how active the WTO has become in not only settling conflicts in competition law but, in doing so, announcing legal principles and standards that will govern these conflicts.

Part IV of the Comment will analyze the different dispute resolution mechanisms available to resolve competition law conflicts. It will analyze the strengths and weaknesses of unilateral, bilateral, and multilateral dispute mechanisms. Part V will suggest that Mexico and the United States should converge their competition laws through cooperation and coordination instead of relying upon multilateral organizations, like the WTO, to harmonize the conflicts.

OPINION, Jan. 23, 2006, http://www.worldpublicopinion.org/pipa/articles/brlatinamericara/161.php?nid=&id=&pnt=161&lb=brla (recognizing the strong trade blocs between the United States, Canada, and Mexico). The United States is Mexico's largest trading partner. Valerie Rota & Jens Erik Gould, *Mexico Slashes 2008 Growth Forecast on U.S. Economy (Update4)*, BLOOMBERG, Jan. 30, 2008, http://www.bloomberg.com/apps/news?pid=20601086&refer=news&sid=aS0b4e0yVJ6Q.

II. MEXICO'S COMPETITION LAW: BEHIND THE LANGUAGE

While Mexico's 1917 Constitution had prohibited "monopolies, monopolistic practices, state monopolies, and tax exemptions under the terms established by the laws,"[7] the prohibitions were difficult to enforce due to the complexity and politicization of competition law.[8] This changed on June 23, 1993, when Mexico's new antitrust law, the L.F.C.E., became effective.[9] The law's substantive provisions are centered on Chapter II, Monopolies or Monopolistic Practices,[10] and Chapter III, Concentrations.[11]

While Mexico competition law primarily exists in the L.F.C.E., the United States' federal competition law scheme exists in multiple statutes, including the Sherman Antitrust Act (Sherman Act),[12] the Clayton Act,[13] and the Federal Trade Commission Act.[14] Section 1 of the Sherman Act proscribes collaborative agreements between entities that restrain trade.[15] Section 2 of the Sherman Act broadens in scope and focuses on illegal monopolization, concentration of economic power, and the structure of industries.[16] Section 7 of the Clayton Act focuses on the illegal concentration of power as a result of business

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7. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 28, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.), *translated in* Comisión Federal de Competencia, http://www.cfc.gob.mx/english/index.php?option=com_content&task=category&sectionid=33&id=178&Itemid=294.

8. Van Fleet, *supra* note 3, at 184.

9. *Id.* at 183.

10. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, arts. 8–15, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

11. *Id.* arts. 16–22.

12. Sherman Act, ch. 647 §§ 1–8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000 & Supp. V 2005)).

13. Clayton Act, ch. 323, §7, 38 Stat. 730, 731–32 (1914) (codified as amended in scattered sections of 15 U.S.C. & 29 U.S.C.).

14. Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 41–58 (2000 & Supp. V 2005)).

15. JOHN FLYNN, HARRY FIRST & DARREN BUSH, FREE ENTERPRISE AND INDUSTRIAL ORGANIZATION: ANTITRUST (forthcoming 2008) (manuscript ch. 3, at 1, on file with Author).

16. *Id.*; 15 U.S.C. § 1.

combinations, such as mergers and stock acquisitions.[17] Finally, the Federal Trade Commission Act, which created the Federal Trade Commission, gives the agency independent regulatory authority to stop anticompetitive practices.[18]

A. Single Agency Enforcement

Mexico's L.F.C.E. authorized the creation of an administrative agency to enforce competition law, the Comisión Federal de Competencia (CFC), or the Federal Competition Commission.[19] The CFC exists within the Mexican Secretariat of Commerce and Industrial Development, and it is headed by five appointed commissioners.[20] The organization has authority to: (1) conduct investigations of anticompetitive activity, (2) establish coordination procedures to enforce the L.F.C.E., (3) issue rulings and assess fines, (4) issue advisory opinions, and (5) participate in the negotiation of competition agreements with other countries.[21]

A major difference between the competition law enforcement in Mexico and the United States is the structure of the enforcement agencies.[22] Mexico's CFC has sole responsibility for L.F.C.E. enforcement,[23] while the United States enforces its antitrust laws through both the FTC and the Department of Justice's Antitrust Division.[24]

Either approach has both strengths and weaknesses. On one hand, dual enforcement may help eliminate enforcement "group think," protect any one special interest from controlling the

17. FLYNN ET AL., *supra* note 15, ch.3, at 3; 15 U.S.C. § 2.

18. FLYNN ET AL., *supra* note 15, ch.1, at 31; 15 U.S.C. § 18.

19. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, art. 23, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.); Joshua A. Newberg, *Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust*, 31 COLUM. J. TRANSNAT'L L. 587, 590 (1994).

20. Newberg, *supra* note 19, at 590 & n.15.

21. *Id.* at 590–91; L.F.C.E. art. 24.

22. *See* Luna, *supra* note 5, at 42 (referencing the FTC and the Department of Justice as the two enforcement agencies of the United States and the CFC as Mexico's only enforcement agency).

23. *Id.* The only exception to the exclusive enforcement role of the CFC is for certain felonies, which are prosecuted by the Mexican General Attorney Office. *Id.*

24. *Id.*

enforcement process, create a sense of urgency by fostering competition, and mitigate the risk of the enforcement structure failing entirely.[25] However, redundant agencies may also suffer from problems that single agency enforcement does not, such as disincentives to initiate activity so often represented in collective activity, redundant fixed costs in supporting two agencies, increased group polarization that results from interagency competition, and lost efficiency.[26]

In addition to the difference in the number of agencies enforcing competition law, there are structural enforcement differences between Mexico's CFC and the FTC and Department of Justice.[27] Unlike in the United States, where the enforcement agencies and the defendant stand as equals in front of the adjudicating body, the CFC plays the role of both the prosecutor and adjudicator.[28] Because a strong incentive exists for the CFC to obtain prosecution of a violator (unlike the incentive for an independent adjudicatory body to set a workable legal standard), the incentive structure not only suggests bias, but it also does not seem to facilitate the creation of consistent legal principles that are easily applied to future cases.[29]

B. Substantive Provisions

1. Collaborative Agreements that Restrain Trade

The L.F.C.E. prohibits any "contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect" is to fix prices, restrict or set

25. *Id.*

26. *Id.* at 1679–81.

27. Luna, *supra* note 5, at 42.

28. *Id.* The only exception is in rare cases where the violation is a felony, and those cases are adjudicated by Mexican courts. *Id.*

29. *See id.* at 43 (arguing that the CFC cannot maintain impartiality). Even though the CFC is "within the Mexican Secretariat of Commerce and Industrial Development," neither that department nor the President of Mexico has legal standing to review decisions of the CFC. SPENCER WEBER WALLER, *North American Competition Law*, *in* 2 ANTITRUST & AMERICAN BUSINESS ABROAD § 17.7 & n.1 (3d ed. 2006). Mexican courts only have a limited right to review the decisions of the CFC. *See id.* (referencing "probable" review of some CFC decisions by federal courts).

output, allocate market share, or rig bids.[30] This provision is analogous to section 1 of the Sherman Act, which prohibits agreements that restrain trade.[31]

While article 9 of the L.F.C.E. bans certain types of agreements as a matter of law,[32] article 10 lists "relative monopolistic practices" as illegal only when the "aim or effect" of the agreements "displace[s] other agents from the market, substantially hinder[s]" those agents' access to the relevant market, or "establish[es] exclusive advantage" of one entity over others in a market.[33] In addition to the conditions in article 10, article 11 mandates that those relative monopolistic practices are only illegal when it is proven that the parties have "substantial power in the relevant market" and that the agreements involve goods and services in that market.[34]

Unlike Mexico, where the L.F.C.E. separates agreements that restrain trade into those agreements that are per se violations and those that require further analysis,[35] it is the U.S. judiciary, not the legislature, which divides restraints of trade into per se violations and agreements requiring further analysis under the "rule of reason" doctrine.[36] This categorization is not a static one, and types of agreements that

30. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, art. 9, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

31. *Compare id.* (prohibiting contracts and other agreements that have a specific enumerated intent or effect), *with* Sherman Act § 1, 15 U.S.C. § 1 (2000 & Supp. V 2005) (prohibiting agreements that restrain trade).

32. *See supra* text accompanying note 30.

33. L.F.C.E. art. 10. Such agreements include setting exclusive distribution rights, setting distribution or supplier prices, and conditioning the sale of one good or service on the sale of another good or service, or "tying." *Id.*

34. *Id.* art. 11.

35. *See id.* arts. 9-10 (detailing per se violations into article 9 and potential violations needing further inquiry in article 10).

36. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (applying the "rule of reason" analysis instead of finding the agreement per se illegal). In "rule of reason" analysis, the court analyzes the legality of an agreement that restrains trade. It does so by determining if there are pro-competitive benefits of the agreement in question that restrain trade, whether these benefits are tied to the anticompetitive harm, and whether the benefits outweigh the harm. *See id.* at 113 (explaining that it is the defendant's burden under a "rule of reason" analysis to provide competitive justification for an agreement that runs afoul of "the operation of a free market").

may be considered per se illegal in one context are subject to the "rule of reason" analysis in another.[37] In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* the Court determined whether Broadcast Music, Inc., and ASCAP (organizations of publishing companies, authors, and performers) could combine to offer a blanket license, which gave a licensee the right to perform the organization's copyrighted works for a stated price.[38] On its face, the practice was a contract to fix the price of a license, a practice that is generally a per se violation of section 1 of the Sherman Act.[39] In this case, however, the Court held that the blanket license was subject to the more burdensome "rule of reason" analysis instead of being per se illegal and, thus, reiterated the principle that the Court must have experience with the particular practice in a factual context before holding a practice per se illegal.[40] Unlike Mexico's static approach, the United States allows for pro-competitive benefits of an agreement restraining trade in a new industry to be considered before the agreement is considered per se illegal.[41]

2. Monopolies

While the L.F.C.E. defines specific acts as illegal monopolistic practices, section 2 of the Sherman Act simply states that those who "monopolize[] or attempt to monopolize" commit an illegal activity.[42] This may be an attempt by the drafters of the L.F.C.E. to ensure that an entity would not be punished for mere growth but only for acting in a way that is specifically prohibited.[43]

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37. *See* Luna, *supra* note 5, at 41 (noting that the per se rule is merely "a methodological approach used to define the illegality of the conduct").

38. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 1, 5 (1979).

39. *Id.* at 8-9.

40. *Id.* at 9-10, 23-24.

41. Luna, *supra* note 5, at 41-42.

42. *Compare* Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, art. 9, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.) (listing specific illegal monopolistic practices like contracting to fix prices), *with* Sherman Act § 2, 15 U.S.C. § 2 (2000 & Supp. V 2005) (generalizing illegal activities as those that "monopolize[] or attempt to monopolize").

43. *See* Van Fleet, *supra* note 3, at 198 (setting forth circumstances under which anticompetitive behavior is punishable under the L.F.C.E.).

3. Mergers and Acquisitions

The L.F.C.E.'s provisions on concentrations, or business combinations, are similar to the merger and acquisition provisions contained in section 7 of the Clayton Act.[44] The objective of the L.F.C.E. is to challenge and penalize those mergers that "diminish, damage or deter competition and free access to equal, similar or substantially related goods and services."[45]

Like the United States, Mexico has a threshold provision that requires pre-merger notice to be filed with the CFC.[46] The difference is that instead of tying the amount of the merger that will trigger the notification requirement to a static value, it indexes the notification threshold to the minimum wage.[47] Mergers must be filed with the CFC in case of any of the following: (1) the value of the transaction is twelve million times the minimum wage; (2) the transaction or series of transactions result in a thirty-five percent accumulation of the assets by the acquiring company of the acquired company, the combined assets of which are twelve million times the minimum wage; or (3) the merging companies' total assets or sales are forty-eight million times the minimum wage, and the effect of the transaction is to accumulate assets or stock in excess of 4.8 million times the minimum wage.[48]

The L.F.C.E. requires an analysis of mergers that is similar to how courts, the FTC, and the Department of Justice analyze

44. Luna, *supra* note 5, at 41. *Compare* Clayton Act § 7, 15 U.S.C. § 18 (2000 & Supp. V 2005) (regulating the act of acquiring another entity's stock or other share capital), *with* L.F.C.E. arts. 16–22 (regulating concentrations).

45. L.F.C.E. art. 16. *Compare* 15 U.S.C. § 18 (declaring that no merger shall be made where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"), *with* L.F.C.E. art. 16 (proscribing mergers that lessen competition).

46. *Compare* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000 & Supp. V 2005) (establishing a pre-merger notification period), *with* L.F.C.E. art. 20 (mandating that the CFC should be notified of certain concentrations "before they are made"). *See* Luna, *supra* note 5, at 41 (noting resemblances in provisions of the Hart-Scott-Rodino Act and the L.F.C.E.).

47. L.F.C.E. art. 20; *see* 15 U.S.C. § 18a (2000 & Supp. V 2005) (setting actual values for voting securities and assets that will trigger the notification requirement).

48. L.F.C.E. art. 20.

mergers in the United States.[49] First, both the L.F.C.E. and U.S. common law analyze the anticompetitive harm of a merger by first defining a relevant market in which that harm occurs.[50] Second, both define the outer boundary of the relevant market in part by determining whether consumers would consider the product or geographic area a substitute for products or geographic areas within the existing group, or, stated another way, the relevant market is defined by where a consumer would reasonably turn to obtain supplies.[51]

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49. *See* L.F.C.E. art. 12 (denoting the criteria used in formulating the relevant markets); *see, e.g.*, U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (revised Apr. 8, 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter U.S. Merger Guidelines]. The U.S. Merger Guidelines, however, use a detailed analysis to define the relevant market based on whether the hypothetical monopolist could profitably increase price by a small but substantial nontransitory increase in price, usually five to ten percent. *See* U.S. Merger Guidelines, *supra*, § 1.0 (discussing the concept of small but substantial nontransitory increase in price); *see also* ROBERT S. SCHLOSSBERG, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 54–55 nn.53-54 (2004) (discussing the five to ten percent rule of thumb).

50. L.F.C.E. art. 12; *see* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (noting the importance of examining the effect of a merger on each relevant market). The relevant market in an antitrust context is "a market in which a firm can raise prices above the competitive level without losing so many sales that the price increase would be unprofitable." BLACK'S LAW DICTIONARY 990 (8th ed. 2004).

51. *See* L.F.C.E. art. 12; *Marine Bancorporation*, 418 U.S. at 619 (employing the use of alternatives available to consumers in determining the relevant market); *Brown Shoe*, 370 U.S. at 325 (stating that outer boundaries "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"). A substitute in a market is a product that is a "market alternative[] that buyers may readily use for their purposes . . . ." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956). However, it should be noted that the U.S. Merger Guidelines use a more refined analysis to define the outer boundary of a relevant market, which is based on whether a hypothetical monopolist could profitably impose a "small but substantial nontransitory increase in price" (SNIP), usually a five to ten percent increase. *See* U.S. Merger Guidelines, *supra* note 49, § 1.0 (discussing the concept of small but substantial nontransitory increase in price); *see also* SCHLOSSBERG, *supra* note 49, at 54–55 nn. 53-54 (discussing the five to ten percent rule of thumb). The SNIP test does not appear in the major implementing rules of the L.F.C.E. *See* L.F.C.E. art. 12 (directing that determination of the outer boundary of a relevant market under the L.F.C.E. is done by looking at the positioning of goods in the relevant market, lack of access to imports, and the presence of high cost differentials).

After defining the relevant market, the CFC will then determine if the merger allows the combined firm to "unilaterally set prices or substantially restrict supply" within the relevant market, to "unduly displace" competition, or to restrict the competition's access to the relevant market.[52]

To accomplish this analysis, the CFC uses tools similar to the 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (U.S. Merger Guidelines).[53] First, the CFC determines the combined firm's market concentration by using an index based on the Herfindahl-Hirshman Index (HHI), which is used in the U.S. Merger Guidelines.[54] Both article 17 of the L.F.C.E. and section 2.2 of U.S. Merger Guidelines place emphasis on whether the merger will give the combined company the ability to either unilaterally set prices with impunity or allow the facilitation of anticompetitive, collective activity of firms within the relevant market.[55] As mitigation of the anticompetitive effects of a merger, the CFC considers such factors as the capability of a competitor to enter the relevant market and the potential efficiencies gained as the result of the merger.[56] The CFC gauges the competition's "access to the relevant market" as a factor in article 17, while the U.S. Merger Guidelines also consider timely, likely, and sufficient entry as a factor mitigating market-power created by the merger.[57] As with the U.S. guidelines, the CFC also considers any potential economic efficiencies that the merger might bring and weighs those

52. L.F.C.E. art. 17.

53. Van Fleet, *supra* note 3, at 199-200; *see, e.g.*, U.S. Merger Guidelines, *supra* note 49, § 1.5.

54. Van Fleet, *supra* note 3, at 200; U.S. Merger Guidelines, *supra* note 49, § 1.5.

55. L.F.C.E. art. 17; U.S. Merger Guidelines, *supra* note 49, § 2.19-2.2.

56. OECD POL'Y ROUNDTABLES, DAFFE/COMP(2003)5, SUBSTANTIVE CRITERIA USED FOR MERGER ASSESSMENT 232–35 (2003), *available at* http://www.oecd.org/dataoecd/54/3/2500227.pdf. The United States considers entry into the relevant market as well as economic efficiency in determining market power. *See* U.S. Merger Guidelines, *supra* note 49, §§ 3-4.

57. L.F.C.E. art. 17; U.S. Merger Guidelines, *supra* note 49, § 3.1-3.4.

efficiencies against their anticompetitive effects to determine if a merger should be challenged.[58]

While the analysis employed by both countries is largely similar, there is a significant difference.[59] Unlike the United States, Mexico tends not to challenge mergers where the combined firm had a large market share in the relevant market if it can find any conceivable efficiency that outweighs the anticompetitive effect of the market size.[60] In a characteristic that may be related, Mexico's competition jurisprudence also tends to downplay a high market share in a relevant domestic market if there is a threat of significant foreign competition with that domestic market.[61] The point of not emphasizing existing market share at enactment of the L.F.C.E. was to assure private firms with large market shares that the L.F.C.E. would not be used to break up existing firms.[62]

C. Similar Language, Different Results

Despite the similar language and conceptual framework in the competition laws of both countries, Mexico has had difficulty shedding its culture of supporting anticompetitive behavior.[63]

58. Van Fleet, *supra* note 3, at 200-01. While not challenging a merger when efficiencies offset the anticompetitive effects, the CFC will sometimes condition the merger on the elimination of the harmful effects. *Id.* The U.S. Merger Guidelines require that the efficiencies be specifically related to the merger and be cognizable. *See* U.S. Merger Guidelines, *supra* note 49, § 4. Cognizable efficiencies are verifiable, they come net of costs of merging the two companies, and they may not be realized by "anticompetitive reductions in output or service." *Id.*

59. *See* Van Fleet, *supra* note 3, at 200-01 (noting the CFC's greater deference to merger efficiencies).

60. *Id.* at 200. It is argued that because of its highly concentrated private sector, Mexico will consider efficiency gains from a merger "to a much greater degree than U.S. antitrust officials." *Id.* at 200-01.

61. *Id.* at 201. For instance, in industries where the trend was for international competition to merge to integrate services and build alliances, like in the telecommunications industry, the CFC has approved mergers where the combined firm has captured a high market share of the relevant domestic market. *Id.*

62. *Id.* While the stated goal of not emphasizing market share may have been articulated as "forward-looking," a subsequent merger was approved by CFC between Telmex, Mexico's national telecommunications company, and Televisa, the country's largest media company. *Id.*

63. Marla Dickerson, *Mexico's Stubborn Lack of Choices*, L.A. TIMES, Apr. 26, 2006, at C1.

Historically, Mexico has experienced substantial market concentration across many of its private industries.[64] Whether the industry is telecommunications,[65] media,[66] or food and beverage,[67] the top two firms in each respective industry control over ninety percent of the market share.[68] While Mexican citizens, half of whom live in poverty, experience lack of consumer choice with the resultant high prices, the country has more billionaires than Switzerland.[69]

Another possible reason for enforcement differences is the age of the L.F.C.E. as compared to U.S. competition statutes.[70] Mexico's Constitution had competition provisions, but those prohibitions were poorly enforced and difficult to apply.[71] While the L.F.C.E. attempts to remedy that problem, it is a relatively new law, just over fourteen years from its enactment.[72] In contrast, U.S. courts have had over one hundred years to apply and interpret the Sherman Act.[73] It is reasonable to expect

64. *See id.* (referencing market concentration in the telecommunications, media, and beer industries). Along with the high market concentration in the private sector, Mexico also has a long history of state ownership of industries, such as the petroleum industry. Luna, *supra* note 5, at 43.

65. Telmex controls ninety-four percent of Mexico's fixed wire phone service and eighty percent of the wireless service. Dickerson, *supra* note 63.

66. Grupo Televisa and TV Azteca own ninety-four percent of Mexico's television stations. *Id.*

67. Brands of beer brewed by Grupo Modelo and Cervecerceria Cuauhtemoc Moctezuma control ninety-nine percent of Mexico's beer market. *Id.*

68. *Id.* According to economists, monopolies like these create high prices for consumers and slow the growth of the economy. *Id.*

69. *Id.* There may be a symbiotic relationship between the disparity of rich and poor in Mexico and the tradition of sustaining monopolies because a large percentage of Mexico's upper class built or inherited their fortune under this system; therefore, Mexico's ruling class has little incentive to change the tradition and often lacks the political clout to initiate such change, regardless of its will to do so. *See* Marla Dickerson, *Mexico's Well-Heeled Get Richer: Report Says Inequities Stunting Nation's Progress*, HOUS. CHRON., Dec. 1, 2006, at D3 (explaining that "[c]ompanies controlled by Mexican billionaires are more likely to be engaged in monopolistic practices than other firms").

70. *See* Luna, *supra* note 5, at 43 (noting that the Sherman Act has already been around for 100 years, while the L.F.C.E. has only been in force since 1993).

71. Van Fleet, *supra* note 3, at 184.

72. *Id.* at 183-84 (explaining the purpose of the new law is to allow the free market to regulate competition while imposing sanctions on monopolies when necessary).

73. Luna, *supra* note 5, at 43; Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005)).

Mexico to take time to develop the type of sophisticated legal doctrine that can deal with both Mexico's anticompetitive culture and its rapidly evolving economy.[74]

D. Differences in Legal Systems and Traditions: Civil Law's Certainty Versus Common Law's Flexibility

In addition to the substantive and cultural differences, another reason for conflict in the application of U.S. and Mexican competition law is that Mexico's legal system and traditions, which are based in civil law, do not allow for the same flexibility as the legal system in the United States, which is grounded in common law traditions.[75] While the civil law system discourages judge-made law, legal systems with common law traditions allow the courts flexibility in developing a competition law jurisprudence.[76] In contrast, a court under a civil law system must strictly apply the statute as written by the legislature.[77]

For example, agreements, which are directly defined as per se illegal restraints of trade by the L.F.C.E.,[78] can be reviewed by U.S. courts under a "rule of reason" analysis as a particular industry or technology evolves.[79] In addition, as the U.S. enforcement agencies refine guidelines for investigating potential violations, the courts have the flexibility to incorporate

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74. Newberg, *supra* note 19, at 608. *See generally* Garcia-Rodriguez, *supra* note 2, at 1160 (discussing the Salinas government's reasons for implementing new rules against monopolies, including the tendency of previous government to encourage monopolistic practices).

75. Luna, *supra* note 5, at 42; Newberg, *supra* note 19, at 607-08. Civil Law, the legal system of much of continental Europe and Latin America, was administered by the ancient Romans as their entire body of law, but the term used to encompass the aspects of Roman law that were "peculiar to the Romans, as opposed to the common law of all peoples []." BLACK'S LAW DICTIONARY 263 (8th ed. 2004).

76. Luna, *supra* note 5, at 42.

77. *Id.*; Newberg, *supra* note 19, at 608.

78. *See* Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, art. 9, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1992 (Mex.).

79. Luna, *supra* note 5, at 41; *see, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-9, 19-20 (1979) (holding that a blanket license is not the type of "price fixing" that is per se illegal).

those refinements into their jurisprudence.[80] In Mexico, the analysis is specifically defined in the statute; thus, the statute would have to be amended to implement the changes.[81]

The next part of the Comment will proceed by exploring those differences via a recent dispute over competition law between Mexico and the United States that was resolved in part by a WTO dispute panel. It will then explore another WTO decision that attempts to resolve a dispute between the United States and Canada which defines another area where competition law conflicts may arise between the United States and Mexico. The dispute will additionally illustrate how the WTO is actively involved in enforcing and interpreting competition law.

III. RECENT DISPUTES: THE WTO TAKES ACTION TO SETTLE COMPETITION LAW CONFLICTS

A. *An Unpleasant Surprise: The Telmex Decision*

A good example of a recent manifestation of how competition law conflicts between Mexico and the United States have affected trade between the two countries is the WTO's Panel Report on Telmex's anticompetitive practices, *Mexico-Measures Affecting Telecommunication Services*.[82] Mexico's largest telecommunication provider, Telmex, had entered into a deal with Sprint to offer international telephone service between the United States and Mexico.[83] As a result, Sprint's competitors, AT&T and MCI, entered into international long distance agreements with Telmex's competitors to compete for the same

80. *See, e.g.*, State v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 359 (S.D.N.Y. 1995) (defining the unilateral effects of a merger by citing the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines).

81. *See, e.g.*, L.F.C.E. art. 17 (defining unilateral effects in the statute).

82. Panel Report, *Mexico — Measures Affecting Telecommunication Services*, WT/DS204/R (Apr. 2, 2004), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/204R.doc [hereinafter Panel Report].

83. Rajeev Sharma & Jason Rosychuk, *The Collision of Trade and Competition Law: Assessing the Aftermath of the WTO Telmex Decision*, TRADEWEEK, July 25, 2004, at 115-17, *available at* http://www.heenanblaikie.com/en/media/pdfs/pdf/20040625_Sharma.pdf.

service.[84] The regulatory rules over the telecommunications industry in Mexico, the International Long Distance Rules (ILD Rules),[85] required that Telmex, the carrier with the greatest market share in completing calls originating in the United States in the last six-month period prior to the negotiations, negotiate the call termination or intercollect rates with U.S. long distance providers for all domestic carriers.[86] When AT&T and MCI discovered the competitive landscape, or lack thereof, they lobbied the United States Trade Representative to file a complaint with the WTO.[87] Telmex, which controls ninety-four percent of Mexico's fixed wire phone service and eighty percent of its wireless service, is a good example of a company that would receive more stringent scrutiny in the United States due to its size and the potential that size has to facilitate anticompetitive practices.[88]

On August 16, 2002, the United States requested that Director-General of the WTO convene a panel to hear the United States' complaint.[89] The main thrust of the United States' complaint was that Mexico's ILD Rules did not ensure that

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84. *Id.*

85. Reglas para Prestar el Servicio de Larga Distancia Internacional que deberán aplicar los Concesionarios de Redes Públicas de Telecomunicaciones Autorizados para Prestar este Servicio [Rules Provide for the International Long Distance Service to be Applied Concessionaires of Public Telecommunications Networks Authorized to Provide This Service], Diario Oficial de la Federación [D.O.], 11 de Diciembre de 1996 (Mex.), *translated in* http://www.cft.gob.mx/cofetel/html/9_publica/reglas/11dic96.shtml [hereinafter ILD Rules]. Mexico's International Long Distance Rules are promulgated by Mexico's Comisión Federal de Telecomunicaciones, or Federal Telecommunication Commission, to regulate international long-distance services. Panel Report, *supra* note 82, para. 2.12.

86. Panel Report, *supra* note 82, paras. 2.12, 2.14; ILD Rules, *supra* note 85, at R. 13.

87. Sergio E. Aleman, *NAFTA and its Impact on the Privatization of Mexico's Telecommunications Industry*, 7 L. & BUS. REV. AM. 5, 8 (2001).

88. *See supra* notes 42-44, 60-62, 65 and accompanying text.

89. Panel Report, *supra* note 82, para. 1.4. For member nations, the WTO has a dispute resolution mechanism. Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls*, 8 N.Y. INT'L L. REV. 51, 71 (1995). Any member nation can trigger the formation of a panel with a complaint. *Id.* Such complaints are then heard by the panel, a decision is issued, and if there are neither appeals nor a unanimous decision against adopting a report, it is automatically adopted and binding on the members. *Id.*

Telmex provided interconnection service to U.S. companies on reasonable terms and, in effect, created a price-fixing cartel with other Mexican telecommunication carriers.[90]

As authority, the United States cited a 1996 WTO Reference Paper on Basic Telecommunications (Reference Paper)[91] that was incorporated into Mexico's General Agreement on Trade and Services (GATS) commitments.[92] Section 1.1 of the Reference Paper mandates that "[a]ppropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices."[93] Section 2.2 of the Reference Paper states that interconnect service should be provided "in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent [and] reasonable, having regard to economic feasibility."[94]

The panel agreed with the United States: because the Reference Paper was a part of its special commitments to the GATS Annex on Telecommunications, Mexico was bound to those commitments as a member of the WTO.[95] Thus, the panel held that Mexico violated section 1.1 of the Reference Paper by not implementing appropriate measures to curtail anticompetitive activities.[96] Specifically, instead of curtailing

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90. Panel Report, *supra* note 82, paras. 3.1, 4.1; NGUYEN THANH TU, CUTS CENTER FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION, THE WTO *TELMEX* CASE—IMPLICATIONS FOR VIETNAM (2007), http://www.cuts-international.org/pdf/C-CIER-WTO_Telmex07.pdf.

91. Negotiating Group on Basic Telecomms., *Telecommunications Services: Reference Paper*, GATS/SC/56Suppl.2 (Apr. 24, 1996), *available at* http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

92. Panel Report, *supra* note 82, para. 4.1; Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271, 277-78 (2006).

93. *Mexico: Schedule of Specific Commitments, Supplement 2*, GATS/SC/56/Suppl.2, § 1.1 (Apr. 11, 1997), *available at* http://www.wto.org/english/tratop_e/serv_e/telecom_e/sc56s2.wpf.

94. *Id.* § 2.2(b).

95. *See* Panel Report, *supra* note 82, paras. 7.4, 7.14 (recognizing that each WTO member adds individual special commitments to the GATS). The panel further held that, as a part of GATS, the dispute was subject to the panel under the WTO's Dispute Settlement Understanding. *Id.* para. 7.14.

96. *Id.* para. 8.1(b).

anticompetitive activities, Mexico's regulations, the ILD rules, created an illegal price-fixing cartel.[97] The panel also held that Mexico violated section 2.2(b) of the Reference Paper by not "ensur[ing] access to and use of public telecommunications transport networks" at cost-orientated rates to cross-border suppliers of telecommunication services from the United States.[98]

Even though there was no specific WTO agreement banning cartels as an anticompetitive practice,[99] the panel interpreted Mexico's general commitment to curtail anticompetitive practices as a commitment to ban price-fixing cartels and, therefore, binding on Mexico under the WTO agreement.[100] It further held that a member country's own regulatory rules do not shield the practice from competitive scrutiny.[101]

Instead of appealing the decision, Mexico reached an agreement with the United States whereby Mexico eliminated the requirement that the top carrier negotiate the interconnect rates of all domestic suppliers, thus creating a system of competitive negotiation of U.S.-Mexico interconnect rates.[102] Despite subsequent negotiation to resolve the conflict with the United States, the *Telmex* decision serves as an example of how a multilateral dispute-resolution panel can interpret an agreement in such a way that it creates de facto multinational competition law that is not only contrary to a signatory's own

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97. *Id.* para. 7.262. ILD Rules required that the long-distance service licensee that had the greatest share of the long distance market between Mexico and the originating country be the sole negotiator with that country. *Id.* para. 7.249. After government approval, that rate became the sole settlement rate between Mexican suppliers and their interconnect partners in other countries. Panel Report, *supra* note 82, para. 2.14; ILD Rules, *supra* note 85, R. 13.

98. *Id.* para. 8.1(a), (c).

99. P.J. Lloyd, *Competition Policy in APEC, ASEAN and the WTO*, *in* COMPETITION POLICY AND GLOBAL COMPETITIVENESS 15, 16 (Tran Van Hoa ed., 2003).

100. Sharma & Rosychuk, *supra* note 83, at 116 (citing Panel Report, *supra* note 82, para. 7.262).

101. Panel Report, *supra* note 82, para. 7.262. The panel's logic was that to allow the practice of price-fixing under the color of a member country's law was tantamount to allowing the member country to relieve itself of its anticompetitive commitments by fashioning rules that require suppliers to break those commitments. *Id.*

102. Notification of an Agreement, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/7 (June 2, 2004).

domestic laws and regulatory schemes but also in a way the signatory never intended to be bound when it signed the agreement.[103]

B. The Panel Remains Active: The Canadian Wheat Board Decision

Another example of a WTO dispute panel becoming more active in interpreting competition law is the long-running dispute between the United States and Canada over the practices of the Canadian Wheat Board (CWB).[104]

The CWB, a state trading enterprise (STE),[105] exclusively purchases and sells all the wheat grown by farmers in Western Canada.[106] Along with these exclusive rights, the CWB and the Canadian government are charged with setting the price paid to the western Canadian farmers.[107] Accordingly, the CWB is a "producer-controlled export monopoly."[108] In setting its price, the Canadian government only mandates that the CWB set a "reasonable" price for the wheat it exports or sells domestically.[109] The objective is not for the CWB to make a

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103. *See* Damien J. Neven & Petros C. Mavroidis, *El Mess in Telmex: A Comment on Mexico—Measures Affecting Telecommunications Services*, WORLD TRADE REV., July 2006, at 271, 295 ("[T]he panel . . . undid the balance of rights and obligations as struck by the negotiating partners.").

104. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 140–41 (2005) (discussing the logic behind the American and Canadian arguments in the *Canadian Wheat Board* case).

105. "State trading enterprises" are organizations that have been granted exclusive or special rights by the government to purchase and sell goods and services. Steve McCorriston & Donald MacLaren, *Perspectives on the State Trading Issue in the WTO Negotiations* 4 (presented at the 77th EAAE Seminar/NJF Seminar No. 325 in Helsinki on Apr. 17–18, 2001). Through the execution of those rights, the organizations are able to influence the export or import level or direction. *Id.*

106. Bhala & Gantz, *supra* note 104, at 123. With a volume of more than twenty metric tons of wheat sold each year, the Canadian Wheat Board is the largest exporter of grain in the world. *Id.*

107. *Id.*

108. Robert Wisner & Nick Gallus, *The Emergence of WTO Competition Law: The Mexico–Telecommunications and Canada–Wheat and Grain Decisions*, 10(5) INT'L TRADE L. & REG. 91, 92 n.11 (2004).

109. Bhala & Gantz, *supra* note 104, at 123. An initial price is paid by the CWB to the western Canadian wheat farmer, and then the CWB resells the wheat. *See id.* at 124 (stating that the CWB distributes its net revenues from its wheat sales and returns this

profit but simply to sell the wheat, collect the revenues, deduct expenses incurred in the marketing of the wheat, and return the net revenue to the Canadian wheat farmer.[110] The United States complained that the CWB violated Canada's GATT/WTO commitment by not behaving like a "commercial actor" would in the same situation.[111] GATT article XVII, paragraph 1(b) requires that STEs make purchases and sales in accord with "commercial considerations,"[112] and the United States argued that the legal structure of the CWB violated this requirement.[113] The United States asserted that because the CWB was not constrained by the same cost considerations as a private actor,[114] it did not have the same market incentives that discipline individual wheat farmers in the United States.[115] However, the panel ruled that the "commercial actor" requirement was not designed to mandate that an STE is coequal with a private actor but required only that the STE not make pricing decisions on a purely political basis.[116] Furthermore, the panel held that because the CWB is controlled

amount to the western Canadian farmers); Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, para. 4.174, WT/DS276/R (Apr. 6, 2004) [hereinafter Canadian Panel Report] (referencing the government's guarantee of an initial payment to farmers). The United States argues that the CWB can sell below full market value due to its position as the exclusive buyer of Canadian wheat; therefore, the CWB has greater flexibility in setting the price of wheat than a purely private actor. *Id.* at para. 4.195.

110. Bhala & Gantz, *supra* note 104, at 123–24.

111. Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, para. 29, WT/DS276/AB/R (Aug. 30, 2004).

112. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

113. Wisner & Gallus, *supra* note 108, at 92.

114. The United States argued the following: (1) the CWB, via the monopoly power it receives as the purchaser and seller of Canadian wheat, gives it a guaranteed supply of wheat that a private actor does not have; (2) the CWB is not required to recoup its costs via the selling price; and (3) the CWB can enter into long-term contracts that a commercial grain trader could not enter because its guaranteed supply shields the CWB from the risk of a fluctuating wheat market. Canadian Panel Report, *supra* note 109, paras. 4.195, 4.196.

115. *See* Wisner & Gallus, *supra* note 108, at 92 (explaining that private actors must "maximize profit, do not enjoy government conferred privileges and are disciplined by market forces" and the CWB is not).

116. Canadian Panel Report, *supra* note 109, para. 6.94.

by the western Canadian wheat farmers, with little to no oversight from the Canadian government, the CWB has a commercial incentive to maximize the revenue from those farmers who determine the CWB's fate.[117] Finally, the panel held that the objective to sell Canadian wheat to world markets is in itself a commercial consideration.[118]

The *Canadian Wheat* decision is just one battle in a long history of complaints made by the United States against the CWB.[119] One of these complaints involved the CWB, using its power as a producer-controlled export monopoly, dumping wheat on the northern U.S. wheat market.[120]

One of the motives for dumping is to lower the price by increasing supply in a market that cannot meet consumer demand so the would-be monopolist can engage in predatory pricing.[121] Predatory pricing occurs when a firm attempts to gain a monopoly foothold in a market by pricing its product below cost in the short-term to destroy its competitors, with the knowledge that it will be able recoup the short-term losses with long-term sales at monopoly price once its competitors leave the market.[122] This has an impact on Mexico's anticompetitive laws because the U.S. dumping complaints are nearly identical to complaints Mexico makes against both the United States and Canada.[123]

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117. *Id.* para. 6.133.

118. *Id.* paras. 6.125–6.127.

119. *See generally, e.g.*, Candice Moberg Tlustosch, Comment, *Government Subsidies for Small Grain Farmers Along the U.S.-Canadian Border: International Implications*, 23 WIS. INT'L L.J. 345 (2005) (arguing that the impact from the growth of Canadian grain into the American market has lowered the price, and that distinguishing the economic justifications from trade policies would help solve the problem). Because both NAFTA and the U.S. membership commitments in the WTO have opened the U.S. markets to Canadian wheat, U.S. farmers, who do not enjoy the same supply advantages as the CWB, have difficulty competing with the price of Canadian wheat. *Id.* at 345.

120. *Id.* at 351–56. Dumping is a practice wherein the "products of one country are introduced into the commerce of another country at less than the normal value of the products." *Id.*

121. *Id.*

122. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–91 (1986).

123. Tlustosch, *supra* note 119, at 365.

Similar to the *Telmex* decision, the fact that the WTO dispute board was willing to look into the legal structure of an entity and ensure that it met GATT/WTO agreements, instead of just validating that the signatory's laws and regulations lived up to the agreement's commitments, may signify that the WTO dispute panels will hold private actors in member countries to a greater standard of scrutiny than in the past.[124] Historically, it was the action of member countries through their competition law and regulations that would be scrutinized by WTO dispute panels.[125] With the *Telmex* and *Canadian Wheat Board* decisions, the WTO appears to be taking a more active role in not only settling disputes, but also in developing precedents to create a body of multinational competition law and enforcing that law against private parties.[126]

IV. HOW DISPUTES ARE RESOLVED

When there are differences between two countries either in the substantive competition laws of either country or in their enforcement that negatively impacts one of the countries, like the differences described above between the United States and Mexico, there are three different methodologies available to the impacted country to resolve the conflict.[127] A country may enforce its own competition law unilaterally, or it can enter a bilateral or multilateral agreement that provides provisions for enforcement.[128] The remainder of this Comment defines each enforcement alternative and its potential problems and suggests the best way forward that will meet the needs of Mexico and the United States while providing a model for resolving other global competition law conflict.

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124. Wisner & Gallus, *supra* note 108, at 95.

125. *Id.* The lead case that stood for the proposition that the WTO would not enforce the WTO competition provision on a private company was the *Korean-Alcoholic Beverage* decision. *Id.*

126. *Id.*

127. *See* Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 435–40 (2002) (discussing the unilateral approach and recognizing bilateral and multilateral actions as alternatives to antitrust enforcement).

128. *Id.* at 439–40.

A. The Historic Standard: Unilateral Enforcement

Historically, the primary enforcement method of international competition law conflict was through unilateral action.[129] An example of unilateral enforcement can be seen in U.S. competition law jurisprudence, where courts have applied an "effects test" to the foreign-based firm accused of the violation to determine if U.S. courts had jurisdiction over the firm.[130] The test, established by Judge Hand in the *United States v. Aluminum Co. of America* (ALCOA), held that conduct by a foreign entity would only trigger the U.S. antitrust laws if the conduct had some anticompetitive effect in the United States and the offending company intended for its conduct to have that anticompetitive effect.[131]

The trouble with using unilateral methods of enforcement is that as globalization increases so does the exposure of the offending firm's country to the competition laws of other countries.[132] This, of course, can potentially undermine the domestic competition laws of that nation.[133] Apart from diplomatic and political concerns, there is also a concern that when a nation has to use extraterritorial reach to apply its antitrust laws, the jurisdictional overlap is an inefficient allocation of judicial resources.[134]

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129. *Id.* at 435. Unilateral action is "[o]ne-sided; relating to only one of two or more persons or things." BLACK'S LAW DICTIONARY 1568 (8th ed. 2004).

130. *See, e.g.*, Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality*,*"* 17 U. PA. J. INT'L ECON. L. 909, 922 (1996).

131. United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945).

132. Himelfarb, *supra* note 130, at 917–22 (describing how the U.S. policy of extraterritoriality has exposed foreign nations to the antitrust laws of the United States and caused those countries to use jurisdictional defenses to escape that exposure). This is especially true if those countries adopt an extraterritoriality policy, which is the ability of a sovereign to apply its law outside its territory, in their antitrust enforcement. *Id.* at 913.

133. *Id.* at 913.

134. *See id.* (explaining extraterritoriality as the legal concept pertaining to the event when an agreement contains two provisions that authorize a nation's jurisdiction over conduct occurring beyond the nation's territory).

B. Multilateral Agreements: A Multinational Competition Code?

The first alternative to unilateral enforcement is to enter into a multilateral agreement where the conflicts in competition law are resolved via an agreement in which more than two countries are signatories.[135]

As trade barriers decrease and the number of countries with competition legislation increases, the idea of harmonizing, or developing a binding body of international competition law, is tempting but problematic.[136]

First, multinational organizations have the near impossible job of interpreting the ambiguous provisions and filling in gaps from agreements involving many countries, a process complicated by the language and cultural differences inherent in such a process.[137] In addition, the complex body of regulatory law that is representative of so many industries, such as communications and energy, often requires such a high level of expertise that an informed panel would be hard to staff.[138] Finally, the multinational code may not be flexible enough to accommodate the ever-changing economic environment in which effective competition laws must operate.[139]

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135. Lanucara, *supra* note 127, at 440–43. Multilateral agreements are those agreements "[i]nvolving more than two parties." BLACK'S LAW DICTIONARY 1041 (8th ed. 2004).

136. *See* Joel Brandon Moore, *The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context*, 36 VAND. J. TRANSNAT'L L. 243, 262 (2003) (explaining that some U.S. senators believe "that the stage is set for development of new international [antitrust] law); Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19 ANTITRUST MAG. 25, 25 (Summer 2005) (describing the United States' goals in establishing international anticompetition law). Randolph Tritell is the Assistant Director for International Antitrust for the Federal Trade Commission. Tritell, *supra*, at 25.

137. Claude Barfield, *WTO Dispute Settlement System in Need of Change*, 37 INTERECONOMICS: REV. OF EUR. ECON. POL'Y 131, 133 (2002), *available at* http://www.aei.org/publications/pubID.14115,filter.all/pub_detail.asp.

138. *Id.*

139. *See* Tritell, *supra* note 136, at 25 (describing how the WTO's developing countries are reluctant to agree on a set of comprehensive competition rules, and noting that such a set of rules is not foreseeable because "[t]here are simply too many jurisdictions with too many differences").

The GATT/WTO dispute panel decisions are examples[140] of enforcement of anticompetitive laws under a multilateral agreement.[141] The WTO's *Telmex* decision was an example of at least two of the challenges facing multilateral agreements.[142] First, in holding that Mexico's ILD rules were anticompetitive, the WTO was attempting to analyze the complex and highly regulated telecommunication industry.[143] Second, in holding that the Reference Paper was a part of Mexico's agreement under its WTO membership, it resolved an ambiguity regarding Mexico's commitments in a way that was inconsistent with Mexico's view of its own responsibility.[144] With this holding, the panel also showed a willingness to take an active role in filling the gaps in the WTO agreement, thus creating competition law precedent.[145] Likewise, the *Canadian Wheat Board* decision demonstrated the will of the WTO dispute panels to take an active role in examining the legal structure of semi-private parties, like the CWB.[146]

Perhaps the best argument against relying on a multinational body of competition law in the short-term is that a real consensus is unlikely to develop any time soon, given the tremendous growth of competition legislation in developing

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140. Another example of a multilateral body enforcing competition law is the International Court of Justice. *See* Moore, *supra* note 136, at 244. In fact, four United States senators, led by Arlen Spector, have encouraged the court to pursue antitrust litigation against the Organization of the Petroleum Exporting Countries (OPEC) in the International Court of Justice. *Id.* at 244–45.

141. *See* Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?*, 14 DUKE J. COMP. & INT'L L. 1, 2 (2004) (explaining that first the GATT, and subsequently the WTO, "liberalized trade through a series of multilateral trade negotiations in various sectors"). While the GATT/WTO agreements have been historically weak and willing only to regulate direct government conduct, the *Telmex* and *Canadian Wheat* decisions show that the WTO is now willing to actively enforce competition laws against private as well as public parties. Lanucara, *supra* note 127, at 452 n.71; *see supra* notes 103, 124–26 and accompanying text.

142. *See* Panel Report, *supra* note 82 (reporting a decision regarding a telecommunications dispute between Mexico and the United States).

143. *Id.* paras. 7.266–7.267.

144. Sharma & Rosychuk, *supra* note 83, at 2 (citing Panel Report, *supra* note 82, para. 7.262).

145. *Id.* at 1.

146. Wisner & Gallus, *supra* note 108, at 95; *see, e.g.*, Canadian Panel Report, *supra* note 109.

countries over the past twenty years.[147] For example, because the developing countries of the WTO were reluctant to agree to the meaningful additions to the agreement, the WTO's Doha negotiation round failed to bring about major advancement of the organization's competition provisions.[148] Despite the difficulty in creating a multinational body of competition law in the short-term, it may be a good long-term goal to create a body of competition law block by block through bilateral cooperation and coordination.[149]

C. The Bilateral Agreement and Positive Comity

The second alternative is a bilateral agreement between countries that are significant trade partners yet have disparate competition laws.[150] Because of the inevitable conflicts between countries' competition laws, effective bilateral agreements (or international agreements in general) embody certain international law principles such as comity to resolve those conflicts.[151] This principle has historically been represented through traditional comity, which is simply one country's consideration of another country's national interest when enforcing laws on its soil.[152] Recently, positive comity, or an agreement between countries to "mutually cooperate in the

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147. *See* Tritell, *supra* note 136, at 25 (explaining that competition policy is evolving too quickly to implement rules and procedures); *see infra* notes 176–77 and accompanying text.

148. Tritell, *supra* note 136, at 25.

149. *Id.*

150. *See* Lanucara, *supra* note 127, at 440–41 (referencing several bilateral antitrust agreements and listing "consultation and cooperation, the exchange of nonconfidential information, traditional comity, and positive comity" as the main factors in new multi-party antitrust agreements). A bilateral agreement is an agreement "[a]ffecting or obligating both [signatories].". BLACK'S LAW DICTIONARY 172 (8th ed. 2004).

151. Lanucara, *supra* note 127, at 440–41. Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

152. *Legislative Developments: Competition Agreement Between the EC and the United States*, 1 COLUM. J. EUR. L. 554, 555 (1995).

detection of antitrust activities and the application of their competition laws," has become a part of bilateral agreements.[153]

A stronger use of positive comity occurs when a country requests another country to enforce the latter's competition laws to remedy a harm in the former country.[154] So, for example, if Country A is negatively impacted by the anticompetitive conduct of a firm doing business in Country B, Country A could request that Country B enforce Country B's anticompetitive laws against the violating firm to remedy the harm.[155]

The prototypical example of an international antitrust bilateral agreement with a positive comity provision is the agreement between the United States and the European Union.[156] Under article V of the agreement, "[i]f a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities."[157] Positive comity allows the country that is geographically closer to the conduct to adjudicate the harm, thus efficiently using judicial resources and fostering communication and coordination between both parties to the agreement.[158]

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153. Jorge Jiminez et al., *Foreign Law Year in Review: 2001—Mexican Law*, 36 INT'L LAW 879, 887 (2002).

154. *See, e.g.*, Himelfarb, *supra* note 130, at 950–51 (discussing the right of the United States to request the EU's Competition Law Enforcement Commission to enforce the EU's laws). The party receiving the request would have a choice of whether to act on the request. *Id.* at 938 n.158.

155. *See* Himelfarb, *supra* note 130, at 951 (discussing how, under positive comity, it is not necessary for the requesting country to resort to its own extraterritorial jurisprudence).

156. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, art. V, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1491, 1497–98 [hereinafter U.S.-E.U. Agreement].

157. *Id.* art. V, § 2.

158. *See* Markus Muller, Case Comment, *The European Commission's Decision Against Microsoft: A Violation of Antitrust Agreement Between the United States and the European Union*, 26(6) EUR. COMPETITION L. REV. 309, 310 (2005) (discussing how positive comity helps mitigate economic harm to one country by addressing

D. Current U.S.-Mexico Framework: The Quintessential "Soft" Bilateral Agreement

The July 11, 2000 cooperation agreement between the United States and Mexico is an example of a bilateral agreement addressing competition law enforcement.[159] The agreement appears to embody the principles of both traditional and positive comity.[160] Article I of the agreement, by enumerating the purpose of the agreement "to avoid conflicts . . . and to minimize the impact on [each country's] respective important interests," suggests the intention to apply traditional comity to enforcement issues.[161] Article V of the agreement addresses situations when anticompetitive conduct that occurs from a firm's business in one of the countries is negatively impacting the interests of the other country in the agreement.[162] "If a Party believes that anticompetitive activities carried out in the territory of the other Party adversely affect its important interests, the first Party may request that the other Party's competition authorities initiate appropriate enforcement activities."[163] This provision is almost identical to the positive comity provision in article V of the agreement between the United States and the European Union.[164]

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anticompetitive harm in foreign nations that might otherwise be beyond the reach of the harmed country).

159. Trade Reg. Rep. ¶ 13,509 (2000).

160. Jiminez et al., *supra* note 153, at 887 (stating that article III "refers mainly to the acknowledgement of the parties to mutually cooperate in the detection of antitrust activities and the application of their competition laws," and article V "provides for cooperation between both countries when one of the parties considers that anticompetitive activities affecting the substantial interests of the party are performed in the territory of the other party").

161. Agreement Between the Government of The United States of America and the Government of The United Mexican States Regarding the Application of Their Competition Laws, U.S.-Mex., July 11, 2000, art. I, § 1, http://www.usdoj.gov/atr/icpac/5145.htm [hereinafter U.S.-Mex. Agreement].

162. *Id.* art. V, §§ 1–4.

163. *Id.* art. V, § 2.

164. *Compare id.* (providing that the party adversely affected "may request that the other Party's competition authorities initiate appropriate enforcement activities"), *with* U.S.-E.U. Agreement, *supra* note 156, art. V, § 2 (providing that the party adversely affected "may notify the other party and may request that the other Party's competition authorities initiate appropriate enforcement activities").

Unfortunately, the agreement between the United States and Mexico suffers from the same general criticisms that seem to plague any bilateral agreement. A primary weakness of most bilateral agreements is that, unlike treaties, they are "soft" or nonbinding, so they do not supersede the domestic law of the parties to the agreement.[165] The agreement between Mexico and the United States is no different. For example, in article V of the agreement, when one country is adversely affected by activities of the other country, the former can request that the latter initiate enforcement activity, but the latter only needs to "carefully consider whether to initiate enforcement activities."[166]

Another issue in enforcing competition law under bilateral agreements regards information sharing between enforcement agencies.[167] Under most bilateral agreements, when one of the parties' enforcement agencies wants to obtain information from a company based in the territory of the other party, the agency is only able to obtain information that is not protected by the latter's confidentiality laws.[168] This protection makes it all but impossible to obtain the evidence necessary to prove a violation, such as intra-firm documents, which are normally obtained by subpoena in domestic anticompetitive cases.[169]

The bilateral agreement between the United States and Mexico provides for the sharing of non-confidential information only, and then it only requires that information be shared if it is not contrary to the interests of the party receiving the request.[170] Article X of the agreement mandates that "neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party

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165. Nina L. Hachigian, *An Overview: International Antitrust Enforcement*, 12 ANTITRUST MAG. 22, 23 & n.13 (Fall 1997); Edward T. Swaine, *The Local Law of Antitrust*, 43 WM. & MARY L. REV. 627, 656, 666–67 n.151 (2001).

166. U.S.-Mex. Agreement, *supra* note 161, art. V, §§ 1–3.

167. *See, e.g.*, Hachigian, *supra* note 165, at 23 (discussing how the sharing of information can help authorities coordinate their enforcement activities).

168. *Id.* The only exception to this rule was when the target company waived its protected rights under the confidentiality law. *Id.*

169. *Id.*

170. U.S.-Mex. Agreement, *supra* note 161, art. X.

possessing the information or would be incompatible with that Party's important interest."[171]

The inability to share information between the two countries retards the effective prosecution of antitrust cases and degrades potential cooperation between the enforcement agencies of both countries.[172]

In addition to criticism focused on the individual agreement level, the global scheme or network of bilateral agreements is criticized as well.[173] Critics argue the sheer number of disparate agreements between nations creates a "spaghetti bowl" of many incoherent agreements, which in the collective are an obstacle to the creation of a clear body of international law.[174] The problem was not as acute when there were only fifteen countries with competition legislation, as was the case as late as 1980.[175] However, the last twenty years have seen a rapid increase in legislation, and today there are at least four times as many countries with competition legislation as there were in 1980.[176] In addition, a system of international law that relies on bilateral agreements leaves behind those countries that are not fortunate enough to forge these agreements.[177]

Even without the general criticisms of bilateral agreements, the agreement between Mexico and the United States is tainted because it is not clear if the signatories representing Mexico had the authority to sign the agreement. Under Mexican law, a

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171. *Id.* art. X, § 1.

172. *Id.*; *see* Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 36 (1999) (noting the need for frequent litigation about court approval of discovery requests in contrivance of foreign blocking statutes).

173. *See* Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON L. 77, 80 (2003).

174. *Id.*

175. Moore, *supra* note 136, at 263.

176. *Id.* at 262. In 2003, there were sixty-seven countries that had implemented antitrust legislation, another nineteen countries had such legislation pending, and ten countries had created "antimonopoly committees." *Id.*

177. Swaine, *supra* note 165, at 669 & n.159. If a country is not a party to a bilateral competition agreement, that country may not be the beneficiary of investment in its market due to fears about competition litigation. *Cf.* Kennedy, *supra* note 173, at 134–35 (discussing how the existence of a general competition agreement between countries can open markets to international competition).

ministry of a decentralized entity must sign this kind of agreement for it to be valid.[178] Here, a representative of the CFC signed the agreement, but the CFC is not a decentralized agency.[179] Accordingly, a representative from the Ministry of Economy should have signed the agreement as well.[180]

V. MEANINGFUL CONVERGENCE: A WAY FORWARD?

Instead of relying upon the "soft," and potentially invalid, bilateral agreement between Mexico and the United States or upon the harmonization of competition law that seems to be the goal of multilateral organizations, such as the WTO, one potential solution is the "convergence" of competition law.[181] Convergence does not mandate uniform legal principles between two countries, like harmonization, but it takes advantage of the will of both countries to forward common competition law principles and best practices by facilitating ways the countries' respective enforcement agencies can work together to accomplish these goals.[182] One way to forward coordination and cooperation is through meaningful bilateral agreements.[183] Because the United States and Mexico already have a bilateral agreement that promotes a certain level of cooperation, a platform for convergence already exists.[184] However, because the agreement is largely voluntary and protects existing domestic laws, it is unlikely that significant cooperation will follow from it.[185] Mexico and the United States could strengthen the existing

178. Jiminez et al., *supra* note 153, at 886.

179. *Id.*

180. *Id.*

181. Tritell, *supra* note 136, at 25.

182. *Id.*

183. *Id.* at 26.

184. *See id.* at 26–27; U.S.-Mex. Agreement, *supra* note 161, art. I, § 1. Because article V of the agreement has a positive comity provision allowing each country to request antitrust enforcement from the other, this agreement already has stronger potential than most to foster convergence. U.S.-Mex. Agreement, *supra* note 161, art. V, § 2; Tritell, *supra* note 136, at 26.

185. *See* Hachigian, *supra* note 165, at 23 (suggesting agreements that do not provide for the sharing of confidential agreement undermine enforcement agencies); *see also* Swaine, *supra* note 165, at 657 (stating that bilateral agreements do not require the

agreement to allow each country to exchange confidential information in the pursuit of enforcing both countries' competition laws.[186] The model information-sharing agreement is an agreement between Australia and the United States to assist in enforcing each other's competition laws.[187] The agreement provides for sharing of information protected by each country's confidentiality laws; therefore, the agreement makes it easier to discover the type of protected documents, such as internal memoranda of corporations, necessary to prove the countries' respective cases.[188]

In addition to strengthening their existing enforcement agreement, Mexico and the United States could form a working group to promote cooperation in enforcement.[189] This could provide a forum for the countries to coordinate competition law enforcement free from the formal constraints of an agreement.[190] For example, the United States has formed a working group with Japan, Korea, and Taiwan to discuss competition law as it relates to intellectual property.[191]

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requested country to enforce its antitrust laws if it is not in that country's interest to do so).

186. *See* Tritell, *supra* note 136, at 26 (arguing that information sharing provisions are a feature of some bilateral agreements which facilitate cooperation).

187. *Id.*; Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, U.S.-Austl., Apr. 27, 1999, Hein's No. KAV 5639, *available at* http://www.usdoj.gov/atr/public/international/docs/usaus7.htm [hereinafter U.S.-Austl. Agreement].

188. *See* U.S.-Austl. Agreement, *supra* note 187, annex A (listing the confidentiality laws of each country that normally would protect information, but stating instead that certain information may be provided in accordance with the agreement); *see also* Hachigian, *supra* note 165, at 23 (arguing that a confidentiality agreement protects the most important documents to prove an antitrust case, such as the internal documents of a company).

189. *See* Tritell, *supra* note 136, at 26 (discussing the development of working groups for cross-border knowledge sharing in international mergers).

190. *See id.* (describing the effectiveness of a working group in U.S. competition with Europe). Mexico and the United States already belong to the International Competition Network, which promotes convergence by facilitating discussions regarding antitrust principles and enforcement best-practices at a multinational level. *Id.* at 27; *see* Int'l Competition Network, Members, http://www.internationalcompetitionnetwork.org/index.php/en/members (last visited Jan. 13, 2006) (listing members of the International Competition Network).

191. Tritell, *supra* note 136, at 26.

Deeper and more meaningful convergence occurs when countries share the same objectives, so effective competition law convergence will require both countries' core principles in this area to be aligned.[192] Historically, Mexico's state-owned industries and its concentrated private industries suggested a lack of commitment to enforcement.[193] Despite this legacy, there are several emerging reasons why Mexico may shed its anticompetitive reputation.

The first is the narrow election of Felipe Calderón as the President of Mexico.[194] Calderón, who campaigned on changing Mexico's anticompetitive, state-controlled legacy, defeated Manuel López Obrador, who blamed Mexico's economic troubles on free-market reforms.[195] In addition, the President of the CFC, Eduardo Pérez Mota, has made inroads during his two year tenure at the CFC by battling the concentrated telecommunications, brewing, cement, and freight transportation industries.[196] There is evidence that the work of Mota and the sentiment that elected Calderón are paying dividends.[197] In 2006, Mexico's Bolsa[198] index, rose forty-nine percent, which marked the fourth consecutive year Mexican

192. *Id.* For example, it is unlikely for convergence to work between the United States and South Africa, the latter of which places non-competitive principles in its competition law. *Id.* at 27.

193. *See* discussion *supra* Part II.C.

194. *Leftists Plan to Recognize Mexican Leader Calderón*, ORLANDO SENTINEL, Oct. 5, 2006, at A5.

195. *See* Andres Oppenheimer, Editorial, *Likely Result for Mexico a Politically Weak President*, ORLANDO SENTINEL, July 5, 2006, at A13 (characterizing Calderón's campaign as based on "pro-free-market continuity" and López Obrador's as one based on lack of confidence in previous free-market reforms). Calderón also has named a University of Chicago-trained economist and former International Monetary Fund official, Agustín Carstens, as his Finance Minister. *New Finance Chief Has U. of C. Training*, CHI. TRIB., Nov. 22, 2006, NEWS, at 14.

196. *A Talk with Mexico's Competition Czar*, BUS. WK. ONLINE, Oct. 6, 2006, http://www.businessweek.com/globalbiz/content/oct2006/gb20061006_350067.htm; Elisabeth Malkin, *Mexico's Antitrust Chief Seeks Stronger Laws*, N.Y. TIMES, Nov. 11, 2004, at W1.

197. *Mexican Stocks Rise for 4th Year*, DALLAS MORNING NEWS, Dec. 30, 2006, at 3D [hereinafter *Mexican Stocks*].

198. Bolsa is the name for the Mexican stock index. *Mexico: Bolsa Posts a Hefty Gain*, HOUS. CHRON., Jan. 25, 2006, at D4.

stocks have risen.[199] While growth in the Mexican economy is expected to slow in 2007, a positive rate growth is still expected at 3.6%.[200]

In addition to the election of Calderón and the work of Mota, there have been recent substantive changes to the L.F.C.E. as well.[201] In April 2006, the Mexican Federal Congress passed sweeping amendments that fortified the enforcement of Mexico's L.F.C.E.[202] The primary goal of the amendments was to strengthen Mexico's competition enforcement agency, the CFC.[203] It did so by increasing fines to violators, increasing the investigative powers of the agency, increasing the threshold amount for transactions requiring agency investigation, and providing incentives for self-governance.[204] The new law provided the CFC with authority to increase the base fine for violators of L.F.C.E. up to the equivalent of U.S. $6.76 million, doubled the fines of repeat offenders, and allowed for structural remedies for third strike offenses, such as divestiture or reorganization.[205] The CFC also has added authority to perform raids or "investigative visits" to the alleged violator's premises if it does not obtain the documentation previously requested.[206]

As well as increasing the penalties for violators, the amendments were also designed to lessen the workload of the

199. *Mexican Stocks*, *supra* note 197. The Mexican economy also grew at an estimated rate of 4.7%, which was the fastest pace in six years, led by rising exports to the United States and a substantial increase of credit that grew domestic spending. *Id.*

200. *Id.* Some of the growth rate in 2006, however, can be attributed to speculation that American Movil SA, the leader in Mexico's concentrated wireless market, was buying Telecom Italia's assets in Brazil. *Id.*

201. Gutierrez-Caballero, *supra* note 1; WALLER, *supra* note 29, § 17.7.

202. *Id.*

203. Gutierrez-Caballero, *supra* note 1. The law substantially altered the L.F.C.E. by amending twenty-four articles, deleting one of the articles, and adding eleven others. *Id.*

204. *Id.*; WALLER, *supra* note 29, § 17.7. Even though the CFC was strengthened by the L.F.C.E. amendments, the changes will not apply to investigation of the constitutionally protected state-owned petroleum and electric companies. WALLER, *supra* note 29, § 17.7.

205. Gutierrez-Caballero, *supra* note 1; WALLER, *supra* note 29, § 17.7.

206. *Id.*

CFC.[207] First, the threshold amount for assets and sales of mergers were increased to lower the number of notifications requiring CFC investigation.[208] Second, a "leniency policy" was applied to monopolistic practices to provide incentives to self-correct these practices and to disband existing cartels without CFC investigation or sanction.[209]

If Mexico continues to distance itself from a concentrated, state-owned economy, and Mexico and the United States can strengthen their bilateral competition agreement, these solutions will be preferable in the short-term to the WTO as vehicles to settle competition conflicts.

VI. CONCLUSION

Even though Mexican and U.S. competition laws are relatively similar substantively and conceptually, conflicts still exist between the two countries.[210] Because of the major differences in enforcement, culture, and legal traditions, the results reached in similar situations are often profoundly different.[211] As illustrated in the *Telmex* and the *Canadian Wheat Board* decisions, these conflicts occasionally lead to unexpected decisions from an ever active WTO.[212]

Because the multilateral solutions to competition law conflicts are at best unrealistic, and at worst, subversive to a country's domestic competition laws and regulatory schemes, an alternative solution is needed.[213] If Mexico and the United States would focus on converging competition law enforcement by strengthening their bilateral agreement and working together outside of the agreement to cooperate and coordinate competition law enforcement, the two countries will likely settle their disputes in a predictable manner that is faithful to each

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207. *See* Gutierrez-Caballero, *supra* note 1 (enumerating procedures that decrease the potential for CFC investigation and sanctions while creating incentives designed to curtail the violating behavior).

208. *Id.*

209. *Id.*

210. *See* discussion *supra* Part II.

211. *See* discussion *supra* Parts II–III.

212. *See* discussion *supra* Part III.

213. *See* discussion *supra* Part IV.B.

country's core competition principles.[214] This process should be facilitated by the committed work of the CFC President, Eduardo Mota, and promise of the pro-competition administration of President Felipe Calderón. This would reverse Mexico's anticompetitive history; facilitate cooperation and coordination with its largest trade partner, the United States; and prove that competition law does matter in Mexico.[215]

*Harve Truskett**

214. *See* discussion *supra* Part V.

215. *Id.*; Weber, *supra* note 6.

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