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Harmonizing the Antitrust Laws of NAFTA Signatories

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I. INTRODUCTION

The North American Free Trade Agreement ("NAFTA") took effect on January 1, 1994.[1] Over a period of fourteen years, the Agreement will abolish virtually all existing restrictions on trade and investment among the three signatories: the United States, Canada and Mexico.[2] This, in turn, will create investment opportunities, which will likely facilitate trade among the three countries and remove barriers to future trade growth.[3] For the United States, easier access to the Mexican market presents attractive business opportunities, as Mexico is currently the fastest growing major export market for U.S. goods and services.[4] Additionally, NAFTA should ensure a more predictable business

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1. North American Free Trade Agreement, Dec. 8, 11, 14 & 17, 1992, U.S.-Can.-Mex., art. 2203, *reprinted in* 32 I.L.M. 289, 605, 702 (1993) (establishing January 1, 1994 as the effective date) [hereinafter NAFTA]. *See generally* NAFTA *reprinted in* 32 I.L.M. at 289-456, 605-799. Due to its length, Articles 101 through 915 begin on page 289 while Articles 1001-2206 begin on page 605.

2. *Id.*, *reprinted in* 32 I.L.M. 289, 309-10 (presenting a schedule for tariff elimination to be completed by January 1, 2008). *See also Overview: The North American Free Trade Agreement*, (Aug. 1992) [hereinafter *Overview*], *available in* Westlaw, NAFTA Database; Nancy Dunne, *U.S. Seeks to Speed NAFTA Tariff Cuts*, FIN. TIMES, Dec. 30, 1993, at 3.

3. *Potential Impact on the U.S. Economy and Selected Industries of North American Free Trade Agreement*, USITC Pub. 2596, Inv. No. 332-37 (Jan. 1993) [hereinafter *Potential Impact*], *available in* Westlaw, FINT-ITC Database.

4. *Id.* The United States has greatly increased trade under NAFTA, particularly in the areas of computers, automatic data processing equipment, semiconductors, cathode ray tubes for television, and agricultural equipment. *United States is Exporting Wide Variety of Products to Mexico Under Trade Pact*, Int'l Trade Daily (BNA), at D-3 (Sept. 27, 1994), *available in* Westlaw, BNA Library, BTD File (quoting Jeffrey R. Shafer, Assistant Secretary for International Affairs at the U.S. Treasury). The United States is also selling more cars because of the trade pact. *Id.* In the first five months of 1994, the United States exported more than 12,380 passenger vehicles to Mexico. *Id.* This quantity is more than 10% higher than the total for all of 1993, in which only 10,910 passenger vehicles were sold. *Id.* Additionally, the value of consumer goods exported to Mexico reached $2.7 billion for January through June of 1994, which represents an increase of more than 17% over 1993. *Id.* Overall, U.S. Exports to Mexico reached $28.7 billion for January through July, an increase of 19% over the same period in 1993. *Id.*

environment in Mexico, reducing the risks associated with investment and other business decisions.[5]

NAFTA's benefits are only attainable, however, in an open and competitive marketplace, free from unfair competition practices and monopolistic behavior. For this reason, it is important to evaluate NAFTA provisions regarding antitrust law[6] enforcement and to determine how anti-competitive conduct in the free trade area might be curbed. Unlike the European Economic Community, which possesses one body of antitrust law to which all parties in the trade area subscribe, NAFTA signatories maintain three separate domestic bodies of antitrust law. In order for the NAFTA countries to compete in a single market without unfair competition, they must either: (1) employ an effective resolution mechanism for disputes arising from different antitrust approaches, or (2) adopt a uniform antitrust approach.

After presenting the background of NAFTA in Part II, this Comment reviews the Agreement's formal dispute resolution process in Part III, emphasizing its specific exemption of dispute resolution for competition disputes. With formal dispute resolution unavailable, fair competition under NAFTA may depend on whether the antitrust approaches taken by the three signatories are harmonious. Part IV compares the antitrust laws in each country from a historical perspective and then analyzes recent developments in each country's laws. This Comment concludes that Mexico and Canada have made deliberate efforts recently to harmonize their antitrust approaches with the antitrust laws of the United States. Most importantly, Mexico's recent legislation indicates that the country is attempting to move away from a history of monopolistic practices, protectionism, and inward-looking trade policies toward a new era of open competition. This trend toward harmonization reduces the likelihood of unfair competition in the trade area and greatly enhances the likelihood of NAFTA's success.

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5. *Potential Impact*, *supra* note 3.

6. Throughout this Comment, "antitrust law" refers to both anti-monopoly laws and competition laws.

II. Background of NAFTA

Prior to NAFTA negotiations, there was an on-going economic integration underway in North America.[7] After Canada and the United States signed the Automotive Products Trade Agreement in 1965,[8] Mexican production facilities known as "maquiladoras" began to form in northern Mexican cities to produce components for the U.S. automobile industry.[9] This initial integration was the foundation for a trade relationship that lead to NAFTA negotiations.[10]

Several factors sparked the creation of NAFTA: (1) the emergence of regional trading blocs by both the European Community and East Asia, (2) the leap in trade volume between Mexico and the United States, (3) the reforms that Mexico had undertaken in recent years, (4) the success of the U.S.-Canada Free Trade Agreement, and (5) the attractive prospects that hemisphere-wide trade integration had presented to U.S. administrations in recent years.[11]

On June 11, 1990, U.S. President George Bush and Mexican President Carlos Salinas de Gortari agreed to negotiate a free trade agreement between their countries.[12] Soon after negotiations began, Canadian Prime Minister Brian Mulroney requested that Canada also be included in the talks.[13] In June 1991, the U.S. House of Representatives and Senate passed resolutions

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7. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE ISSUES AND RECOMMENDATIONS 1 (1992).

8. Automotive Products Trade Agreement, Jan. 16, 1965, U.S.-Can., 17 U.S.T. 1372.

9. HUFBAUER & SCHOTT, *supra* note 7, at 3. Maquiladoras are offshore, light-assembly factories that resemble airport hangars. They import components duty-free from supplier nations, assemble them, and ship the finished products out of Mexico, paying duty only on the value added. Many of the assembly plants are U.S. owned. *See* Mary Williams Walsh, *Mexican Factories Along the U.S. Border Succeed Despite the Criticism on Both Sides,* WALL ST. J., Nov. 19, 1985, *available in* Westlaw, WSJ Database.

10. HUFBAUER & SCHOTT, *supra* note 7, at 3.

11. *The Year In Trade: Operation of the Trade Agreements Program,* USITC Pub. 2554 (1991) [hereinafter *The Year in Trade*] (prepared in conformity with section 163(b) of the Trade Act of 1974), *available in* Westlaw, FINT-ITC Database.

12. HUFBAUER & SCHOTT, *supra* note 7, at 1. *See also* Peter Truell, *U.S., Mexican Leaders Plan To Begin Formal Talks After December Meeting,* WALL. ST. J., June 12, 1990, at A2.

13. PETER MORICI, TRADE TALKS WITH MEXICO: A TIME FOR REALISM 1 (1991).

allowing fast track negotiations to begin.[14] Even before formal talks began, the process of drafting NAFTA progressed from a step-by-step approach of integrating the separate free trade agreements between the countries[15] to a full-blown trilateral effort.[16] In 1993, just three years after the process began, the U.S. Congress passed the implementing bill,[17] which took effect on January 1, 1994.[18]

Under NAFTA, the United States, Canada, and Mexico formed the largest free trading region in the global market with an estimated 360 million consumers and $6 trillion in annual output.[19] NAFTA simplifies access to the Mexican market—the fastest growing major export market for U.S. goods and services[20]—and spurs job creation, economic growth, and investment opportunities.[21] Most importantly, the Agreement creates a strong alliance among the three countries that improves the competitive stance of each country in the global market.[22] With the emergence of competing trade alliances in the global market, the pact among the United States, Canada, and Mexico is crucial to each country's future economic stability and growth.[23]

Finally, NAFTA is expected to serve as the free trade model for free trade agreements with other Latin American countries.[24] Former President George Bush's Enterprise for the Americas Initiative ("EAI") envisioned a series of such agreements serving to broaden the trade area.[25] Trade pacts encompassing the

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14. *Id.* Fast track authority was granted under the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903 (1988).

15. When talks began, Canada and the United States had enacted the U.S.-Canada Free Trade Agreement ("CFTA"). Mexico and the United States had, at that time, begun to discuss a future free trade agreement between their two countries.

16. MORICI, *supra* note 13, at 1.

17. On November 17, 1993, the vote in the House of Representatives was 234 to 200 in favor of NAFTA. 139 CONG. REC. H10048 (daily ed. Nov. 17, 1993). On November 20, 1993, the U.S. Senate approved the NAFTA implementing bill by a 61-38 margin. 139 CONG. REC. S16712 (daily ed. Nov. 20, 1993). *See also Trade Pact Clears by Margin 61-38*, Int'l Trade Daily (BNA), Nov. 23, 1993, *available in* LEXIS, BNA Library, ITD File.

18. NAFTA, *supra* note 1, art. 2203, *reprinted in* 32 I.L.M. 289, 605, 702 (1993).

19. *Overview*, *supra* note 2.

20. *Potential Impact*, *supra* note 3.

21. *Id.*

22. *Id.*

23. *Id.*

24. *The Year in Trade*, *supra* note 11.

25. *Potential Impact*, supra note 3.

NAFTA partners and South America would form a powerful hemisphere-wide trading unit.[26]

III. DISPUTE RESOLUTION UNDER NAFTA

In the past, Mexico's economic policies did little to invite foreign business into its marketplace.[27] Though Mexico offered attractive natural advantages, such as a highly trainable, wage-competitive workforce and a close proximity to the U.S. border, Mexico's inward-looking and protectionist policies increased the risk of doing business in Mexico.[28] Monopolies, collusion, and corruption were the rule rather than the exception—a fact that further deterred foreign businesses from trading and investing in Mexico.[29] Now, under NAFTA, U.S. and Canadian businesses that may potentially invest in Mexico should consider what protections the Agreement affords to avoid some of these problems. These businesses should first examine the dispute resolution mechanism available for competition or antitrust disputes.

A. NAFTA's Formal Dispute Resolution Mechanism

According to NAFTA's dispute settlement provisions,[30] parties who wish to submit a dispute for resolution must follow a three-step process.[31] First, the disputing parties must attempt to settle the claim through consultation or negotiation.[32] Second, if the dispute is not resolved, one disputing investor must give

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26. *Id.* In its effort to achieve this goal, the United States is planning to negotiate a free trade agreement with Chile. *U.S. May Be Ready to Negotiate a Free Trade Agreement Within the Next Two Years, a U.S. Trade Representative Says*, Int'l Trade Daily (BNA), (Apr. 17, 1991), *available in* Westlaw, BNA-BTD Database. The Clinton administration has not yet decided whether to pursue a bilateral free trade agreement with Chile or to seek to negotiate its accession to NAFTA with Canada and Mexico. *U.S. Reassures Chile of Commitment to Free Trade Deal, U.S. Officials Say*, Int'l Trade Rep. (BNA) (Sept. 21, 1994), *available in* Westlaw, BNA-ITR Database.

27. 1 DOING BUSINESS IN MEXICO § 2.08 (Michael W. Gordon ed., 1992).

28. *Id.*

29. *See* Juanita Darling, *Trade: Competition is Tough in Industries Where Monopolies Still Exist, as One U.S. Entrepreneur Found Out*, L.A. TIMES, Sept. 1, 1994, at D1; Tod Robberson, *NAFTA's Reality Rattles Mexico; Competition Spurs Violence*, WASH. POST, Aug 5, 1994, at A23; Tod Robberson, *Mexico's Banking Afflicts Investors; Corruption Said to Be Compounding Risk*, WASH. POST, Apr. 30, 1993, at A35.

30. NAFTA, *supra* note 1, arts. 1115-1139, *reprinted in* 32 I.L.M. at 642-647.

31. *Id.* arts. 1118-1120, *reprinted in* 32 I.L.M. at 643.

32. *Id.* art. 1118, *reprinted in* 32 I.L.M. at 643.

written notice to the other of his intent to submit a claim to arbitration to the disputing party at least 90 days before the claim is submitted.[33] Third, after six months, if the claim is not explicitly exempt under NAFTA,[34] a disputing investor may submit the claim under any of the following arbitral agreements: (1) the International Centre for Settlement of Investment Disputes ("ICSID") Convention, provided that the disputing parties are both parties to the convention;[35] (2) the Additional Facility Rules of ICSID, provided that one of the disputing parties, but not both, is a party to the ICSID convention;[36] or (3) the UNCITRAL Arbitration Rules.[37] The dispute is then resolved by a panel of three arbitrators, one appointed by each party and a third arbitrator agreed upon by both parties.[38]

B. Competition Law Disputes Exempt from Formal Dispute Resolution Mechanisms

While NAFTA provides a formal dispute resolution mechanism for conflicts regarding monopolies and state enterprises, it specifically exempts all other competition conflicts.[39] Because

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33. *Id.* art. 1119, *reprinted in* 32 I.L.M. at 643. The notice requires the following information: (a) The name and address of the disputing investors and, where a claim is made under Article 1117, the name and address of the enterprise; (b) the provisions of the Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual bases for the claim; and (d) the relief sought and the approximate amount of damages claimed. *Id.* art. 1119(a)-(d).

34. *Id.* art. 1120(1), *reprinted in* 32 I.L.M. at 643.

35. *Id.* art. 1120(1)(a), *reprinted in* 32 I.L.M. at 643. *See also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

36. NAFTA, *supra* note 1, art. 1120(1)(b), *reprinted in* 32 I.L.M. at 643.

37. *Id.* art. 1120(1)(c), *reprinted in* 32 I.L.M. at 643. *See also* United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Supp. No. 17, at 81-93, U.N. Doc. A/40/17 (1985), *reprinted in* 24 I.L.M. 1302 (1985).

38. NAFTA, *supra* note 1, art. 1123, *reprinted in* 32 I.L.M. at 644.

39. Monopolies and state enterprises have access to the NAFTA dispute resolution mechanism. NAFTA, *supra* note 1, art. 1117(1)(a)-(b), *reprinted in* 32 I.L.M. at 643. Other competition disputes do not have access to the NAFTA dispute resolution mechanism. *Id.* art. 1501(3), *reprinted in* 32 I.L.M. at 663. NAFTA's special treatment of monopolies and state enterprises might be intended to reduce the risk of allowing them to exist in the trade area. Monopolies and state enterprises are heavily disfavored under U.S. and Canadian law. For a discussion of Domestic Antitrust Laws of United States, Canada, and Mexico, see Part IV. Submitting disputes involving monopolies or state enterprises to a formal resolution mechanism might be a way for Canada and the United States to check Mexico's freedom to support its monopolies and state enterprises.

one of the broad objectives specifically stated in NAFTA is to "promote conditions of fair competition in the free trade area,"[40] this exemption of competition disputes from the formal dispute resolution mechanism is paradoxical. The exemption raises the question: how can "fair competition" be enforced in the NAFTA trade area, in light of the fact that each signatory has its own set of competition laws with its own antitrust approach? The remainder of article 1501 provides little guidance.

Article 1501(1) states that "[e]ach party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto" and that "[t]o this end, parties shall *consult* from time to time about the effectiveness of measures undertaken by each party."[41]

Article 1501(2) states:

> [E]ach party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The parties shall *cooperate* on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and

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The NAFTA provision that permits state enterprises specifically provides that "[e]ach party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes, acts in a manner that is not inconsistent with the Party's obligations under [the Agreement]." *Id.* art. 1503(2), *reprinted in* 32 I.L.M. at 663-64.

A similar provision exists with regard to monopolies. *Id.* art. 1502(3), *reprinted in* 32 I.L.M. at 633. The Agreement, however, imposes three additional rules on monopolies that are not imposed on state enterprises. First, each monopoly must act "solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with respect to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale." *Id.* art. 1502(3)(b), *reprinted in* 32 I.L.M. at 633. Second, each monopoly must provide "non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market." *Id.* art. 1502(3)(c), *reprinted in* 32 I.L.M. at 633. Third, each monopoly must not "use its monopoly power to engage, either directly or indirectly, including dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct." *Id.* art. 1502(3)(d), *reprinted in* 32 I.L.M. at 633.

40. *Id.* art. 102(1)(b), *reprinted in* 32 I.L.M. at 297.

41. *Id.* art. 1501(1), *reprinted in* 32 I.L.M. at 663 (emphasis added).

exchange of information relating to the enforcement of competition laws and policies in the free trade area.[42]

In sum, NAFTA's competition law provisions leave substantial gaps that could threaten the success of the Agreement. Specifically, NAFTA's express exemption of competition disputes from its dispute resolution process, leaves the signatories with no formal dispute resolution mechanism. As a result, the countries must rely on the effectiveness of their consultations and cooperation.

The effectiveness of consultations and efforts to cooperate could hinge on each country's willingness to employ a common antitrust approach. Unlike the United States and Canada, which share similar antitrust philosophies, Mexico had no effective antitrust laws in force at the time the Agreement was drafted.[43] Moreover, NAFTA does not require Mexico to ever adopt such antitrust legislation.[44] At the time the Agreement was drafted, therefore, the United States and Canada could only assume, in good faith, that Mexico would eventually develop antitrust and competition policies. Mexico did, in fact, begin developing antitrust legislation in June 1993, shortly before the Agreement took effect.[45]

42. *Id.* art. 1501(2), *reprinted in* 32 I.L.M. at 663 (emphasis added). Another competition-related provision is the Agreement's establishment of a "Working Group on Trade and Competition." *Id.* art. 1504, *reprinted in* 32 I.L.M. at 664. This group is comprised of representatives of each signatory and make appropriate reports and recommendations, to the Free Trade Commission on relevant issues concerning competition laws, policies and trade in the free trade zone. *Id.*

43. Prior to the establishment of the Federal Competition Commission on June 23, 1993, Mexico did not have an antitrust enforcement agency. *See* COMISIÓN FEDERAL DE COMPETENCIA, ANNUAL REPORT 9-11 [hereinafter ANNUAL REPORT]. As a result, Mexico's constitutional prohibition of monopolies, which existed since 1857, went virtually unenforced. *See Government Explains Rationale, Program for Anti-monopoly Legislation*, Mexico Trade and L. Rep., Dec. 1, 1992, *available in* LEXIS, News Library, MTLR File [hereinafter *Government Explains Rationale*]; ANNUAL REPORT at 15. According to the Commission, "What is new in Mexico is the creation of specific provisions and procedures that translate old concern with monopolies into concrete actions." ANNUAL REPORT at 41.

44. *See generally* NAFTA, *supra* note 1, *reprinted in* 32 I.L.M. 289, 605.

45. For a discussion of the development and current status of Mexico's antitrust policies, see Part IV.

IV. Domestic Antitrust Laws of the United States, Canada, and Mexico

The threat of monopolies poses a special problem for those doing business in Mexico, given the country's history of weak antitrust enforcement and current problems stemming from the response of Mexican businesses to increased competition under NAFTA.[46] One industry reporting problems is the dairy industry.[47] According to U.S. dairy company officials, "as Mexican dairy farmers steadily lose control of once-safe markets . . . they are turning to violence."[48] In one incident, unidentified men poured gasoline onto a dairy truck bearing a U.S. logo and then set it on fire.[49] The owner of the truck claimed that his trucks' tires had been punctured several times a week, prior to the arson, and that some trucks had been hijacked.[50] The hijacked trucks were found in poor neighborhoods where residents claimed they were told to take whatever milk they could find inside.[51]

In another incident, fifty men armed with rifles and clubs invaded a dairy warehouse.[52] They held the workers at gunpoint while they slashed open milk cartons bearing American labels.[53] The gunmen then "sprayed the warehouse with bullets" before leaving.[54]

Another industry reporting problems is the soft-drink industry.[55] In a letter to Mickey Kantor, the U.S. Corn Refiners Association claimed that Mexican sugar growers had threatened to boycott the product of any domestic soft-drink producers who switched from high-priced Mexican sugar to cheaper sugar, imported from the United States.[56] Coca-Cola was one of several companies considering switching to the U.S. sugar in order to cut costs.[57] The U.S. Corn Refiners Association claimed that Coca-

46. Darling, *supra* note 29; Robberson, *supra* note 29.
47. Robberson, *supra* note 29.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

Cola did not switch because they were threatened with an all-out boycott led by sugar industrialist Enrique C. Molina, the largest bottler of Pepsi in Mexico.[58]

> "The Mexican sugar industry, under the leadership of . . . Molina, has systematically visited other bottlers 'asking' them to sign a written agreement not to use high-fructose corn syrup," the refiners association complained to Kantor. Any refusal to sign means ostracism from domestic suppliers, they said, "because no sugar mill will sell them sugar."[59]

Another incident involved a telecommunications entrepreneur. Brad Tirpak, a twenty-four year old graduate from Georgetown, started Access Telecom, a profitable discount long distance service in Mexico.[60] With an out-of-pocket investment of $3,000, he was able to turn a profit of $2.5 million in the first year.[61] Telephono de Mexico ("Telmex"), a Mexican telephone monopoly, responded to the competition by cutting Access Telecom's telephone wire and terminating its business.[62] "Tirpak's case is an exceptionally blatant illustration of barriers that small- and medium-sized companies may face if they try to carve a niche for themselves in a Mexican market geared toward big corporations."[63] In the end, Tirpack laid off his seven employees and returned to the United States.[64] Because Telmex is a legal monopoly under Mexican law, it had the right to cut Tirpak's wires.[65] Fortunately for entrepreneurs like Tirpak, Telmex's monopoly status will terminate in 1996, opening up the market to free competition. [66]

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58. *Id.*
59. *Id.*
60. Darling, *supra* note 29.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Article 28 of the Mexican Constitution forbids monopolies in principle, but authorizes their existence "in cases of general interest," in order "to assure the efficiency of the provision of services and the social utilization of goods." CONST. art. 28 (Mex.). Until 1993, when Mexico adopted its new Federal Economic Competition Law, Mexico had no comprehensive antitrust legislation comparable to that of either the United States or Canada. The Federal Economic Competition Law has been characterized as a "wide ranging attack on existing and future contraints on market forces." *Government Explains Rationale*, *supra* note 43, *available in* LEXIS, News Library, MTLR File. *See* discussion *infra* Parts IV.B.3 and IV.C.3.
66. Darling, *supra* note 29.

Ruthless competition in Mexico still exists because competition law enforcement is relatively new in Mexico.[67] Though Mexico has prohibited monopolies for more than a century,[68] its first enforcement agency, the Federal Competition Commission,[69] is less than two years old. Entrepreneurs doing business in Mexico could be up against a long-standing preference for monopolies, which were permitted to exist under Mexico's protectionistic policies.[70] The effects of this past tradition could have a negative effect on efficiency and fairness for years to come, especially if the new Commission does not take an aggressive antitrust approach.[71]

With the threat of monopolies hindering competition, and no prospect for formal competition dispute resolution under the Agreement, it is important to compare the antitrust philosophies of each NAFTA country. It is especially important to consider the direction in which each country's domestic antitrust laws are moving. An examination of each country's history and current trends in the area of antitrust enforcement provides insight into whether harmonization of these domestic laws is likely.

A. Historical Roots of Antitrust Laws

1. United States

The U.S. antitrust laws have long recognized competition as the driving force of the economy.[72] The word "antitrust" signifies

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67. Mexico's first antitrust enforcement agency, the Federal Comptetition Commission, was formed on June 23, 1993. *Ley Federal de Competicia Económica* [Federal Law of Economic Competition], D.O., Dec. 24, 1992 [hereinafter Federal Economic Competition Law]. *See* ANNUAL REPORT, *supra* note 43, at 5 (stating that the Federal Competition Commission was created on June 23, 1993).

68. CONST. art. 28 (Mex.).

69. For a discussion of Mexico's Federal Competition Commission, see *infra* Parts IV.B.3 and IV.C.3.

70. Darling, *supra* note 29; *see also* SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES 91 (1985).

71. Darling, *supra* note 29; *see also* ANNUAL REPORT, *supra* note 43, at 14-15.

72. U.S. Senator John Sherman stated:

> The popular mind is agitated with many problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down *competition* . . . . Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 CONG. REC. 2,460 (1890) (emphasis added).

opposition to the large trusts that began to develop after the Civil War.[73] Along with the large-scale enterprises that developed during the war to meet military demands, came large amounts of capital.[74] This capital, combined with the entrepreneurial spirit at the time, encouraged the creation of monopolies.[75]

The Sherman Antitrust Act of 1890[76] came into existence as a result of public outrage aimed at these monopolies that threatened competition.[77] Two key provisions of the Sherman Act forbid monopolizing and combinations in restraint of trade.[78]

Section 1 of the Sherman Act states: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal."[79] Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"[80]

Sherman further stated that, "[t]he sole object of [trusts] is to make *competition* impossible." *Id.* at 2,457 (emphasis added).

73. JETHRO K. LIEBERMAN & GEORGE J. SIEDEL, THE LEGAL ENVIRONMENT OF BUSINESS 524 (1989).. Sherman defined trusts as "a new form of combination" that "seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president." 21 CONG. REC. 2,457 (1890).

74. LIEBERMAN & SIEDEL, *supra* note 73, at 524.

75. *Id.* at 524-25.

76. Sherman Antitrust Act §§ 1-8, 15 U.S.C. §§ 1-7 (1890).

77. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), Chief Justice White explained the purpose behind the Sherman antitrust legislation:

> [T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is the vast accumulation of wealth in the hands of corporations and individuals . . . and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Id. at 50.

78. The U.S. Supreme Court articulated these prohibitions in *Standard Oil*:

> [C]ontracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as resticting the due course of trade, and therefore as being in restraint of trade.

Id. at 61.

79. 15 U.S.C. § 1.

80. *Id.* § 2.

U.S. Supreme Court Chief Justice White distinguished these provisions in the landmark case, *Standard Oil Co. v. United States:*

> [H]aving by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.[81]

Cases since *Standard Oil* maintain the goal of protecting competition. In *Northern Pac. Ry. v. United States,*[82] the Court said:

> [T]he Sherman Act was aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions . . . [T]he policy unequivocally laid down by the Act is *competition.*[83]

In *United States v. Nat'l Soc. of Prof. Engineers,*[84] the Supreme Court reiterated the long-standing value of competition and further stated, "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."[85]

In 1914, Congress passed two additional antitrust laws, the Clayton Act[86] and the Federal Trade Commission Act.[87] Within the jurisdiction of the Clayton Act are specific practices such as

81. *Standard Oil,* 221 U.S. at 61.
82. 356 U.S. 1 (1958).
83. *Id.* at 4 (emphasis added).
84. 435 U.S. 679 (1978).
85. *Id.* at 695.
86. §§ 1-20, 15 U.S.C. §§ 12-27 (1914). The Clayton Act supplemented existing laws against unlawful restraints and monopolies. *Id.* pmbl., § 12.
87. §§ 1-25, 15 U.S.C. §§ 41-51 (1914). The Federal Trade Commmission Act created a Federal Trade Commission and defined the Commission's powers and duties. *Id.* pmbl., § 41.

price discrimination,[88] exclusive dealing contracts,[89] tying arrangements,[90] acquisition of a company's competitors,[91] and interlocking directorates.[92] The Federal Trade Commission Act, on the other hand, is less specific. It outlaws, in general, "unfair methods"[93] of competition and also establishes the Federal Trade Commission ("FTC")[94] as an independent agency to assist the U.S. Department of Justice in enforcing antitrust laws.[95]

The Sherman Act, the Clayton Act, and the Federal Trade Commission Act remain the bases of antitrust law.[96] Over the years, many states have adopted similar laws to supplement and provide additional protection against anticompetitive practices.[97] Most of these laws are modeled after the federal laws.[98]

2. *Canada*

Canada and the United States share a similar antitrust background. Canadian antitrust legislation was first introduced in 1889 when the Canadian Parliament passed an act prohibiting "all conspiracies, combinations, and agreements, which had the effect of unduly limiting competition in trade or production."[99] The Canadian legislation was similar to the Sherman Act adopted in the United States one year later.[100] Canada's legislation was

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88. Clayton Act § 2, 15 U.S.C. § 13.
89. *Id.* § 3, 15 U.S.C. § 14.
90. *Id.*
91. *Id.* § 7, 15 U.S.C. § 18.
92. *Id.* § 8, 15 U.S.C. § 19.
93. Federal Trade Commission Act § 5, 15 U.S.C. § 45. Section 5(a)(1) of the Federal Trade Commission Act states that "[u]nfair methods of competition in or affecting commerce and unfair or deceptive acts or practice in or affecting commerce are hereby declared unlawful." *Id.* § 5(a)(1), 15 U.S.C. § 45(a)(1). "The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons." Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986).
94. Federal Trade Commission Act § 1, 15 U.S.C. § 41.
95. *Id.*
96. LAWRENCE ANTHONY SULLIVAN, ANTITRUST 13 (1977).
97. LIEBERMAN & SIEDEL, *supra* note 73, at 524-26 (1989).
98. *Id.*
99. GORDON KAISER, COMPETITION LAW OF CANADA § 1.01 (1988) (citing An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C., ch. 41 (1889) (Can.)).
100. *Id.* For a comparison of the Canadian legislation with the Sherman Act, see *supra* notes 72-98 and accompanying text.

designed to provide a mechanism for investigation into trusts and monopolies that may potentially be contrary to public interest.[101] The 1889 Act was codified in the criminal code in 1892. In 1960, the legislation was consolidated into the Combines Investigation Act.[102]

As in the United States, trusts and combinations began to form in Canada, which required regulation by antitrust legislation.[103] Both Canada and the United States pursued the common goal of protecting competition.[104] Despite these similarities, there was a significant difference between the U.S. and Canadian antitrust legislation; the Canadian legislation was enforced primarily through the criminal courts.[105] As a result of the high burden of proof in criminal cases, the "beyond a reasonable doubt" standard, the legislation proved to be ineffective.[106] In response, the Canadian Legislature enacted the Competition Act of 1986.[107]

The Canadian legislature was motivated by four factors in enacting the Competition Act: (1) Canada's merger and monopoly laws had become ineffective and obsolete, (2) various enforcement procedures under the Combines Investigation Act had been challenged and declared invalid, (3) the Combines Investigation Act was a criminal statute that, according to the federal government, could not adequately address matters of economic conduct and structure,[108] and (4) several Canadian Supreme Court decisions had resulted in unexpected interpretations of the Act.[109]

With the enactment of the Competition Act and the Competition Tribunal Act[110] in June 1986, the Canadian Parliament

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101. KAISER, *supra* note 99, § 1.01.

102. *See* Combines Investigation Act, R.S.C., ch. C-23 (1970) (Can.) (amended and superseded by the Competititon Act, S.C., ch. 26 (1986) (Can.)). The 1986 amendment repealed the name "Combines Investigation Act" and replaced it with "Competition Act." S.C., ch. 26, Pt. II, § 19 (1986) (Can.).

103. KAISER, *supra* note 99, § 1.01.

104. *Id.*

105. *Id.*

106. *Id.*

107. S.C., ch. 26 (1986) (Can.).

108. KAISER, *supra* note 99, § 14.02. This inadequacy was due to the criminal burden of proof and the lack of expertise existing in the Criminal Court system. *Id.* The new Competition Tribunal was designed to remedy this particular problem. *Id.*

109. *Id.*

110. S.C., ch. 26 (1986) (Can.).

fundamentally reformed the law. Instead of a prosecutorial criminal court system, the legislation created a new regulatory system based on the federal power to regulate trade and commerce.[111] Currently, the law applies to both criminal and civil violations, as in the United States.[112] Under the Competition Act, there is a current trend in Canada toward a compliance-oriented approach similar to that of the United States.[113]

3. *Mexico*

Unlike Canada and the United States, Mexico does not have a history of antitrust law enforcement. Traditionally, Mexico's competition laws have been protectionist and inward-looking.[114] As Mexico's newly-formed Competition Commission[115] explains:

> For many years, the Mexican economy operated in an environment of substantial protection and strong State participation. As a consequence, opportunistic behavior emerged in many sectors, often with the cooperation of the authorities. The belief was that protection and regulation would produce a strong industrial sector responsive to society's needs.[116]

Mexicans did not expect the government to leave the determination of the overall course and pattern of economic development to private policy-makers.[117] They entrusted the Mexican government with, and expected it to play, a significant role in managing the economy.[118] The Mexican government was expected to protect Mexicans from foreign economic domination and to ensure fairness.[119] The new Federal Competition Commission described the results of this protection:

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111. KAISER, *supra* note 99, § 1.01.

112. *Id.*

113. *Id.* *See generally* Ian Nielson-Jones, *Canadian Antitrust Enforcement*, 57 ANTITRUST L. J. 923 (1989).

114. Terry Wu & Neil Longley, *A U.S. Mexico Free Trade Agreement: U.S. Perspectives*, J. WORLD TRADE, June 1990, at 5-6. *See also* SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES 91 (1985). *See generally* ANNUAL REPORT, *supra* note 43, at 14.

115. For a discussion of Mexico's new antitrust legislation and Federal Competition Commission, see *infra* Parts IV.B.3 and IV.C.3.

116. ANNUAL REPORT, *supra* note 43, at 14. *See also* Alejandro Junco, *The Americas: The Case for an Internal Mexican Free-Trade Agreement*, WALL ST. J., Mar. 22, 1991, at A9.

117. MORICI, *supra* note 13, at 20.

118. *Id.*

119. *Id.*

> Protection reduced firms' competitive abilities and harmed consumers. Regulations were inadequate as they created artifical barriers to the entry of new competitors, and resulted in a sometimes ambiguous legal framework, a factor which contributed to the formation of monopolies.[120]

The Mexican economic environment has not only allowed, but encouraged, the existence of monopolies.[121] Although Article 28 of the Mexican Constitution provides that "there shall be no monopolies or restrictions to free competition (estancos) of any kind," the prohibition applied in only limited circumstances.[122] The limited circumstances included the elimination of the following: (1) agreements to artificially maintain price, (2) arrangements limiting competition in industries, (3) price discrimination, and (4) refusals to supply.[123]

"Since the mid-1980's, Mexico has achieved progress in opening up its economy to international competition."[124] These measures increased the role of private parties in economic management and removed barriers to the efficient allocation of resources.[125] The reforms have paved the way for Mexico's first aggressive antitrust legislation, the Federal Economic Competition Law, which established its first antitrust enforcement agency, the Federal Competition Commission.[126]

The new Federal Competition Commission describes the recent reforms in Mexico as follows:

> Mexico is undergoing far-reaching changes in its economic strategy. The State's role in the economy has been reformed, and distortions that hindered efficient market operations have been eliminated. The revision of the regulatory framework in which economic activity takes place led to the repeal and

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120. ANNUAL REPORT, *supra* note 43, at 14.

121. *Id. See generally* MORICI, *supra* note 13.

122. CONST. art. 28 (Mex.); *see also* GISBERT H. FLANZ & LOUISE MORENO, MEXICO, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 32 (1988).

123. CONST. art. 28 (Mex.)State enterprises run by the government are also excluded from the definition of monopolies. *Id.*; *see also* FLANZ & MORENO, *supra* note 122, at 32. State enterprises include such industries as the coinage of money, the postal system, the telegraph, radiotelegraphy and satellite communication, federal banking, petroleum and other hydrocarbons, basic petroleum chemistry, radioactive minerals, nuclear power production, electricity, and railroads. FLANZ & MORENO, *supra* note 122, at 32.

124. FLANZ & MORENO, *supra* note 122, at 32.

125. *Id.*

126. Federal Economic Competition Law, *supra* note 67.

modification of laws and regulations which limited the initiative and activity of producers and consumers.[127]

Finally, the Commission has set the following two broad objectives to guide Mexico's change in strategy: (1) "to set the foundations of a modern market economy that can generate sustained growth in the medium term" and (2) "to redefine the State's role in the economy so that it may assist more effectively those that are most in need."[128]

B. Current Antitrust Laws Pertaining to Restraint of Trade and Monopolies

1. *United States*

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal."[129] Though section 1 literally prohibits every contract, combination, or conspiracy in restraint of trade, the prohibition has long been confined to "only such concerted activity as reasonably restrains trade."[130]

In determining what activities reasonably restrain trade, the court considers several factors. First, it must define the market, as comprised of geographical and product specifications, in which the company under investigation does business.[131] Second, the court must determine if the company has power within that market, as defined by market share and consumer product differentiation.[132] Once these two threshold determinations have been made, the court can engage in a balancing test required under the "rule of

127. ANNUAL REPORT, *supra* note 43, at 9.
128. *Id.*
129. 15 U.S.C. § 1.
130. Graphic Prod. Distrib. v. Itek Corp., 717 F.2d 1560, 1566 (11th Cir. 1983); *see also* Standard Oil v. United States, 221 U.S. 1, 31 (1911).
131. *Itek,* 717 F.2d at 1569.
132. *Id.* at 1570.

reason."[133] "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[134]

The balancing test is used to determine whether the company's actions *hurt* rather than *help* competition.[135] This determination requires the courts to identify and weigh the anti-competitive aspects of the company's action or practice against the pro-competitive aspects in order to determine the overall effect on competition. If the company's actions have an overall anti-competitive effect, with due consideration given to legitimate business reasons or economic rationale, it has violated the Sherman Antitrust Act under the rule of reason test.

The broad-ranging inquiry required by the rule of reason is limited by an insistence that, at the threshold, the plaintiff establish the defendant's market power.[136] Once this threshold is crossed, a systematic comparison of the negative effects of the actions is required.[137] "In order to establish the defendant's market power, a plaintiff must first offer proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact."[138] The next step, therefore, is to deter-

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133. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 (1977) (overruling the "per se" rule stated in United States v. Schwinn & Co., 388 U.S. 365 (1967)). Under the rule of reason, the ultimate legality rests on whether the plaintiff has demonstrated an anticompetitive effect that is not offset by a need to achieve a procompetitive benefit or justification. *Id. See also* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *Standard Oil*, 221 U.S. at 62 (adopting the rule of reason).

134. *Continental T.V.*, 433 U.S. at 49-50. *See also* Abrams v. Anheuser-Busch, Inc., 811 F. Supp. 848, 869 (E.D.N.Y. 1993). "[A] per se rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" Nat'l Collegiate Ass'n v. Board of Regents, 468 U.S. 85, 100 (1984) (stating that "[i]n such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it was found.").

135. General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984) (emphasis added).

136. *See* Graphic Prod. Distrib. v. Itek Corp., 717 F.2d 1560, 1568 (11th Cir. 1983). *But see Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (applying the rule of reason test and concluding that a finding of actual, sustained adverse effects in the dental services market was legally sufficient to support finding of unreasonable restraint, even in absence of market elaborate analysis); *Nat'l Collegiate Ass'n*, 468 U.S. at 86 (applying rule of reason test and holding that "[as] a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that "when there is an agreement not to compete in terms of or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'").

137. *Itek*, 717 F.2d at 1571.

138. *Id.* at 1569. *See also Abrams*, 811 F. Supp. at 848. "A relevant market is comprised of those 'commodities reasonably interchangeable by consumers for the same

mine whether the company is a market power in the relevant market.

"Market power is the ability to raise prices significantly above the competitive level without losing all of one's business."[139] Because market power is conceptually difficult to define in any given case, two criteria are used to measure it: (1) market share and (2) product differentiation.[140] In determining market share, however, the amount of market share required to establish market power is ambiguous.

Several cases have attempted to define the amount of market share required for market power. In *American Tobacco Co. v. United States*,[141] the Supreme Court found that "over two thirds of the entire domestic field of cigarettes and over eighty percent of the field of comparable cigarettes" constituted a "substantial monopoly."[142] In *United States v. Grinnell Corp.*,[143] the Supreme Court held that an eighty-seven percent market share constituted monopoly power. The Supreme Court has also held that an eighty to ninety-five percent market share is sufficient enough indication of monopoly power to withstand summary judgment.[144] In *United States v. Aluminum Co. of America*,[145] the court found 90% of market constituted a monopoly. Finally, in *Graphic Prods. Distrib. v. Itek Corp.*,[146] the court found that a seventy to seventy-five percent market share of the relevant market constituted market power. Thus, there is some ambiguity as to the amount of market share required to indicate monopoly power.

The court also examines product differentiation because, where it exists, "a company will have additional freedom to raise the price of its product above that of competing brands while still

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purposes . . . .'" United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956).

139. *Itek*, 717 F.2d at 1570 (quoting Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)).

140. *Id. See also* Storer Cable Communications, Inc. v. Montgomery, 826 F. Supp. 1338, 1351 n.15 (M.D. Ala. 1993).

141. 328 U.S. 787 (1946).

142. *Id.* at 797.

143. 384 U.S. 563, 571 (1966).

144. *See* Eastman Kodak Co. v. Image Technical Serv., Inc., 112 S. Ct. 2072, 2076 (1991).

145. 148 F.2d 416, 429 (1945).

146. *See* Graphic Prod. Distrib. v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983)

retaining a substantial portion of business."[147] Thus, where there is strong product differentiation, significant market power may exist *without* market dominance.[148] If it is possible that the defendant has the power to substantially restrain trade, the inquiry proceeds to the question of whether the challenged practice is likely—with due consideration for any justifications presented by the defendant—to help rather than hurt competition.[149] As the *Itek* court pointed out, vertical restraint on trade,[150] for example, involves some reduction in intrabrand competition, almost by definition.[151] This may or may not, however, have a negative impact on interbrand competition.[152] "The real issue remains whether the loss of intrabrand competition itself injures or benefits potential consumers of the brand in question."[153] The restraint injures consumers if they are denied intrabrand choices from which they would benefit, without obtaining more services through interbrand competition.[154]

The complete analysis, therefore, requires a balancing of the company's business and economic purposes against possible unreasonable effects. The burden of proving unreasonable effects lies with the antitrust plaintiff.[155] Nevertheless, the plaintiff is not required to offer every possible pro-competitive rationale for a vertical restraint, and prove their inapplicability to the restraint in question.[156]

In analyzing the defendant's reasons for its seemingly anticompetitive behavior, the court considers: (1) the condition of the business before and after the restraint was imposed, (2) the nature of the restraint and whether its effect is actual or probable,

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147. *Id.* at 1570 n.15.

148. *Id.*

149. *See* General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984); *Itek*, 717 F.2d at 1571.

150. "Vertical restraints are agreements between firms at different levels of the chain of distribution, ranging from the original supplier of basic compenents to the retailer who sells the finished product to the ultimate consumer." STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST 224 (1993)

151. *Itek*, 717 F.2d at 1571.

152. *See Continental*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977) (listing the positive effects that restricting intra-brand competition might have on interbrand competition).

153. *Itek*, 717 F.2d at 1571.

154. *Id. See also Storer Cable Communications*, 826 F. Supp. at 1351.

155. *Itek*, 717 F.2d at 1573.

156. *Id.*

(3) the history of the restraint, and (4) the evil believed to exist by imposing the restraint.[157] Furthermore, the plaintiff's arguments can be supported by evidence of anticompetitive intent on the part of the company.[158]

Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[159] The U.S. Supreme Court defines monopoly power as "the power to control market prices or exclude competition."[160] A Section 2 offense has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development resulting from legitimate means.[161]

In enforcing section 2 of the Sherman Act, the courts do not assume, per se, that all monopolies are harmful.[162] Rather, the courts seek out only those companies that have become monopolists through illegitimate means, or that, after becoming a monopolist, act illegitimately to maintain power.[163]

2. *Canada*

The Competition Act of 1986 completely changed Canada's prior monopoly laws.[164] Prior to the enactment of the Competition Act, the Combines Investigation Act governed antitrust violations and provided: "Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offense and liable to imprisonment for a term not exceeding two years."[165]

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157. *Id.* at 1568.

158. *Id.* at 1573 (holding that evidence of anticompetitive intent is highly probative, not because good intention will save otherwise objectionable regulation, but because knowledge of intent may help the court to interpret facts and predict consequences).

159. *Id.* § 2.

160. United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1966).

161. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). Legitimate means include: a superior product, business acumen, and historical accident. *Id.* at 571.

162. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272-73 (2d Cir. 1979).

163. *Id.* Unlike in criminal cases, specific intent to monopolize is not required in civil cases.

164. *See generally* Competition Act, S.C., ch. 26 (1986) (Can.).

165. Combines Investigation Act, R.S.C., ch. C-23, art. 1 (1985) (Can.).

The Combines Investigation Act presented two main problems for the Canadian judiciary that were eradicated by the new Competition Act. First, the criminal burden of proof placed a "high onus on the Crown."[166] Second, the need to prove that a monopoly operated to the detriment of the public proved to be a difficult hurdle for the prosecution.[167]

Under the Competition Act, monopolization has been termed "abuse of a dominant position."[168] As in the United States, monopolization is adjudicated in a civil proceeding under the jurisdiction of the Competition Tribunal.[169]

Under the Act, the Tribunal must make three basic findings before ordering an anti-competitive practice to cease.[170] First, the Tribunal must find that one or more persons substantially or completely control the class of business.[171] Second, the person or persons must have engaged in the anti-competitive practice.[172] Third, the anti-competitive practice must have, or be likely to have, the effect of preventing or substantially lessening competition in a market.[173]

In *Eddy Match Co. v. The Queen*,[174] the Quebec Court of Appeal defined control as:

> [W]hen a group of companies engage in the same business or alone in the field; when they work together as units; when they are free to supply the market or to withhold their market; when there is no restriction on the prices which they charge, save their own self interest; when their freedom to exclude individuals' customers is restricted only by their interpretation of existing penal laws, then by all normal standards, those companies are in control of the business in which they are engaged.[175]

If the Tribunal finds that the defendant substantially or completely controls the class of business, then the inquiry proceeds

166. KAISER, *supra* note 99, § 9A.01.
167. *Id.*
168. Competition Act, S.C., ch. 26 (1986) (Can.). *See also* Warren Grover & Robert Kwinter, *The New Competition Act*, 66 CAN. BUS. REV. 267, 287 (1987).
169. Competition Act, S.C., ch. 26 (1986) (Can.).
170. Competition Act, S.C., ch. 26, §§ 51(a)-(c) (1986) (Can.).
171. *Id.* § 51(a).
172. *Id.* § 51(b).
173. *Id.* § 51(c).
174. 18 C.R. 357; 109 C.C.C. 1; 20 C.P.R. 107 (1953) (Can.).
175. Grover & Kwinter, *supra* note 168, at 287.

to whether the defendant firm engaged in an anti-competitive act.[176] This raises the question: what is an anti-competitive act?

The new legislation provides examples of anti-competitive acts to guide the Tribunal.[177] The list includes the following acts: the squeezing of margins,[178] acquisition of a competitor's supplier or a competitor's customer,[179] freight equalization,[180] fighting brands,[181] preemption of scarce resources,[182] buying up products to prevent falling prices, adoption of incompatible product specifications,[183] inducing a supplier not to sell,[184] and selling articles below cost.[185] The list provided in the Act is not exhaustive. The examples provided, however, indicate that prohibited practices include anti-competitive intent or purpose.[186]

The final prong of the inquiry requires that "the abuse must have, or be likely to have, the effect of substantially lessening competition in a market."[187] It is unclear what the Tribunal seeks to achieve in the third prong of the analysis. "Once the Tribunal has found 'dominance,' which by definition posits a market completely or substantially devoid of competition, and a

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176. *Id.*

177. Competition Act, S.C., ch. 26. §§ 50(a)-(i) (1986) (Can.).

178. *Id.* § 50(a). This squeezing of margins occurs in vertically integrated industries with dual distribution systems. An integrated supplier can squeeze the margin available to an unintegrated customer who competes with the supplier. Grover & Kwinter, *supra* note 168, at 289-91.

179. Competition Act, S.C., ch. 26, § 50(b) (1986) (Can.). This is done through acquisition of a customer or supplier who would otherwise be available to a competitor. *Id.*

180. *Id.* § 50(c). Freight equalization occurs when a dominant firm may automatically match a competitor's price regardless of freight charges. This negates the advantage a small firm may have in terms of proximity to the market. Grover & Kwinter, *supra* note 168, at 291-92.

181. Competition Act, S.C., ch. 26, § 50(d) (1986) (Can.). Fighting brands is the use of selective, regional or temporary brands to discipline or keep customers out. Grover & Kwinter, *supra* note 168, at 294-95.

182. Competition Act, S.C., ch. 26, § 50(e) (1986) (Can.). Preemption of scarce resource is the practice of cutting off the source of supplies for potential entrants. Grover & Kwinter, *supra* note 168, at 295.

183. Competition Act, S.C., ch. 26, § 50(g) (1986) (Can.). In some industries, product standards are essential for distribution. The adoption of unique standards by a dominant firm can forestall competition. Grover & Kwinter, *supra* note 168, at 296.

184. Competition Act, S.C., ch. 26, § 50(h) (1986) (Can.). A dominant firm may use its purchasing power to coerce a supplier to cut off supply to a competitor. Grover & Kwinter, *supra* note 168, at 296-97.

185. Competition Act, S.C., ch. 26, § 50(i) (1986) (Can.).

186. Grover & Kwinter, *supra* note 168, at 288-89.

187. *Id.* at 297.

practice of anti-competitive acts, it is unclear what additional relevance the 'substantial lessening of competition' factor could have to the Tribunal's determination as to the existence of abusive conduct."[188]

In making an order regarding abuse of a dominant position, the Tribunal must also consider whether the practice is the result of superior competitive performance.[189] Where the Tribunal finds that the anti-competitive practice has had, or is having, the effect of preventing or "lessening competition substantially" in a market, and that additional measures are required to restore competition, it may direct the involved parties to take such actions "as reasonable and necessary to overcome the effects of the practice in that market."[190]

3. Mexico

Mexico has restructured its economy and effectuated substantial liberal economic reforms.[191] These reforms have included privatization of state-owned enterprises, significant reductions in maximum tariff rates, elimination of restrictive licenses on imported goods, and the encouragement of foreign investment and ownership of Mexican firms.[192] Also, the Mexican legislature enacted additional antitrust measures to streamline the NAFTA transition and to minimize potential trade disputes.[193]

In December 1992, Mexican President Salinas de Gortari signed and enacted the Federal Law Governing Economic Competition.[194] Modeled after antitrust laws in the United States, Mexico's Federal Economic Competition Law is enforced

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188. *Id.*

189. Competition Act, S.C., ch. 26, § 51(4) (1986) (Can.).

190. *Id.* § 51(2).

191. *See generally* COMISIÓN FEDERAL DE COMPETENCIA, REGULATORY REFORM AND COMPETITION POLICY: SETTING THE INCENTIVES FOR AN EFFICIENT ECONOMY (1994). The brochure describes the reforms taking place in Mexico and introduces Mexico's new Federal Law on Economic Competition, which is enforced by the newly-created Federal Competition Commission. *Id.*

192. Wu & Longley, *supra* note 114, at 6.

193. Federal Economic Competition Law, *supra* note 67.

194. *Id.* On November 26, 1992, President Carlos Salinas de Gortari sent the Chamber of Deputies a legislative initiative "to promote domestic and foreign competition by forbidding the creation of monopolies." *Economic News & Analysis on Mexico*, December 2, 1992, *reprinted in* LEXIS, Nsamer Library, Mexico File. In December 1992, the [Chamber of Deputies] approved the Federal Law of Economic Competition. The law became effective in July 1993. Federal Economic Competition Law, *supra* note 67.

by the Federal Competition Commission. It sets regulations regarding competition, mergers, acquisitions, and purchases of Mexican companies.[195]

In 1993, the first year of its existence, the Commission kept a low profile.[196] Although the Commission was intended to break up cartels, the law failed to accomplish this goal throughout 1993.[197] The main problems facing the Commission included lack of experience and lack of resources.[198] The Mexican agency had a full-time staff of only fifteen and no clearly defined budget.[199]

The Commission appears to be far more successful during the first half of 1994, however, as indicated by its first annual report, which details the reforms and decisions it has made since its origination.[200] United States antitrust enforcement officials are praising the new laws and have demonstrated faith that the nation has taken steps to prevent a repeat of the problems encountered in the past.[201]

As in the United States and Canada, Mexico's new antitrust approach is aimed at protecting competition.[202] Article 2 of the

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195. *Changes in Mexican Law Anticipate Approval of NAFTA, Attorneys Say*, Int'l Trade Daily (BNA), (Apr. 15, 1993) *available in* LEXIS BNA Library, BNAITD File.

196. Janet Duncan, *Mexico Monopoly Buster Says Agency Profile to Rise,* Reuters, July 5, 1994, *available in* LEXIS, News Library, Wires File.

197. Jonathan D. Glater, *Busting Trusts South of the Border—Latin Countries Take Antitrust Lessons from U.S. to Open Markets*, WASH. POST, Aug. 21, 1993, at B1.

198. *Id.*

199. *Id.*

200. ANNUAL REPORT, *supra* note 43, at 10-11. In its first annual report, the Commission discusses its first steps taken "to improve economic efficiency and increase social welfare." *Id.* at 10. The Commission investigated the bank credit card market to prevent possible anticompetitive conduct on the part of financial institutions regarding the setting of merchant commissions and interest rates. *Id.* The investigation resulted in a consent agreement with the main financial institutions sponsoring the Banamex, Bancomer, and Carnet credit cards. *Id.* The agreement allows merchants to individually negotiate commissions with each acquiring bank and grant comsumers discounts for payments in cash. *Id.* Each bank will also individually set the interest rate to cardholders. *Id.* The Commission also investigated the rules for operating and opening gasoline stations. *Id.* As a result, the Commission signed a consent agreement with Petróleos Mexicanos that will "increase the number of gasoline stations and improve their geographical distribution according to market requirements." *Id.* The consent agreement also allows gasoline station operators to offer their own choice of complementary products or services, from any supplier. *Id.*

201. *Chief of Antitrust Division Commends Mexico's New Competition Law*, Int'l Business & Finance Daily (BNA) (Mar. 30, 1993), *available in* LEXIS, Nsamer Library, ALLNSA File.

202. Federal Economic Competition Law, *supra* note 67, ch. 1, art. 2. *See also* Antitrust and Trade Reg. Rep. (BNA) No. 1606, at 299 (Mar. 18, 1993) *available in* LEXIS, BNA

Federal Competition Act strives to safeguard the Mexican consumers by "protecting the process of competition" in Mexican markets.[203] The purpose of Article 2 is "to protect the process of competition and free market participation, through the prevention of monopolies, monopolistic practices and other restraints on the efficient operation of goods and services markets." [204]

As in the United States and Canada, the new Mexican approach toward monopolies depends on the type of practice being examined. The Mexican law bans horizontal restrictive action deemed to be "absolute monopolistic practices" such as price fixing, production and distribution restrictions, market division and concerted bidding in public tenders.[205] Absolute monopolies will be severely sanctioned and monopolistic contracts will have no legal force.[206] This rule is similar to the "per se" rule of illegality employed in the United States.[207] "[R]elative monopolistic practices" like resale price maintenance, tied purchases, exclusivity contracts, refusals to deal and boycotts may be permissible, depending on their effect.[208] Mexico's approach to relative monopolies is similar to the United States' approach under the rule of reason.[209] Such actions are prohibited only if a company

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Library, TRADRG File.

203. Federal Economic Competition Law, *supra* note 67, ch. 1, art. 2.

204. *Id.*

205. *Id.* Absolute monopolistic practices are contracts, agreements, arrangements, or cartels of economic agents competing among themselves, whose aim or effect is any of the following: (1) to lower, raise, fix, or manipulate the sale or purchase price of goods or services at which they are supplied or demanded on the market, or the exchange of information that has the same purpose or effect; (2) to establish an obligation not to produce, process, distribute, or market but a restricted or limited amount of goods or a restricted or limited type, volume, or frequency of service; (3) to divide, distribute, assign, or impose portions or segments of a present or potential market of goods and services, on the basis of certain customers, suppliers, time, or space, or those to be determined; or (4) to establish, rig, or coordinate bids, or to abstain from submitting proposals in tender competitions or bidding in public auctions. *Id.* ch. 2, art. 9.

206. *Id.* ch. 2, art. 9.

207. For a discussion of the "per se" rule, see *supra* note 134 and accompanying text.

208. Federal Economic Competition Law, *supra* note 67, ch. 2, art. 10. "Relative monopolistic practices are considered to be those acts, contracts, agreements or cartels, whose purpose or effect is or could be to wrongfully displace other agents from the market, substantially impede their access thereto or to establish exclusive advantages in favor of one or several entities . . . ." *Id.*

209. For a discussion of the "rule of reason," see *supra* note 133 and accompanying text.

has substantial power over the relevant market and such power has the effect of restraining competition.[210]

In determining the relevant market, the Commission considers the following factors: (1) the possibility and feasibility of product substitution, (2) the cost of product distribution, (3) the cost and probability of users or consumers seeking other markets, and (4) federal, local or international restrictions that limit access by users or consumers to alternate sources of supply or the access by suppliers to alternate customers.[211]

Whether a company has "substantial" market power is determined on a case-by-case investigation based on the following criteria: (1) the firm's market participation and its ability to unilaterally fix prices without competitors being able to counteract, (2) the presence of barriers to market access, (3) the existence and market power of competitors, (4) the access of the company and its competitors to input and other raw materials, and (5) recent market performance.[212]

One commentator compared the Competition Commission's analysis of relative monopolies to a series of filters that serve to separate true monopolistic practices from those that encourage efficiency and are therefore legal.[213]

> In the first step or filter, the commission receives a complaint and begins a study of the relevant market. If the commission finds that the problems exist only in a small sector of the market, the case will be dismissed. For example, if a good trades internationally, and the domestic price in Mexico does not systematically differ from the international price, it is improbable that a monopoly exists.[214]

If the Competition Commission determines that a price differential exists, indicating a monopoly, the Commission "investigates the responsible parties in the market" in the second filter.[215] The case will be dismissed if the investigation reveals that the responsible parties have insufficient power to monopolize

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210. Federal Economic Competition Law, *supra* note 67, ch. 2, art. 11.
211. *Id.* ch. 2, art. 12.
212. *Id.* ch. 2, art. 13.
213. Joel Russell, *New Monopoly Law Limits Anti-Competitive Practices; A Level Playing Field*, BUS. MEX., Aug. 1993, *available in* LEXIS, News Library, CURNWS File.
214. *Id.*
215. *Id.*

the market.[216] If the case is dismissed, the practice in question may continue.[217] Otherwise, the case proceeds to the third filter.[218]

In the third filter, the Commission analyzes the effect of the practice on competition.[219] "The Commission will follow consistent procedures and decision-making processes, but will not use statistical "rules" to determine the presence of a monopoly."[220]

Two specific provisions of the Economic Competition Law are being praised by the U.S. Department of Justice.[221] Article 14 of the Act provides that any act of a Mexican State Government, which is intended to "prohibit the entry or exit from its territory of goods or services of domestic or foreign origin," shall have no legal force.[222] Article 15 of the Act further provides further that the Competition Commission has the authority to determine that or whether such trade restraining acts by state governments exist.[223] These Articles are not included in the United States antitrust laws and are viewed by the U.S. Justice Department as an improvement over U.S. law.[224]

There is some criticism, however, regarding the extent to which the new laws will be applied. The law will not apply to federal agencies such as the postal service and the state-run oil company PEMEX.[225] One prediction is that the law may not have much impact on giant companies such as Vitro, Cemex, and Televisa.[226] Mexico needs big companies to compete in the

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Chief of Antitrust Division Commends Mexico's New Competition Law*, Int'l Business & Finance Daily (BNA) (Mar. 30, 1993), *available in* LEXIS, Nsamer Library, ALLNSA File.
222. Federal Economic Competition Law, *supra* note 67, ch. 2, art. 14.
223. *Id.* ch. 2, art. 15.
224. *Chief of Antitrust Division Commends Mexico's New Competition Law*, Int'l Business & Finance Daily (BNA) (Mar. 30, 1993), *available in* LEXIS, Nsamer Library, ALLNSA File.
225. *Id.*
226. Monopoly players in Mexico include: Aerovias de Mexico, which controls Aeromexico and Mexicana (1992 airline sales of $1 billion); Cementos Mexicanos (1992 cement sales of $2.2 billion); Vitro (1992 glass sales of $3.3 billion); Petroleos Mexicanos (1992 oil and gas sales of $21.3 billion); Ferrocarriles Nacionales de Mexico (1992 railway sales total not available); Transportacion Maritima Mexicana (1992 shipping sales of $.4 billion); Telefonos de Mexico (1992 telephone sales of $6.7 billion); Televisa (1992

international arena, and the government is not going to weaken them because it would make it easier for foreign companies to seize their markets.[227] One commentor explains: "[m]onopolies and monopolistic practices have long existed in Mexico and long been ignored by the authorities. Under the previous monopoly law, which dated from 1934, only one law suit was ever brought to Mexican courts. Even today, many key industries are dominated by a single player that overshadows competitors."[228]

C. Current Antitrust Laws Pertaining to Mergers

1. United States

Under the Hart-Scott-Rodino Act,[229] the companies planning mergers or acquisitions must submit advance notification to the U.S. Federal Trade Commission ("FTC").[230] The FTC then reviews the potential merger or acquisition to determine if it might violate the Clayton or FTC Acts.[231] If appropriate, the FTC then may bring an enforcement action to stop or modify the nature of the plan.[232]

The FTC's merger analysis consists of two main steps that are similar to the monopoly approach. First, it defines the relevant market in terms of product and geography.[233] Then, the FTC analyzes the merger to determine if it substantially lessens competition.[234] The main difference between the monopoly analysis and the merger analysis is the relevant market definition. In the merger analysis, the FTC can consider the effects of the merger in *any* relevant geographic market, regardless of how broad

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television sales of $ 1.4 billion). *Monopoly Rules: Effects of the New Antitrust Law May Not be Clear, Business Latin America* (Oct. 4, 1993), *available in* LEXIS, Nsamer Library, Mexico File.

227. *Id.*

228. *Id.*

229. Hart-Scott-Rodino Act, 15 U.S.C. §§ 15(c)-(h), 18(a), 66 (1988).

230. 15 U.S.C. § 18(a).

231. 15 U.S.C. § 21 (1988).

232. 15 U.S.C. § 53(b) (1988).

233. Abrams v. Anheuser-Busch, Inc., 811 F. Supp. 848, 866 (E.D.N.Y. 1993).

234. California v. American Stores Co., 872 F.2d 837 (9th Cir. 1988). The court held: "[t]o establish a prima facie violation of section 7 of the Clayton Act, California must prove that the effect of the American Store's acquisition of Lucky's stock 'may be substantially to lessen competition.'" *Id.* at 841 (citing 15 U.S.C. § 18).

or how narrow; whereas, in the monopoly analysis the FTC only considers the broader relevant geographic market.[235]

The seminal case in defining the market for merger analysis purposes is *United States v. Brown Shoe*.[236] In *Brown Shoe*, the Supreme Court held that the outer boundaries of broad markets "are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it,"[237] but that narrower "well-defined submarkets" might also be appropriate lines of commerce.[238] By defining the relevant product market as narrowly as the narrowest submarket, and by defining the relevant geographic market as any area of the country affected, the FTC can focus on the smallest market possible when assessing the effect of a merger or acquisition.

In *Brown Shoe*, the Supreme Court upheld the trial court's finding that men's, women's, and children's shoes made up separate submarkets.[239] The Supreme Court established the following indicia for identifying areas of actual or potential competition: (1) industry and public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.[240]

In *Brown Shoe*, the Supreme Court relied on the presence of separate manufacturing facilities, public recognition of separate submarkets, the peculiar characteristics of each type of shoe, and distinct customer groups.[241] The court found that these factors were economically significant in identifying actual fields of competition simply because men do not normally buy women's or children's shoes for their own use, and women and children exhibit parallel purchasing habits regarding shoes made for their respective groups. This natural barrier insulated sales of each of the

235. Section 7 of the Clayton Act refers to "*any* line of commerce . . . in *any* section of the country" 15 U.S.C. § 18 (emphasis added).
236. 370 U.S. 294 (1962).
237. *Id.* at 324.
238. *Id.* at 325.
239. *Id.* at 326.
240. *Id.* at 325.
241. United States v. Brown Shoe, 370 U.S. 294, 326 (1962).

three types of shoes from competition with the others and justified their division into separate submarkets.[242]

An example analysis is the merger case of *California v. American Stores Co.*[243] The court had to determine which relevant product market encompassed supermarkets. The defendant, American Stores, argued that the market should not be limited to supermarkets[244] but rather should include "all retailers of grocery products, such as convenience stores, "mom and pop" grocery stores, gasoline stations, delis, bakeries, and limited assortment warehouse hyper-stores."[245] According to the defendant, consumers readily engage in demand substitution between different types of grocery retailers. By broadening the market definition, American Stores had a better chance of proceeding with the planned merger, because the anti-competitive effects of such a merger are quite significant in smaller markets due to fewer competitors.

The court, however, accepted the plaintiff's view that the relevant product market was limited to supermarkets: full-line grocery stores with more than 10,000 square feet.[246] The district court reasoned that only supermarkets compete for consumers' periodic grocery shopping needs. In reaching its decision, the court relied on expert testimony and on American Stores' own internal marketing documents, which suggested that it considered other supermarkets to be its only competitors.[247] The Ninth Circuit expressed reservation, however, as to whether, under independent review, it would reach the same conclusion regarding relevant product market.[248] The court postponed ultimate determination of the issue because its review in *American Stores* required strong deference to the trial court. This case illustrates the uncertainty that exists in the United States regarding the definition of markets. As is often the case in the submarket analysis, an economic debate occurs.

242. Thurman Industries, Inc. v. Pay 'n Pak Stores, Inc., 875 F.2d 1369, 1375 (9th Cir. 1989).

243. 812 F.2d 837 (9th Cir. 1988).

244. *Id.* at 841.

245. *Id.*

246. *Id.*

247. *Id.*

248. 812 F.2d at 843.

Another example of this uncertainty can be found in *Thurman Industries v. Pay 'N Pak Stores, Inc.*[249] In *Thurman*, the Ninth Circuit expressed some reservation in finding a submarket to exist[250] just two months after *American Stores.* The *Thurman* court refused to find that "home center stores" constituted a submarket.[251] Thurman argued that home center stores constituted a discrete product market because of their broad selection of building, plumbing, and electrical supplies for home remodeling projects and their trained sales staffs. Thurman maintained that the unique combination of goods and services allows do-it-yourself remodelers and home repairers to obtain "everything they need at one location." [252]

> The goods and services that sellers or producers offer provide the best indicia of who competes in the same market. Thus, a product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand.[253]

The court admitted, however, that the product market could be narrowed further to account for identifiable submarkets and product clusters.[254]

Despite its recognition that submarkets and product clusters do, in fact, exist, the *Thurman* court found that the market could not be defined so narrowly for home centers.[255] The court was swayed by "Pay 'N Pak's evidence that for any given product sold at a home center, a functionally equivalent or identical product is available for purchase at several more specialized stores" throughout the relevant geographic area.[256] Pay 'N Pak also presented evidence that consumers were quite sensitive to price fluctuations among the various vendors for any given product.[257] The court stated that Thurman could not contradict this evidence and that it

249. 875 F.2d 1369 (9th Cir. 1989).
250. *Id.*
251. *Id.* at 1374.
252. *Id.* at 1373.
253. *Id.* at 1374.
254. 875 F.2d at 1374.
255. *Id.* at 1374.
256. *Id.*
257. *Id.*

erroneously placed its reliance on a submarket or product cluster theory.[258]

Another factor the FTC considers in analyzing the effect of a merger or acquisition is the barriers to entry. That is because an absence of entry barriers into a market constrains anticompetitive conduct, regardless of the market's degree of concentration.[259] In evaluating the absence of entry barriers, the Court considers the following factors: (1) amount of capital necessary to become a competitor in the market, (2) availability of capital, (3) availability of technological advancements, (4) number and size of customers or firms already operating in the market, and (5) structure and nature of industry.[260]

2. *Canada*

As in the United States, the Canadian Parliament's intention is to not regard mergers as necessarily good or bad, but rather to consider the likely impact of each merger individually. The Canadian Tribunal hopes to eliminate any merger that "prevents or lessens, or is likely to prevent or lessen, competition substantially."[261] This approach closely resembles the approach taken in the United States under Section 7 of the Clayton Act.[262] The similar wording of the Canadian and U.S. merger laws, then, allows for development of complimentary case law in the United States and Canada.[263]

In defining markets for Canadian purposes, one can find guidance in the statutory factors that the Tribunal utilizes to determine whether or not a merger is likely to lessen competition substantially.[264] The list includes: (1) the extent to which foreign competitors could provide effective competition to the businesses of the parties to the merger,[265] (2) whether the business of a party to the merger is likely to fail,[266] (3) the extent to which

258. *Id.*

259. California v. American Stores Co., 872 F.2d 837, 843 (9th Cir. 1989).

260. *Id.* (recognizing the factors as established in FTC v. Warner Communications, Inc., 742 F.2d 1156, 1163-64 (9th Cir. 1984)).

261. Competition Act, S.C., ch. 26, § 64(1) (1986) (Can.). *See also* Grover & Kwinter, *supra* note 168, at 273.

262. *See supra* note 86 and accompanying text.

263. *See generally* Nielson-Jones, *supra* note 113.

264. Competition Act, S.C., ch. 26, §§ 65(a)-(h) (1986) (Can.).

265. *Id.* § 65(a).

266. *Id.* § 65(b).

acceptable substitutes for products supplied by the parties to the merger are likely to be available,[267] (4) barriers to entry,[268] (5) the extent to which effective competition could remain in a market that could be affected by the merger,[269] (6) the likelihood that the merger could result in the removal of a vigorous and effective competitor,[270] (7) the nature and extent of change and innovation in a relevant market,[271] and (8) any other factor relevant to competition in an affected market.[272]

The Canadian approach rejects U.S. assumptions such as the Herfindahl-Hirschmann Index (HHI), used by the U.S. Justice Department to simplify the identification of mergers that may pose a threat to competition due to high market share concentration.[273] The Competition Act provides: "The Tribunal shall not find that a merger or proposed merger prevents or lessens . . . competition substantially solely on the basis of evidence of concentration or market share."[274] In the Canadian context, the list of factors included in the Competition Act ensures that no presumptions based on a Canadianized HHI will arise.[275] In addition, the Act recognizes a limited "gains in efficiency" defense where the merger is likely to result in gains in efficiency that will be greater than any adverse effect on competition resulting from the merger.[276]

The Tribunal considers two factors to determine if the "gains in efficiency" defense might apply: (1) a significant increase in the real value of exports, or (2) a significant substitution of domestic products for imported products.[277] The Act cautions, however,

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267. *Id.* § 65(c). This provision invites the Tribunal to consider products to which buyers might turn in response to a price increase in the principal product. Grover & Kwinter, *supra* note 167, at 273.

268. Competition Act, S.C., ch. 26, § 65(d) (1986) (Can.).

269. *Id.* § 65(e).

270. *Id.* § 65(f).

271. *Id.* § 65(g).

272. *Id.* § 65(h).

273. The HHI measures the sum of the area of the market share of each firm in the market. The Department of Justice 1984 Guideline promoted the use of this index and established the HHI as the threshold that will normally govern the Department's response to any particular merger. *See generally* United States Dep't. of Justice Merger Guidelines § 1.51 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992).

274. Competition Act, S.C., ch. 26, § 64(2) (1986) (Can.).

275. *Id.* § 65.

276. *Id.* § 68(1).

277. *Id.* §§ 68(a)-(b).

that the Tribunal "shall not find that a merger or proposed merger has brought about, or is likely to bring about, gains in efficiency by reason only of redistribution of income between two persons.[278]

As in the United States, the pertinent market identification, in terms of both product and geography, is central to the merger analysis.[279] In fact, Canada employs a market definition approach similar to *Brown Shoe.* "The outward boundaries of the market expand or contract as emphasis is given to factors such as product substitutability and the possible influence of actual or potential mergers where the merging entities are in direct competition at the same level of business within an industry."[280]

Mergers are divided into three categories and subject to different competitive concerns. This is important because the type of merger will dictate the test used to determine the merger's impact. The three types of mergers are: "horizontal," which applies to directly competing firms; "vertical," which applies to buyer-seller mergers; and "conglomerate," which usually describes mergers that are neither horizontal nor vertical.[281] As in the United States, once the market definition threshold is crossed, the next step is to apply the impact test.

Where the United States and Canada differ in their merger analyses is with regard to the test used for horizontal mergers. Basically, the United States views such mergers as possessing the greatest threat to consumers. Canada, on the other hand, takes a less presumptive approach:

> On the good side, mergers may be an important means by which owners who wish to divest themselves of a business can do so with a minimum of disruptive economic effects. They may also be the most appropriate means of achieving certain cost savings or bringing about industrial reorganizations made necessary by changes in patterns of demand or in the technical conditions of production.[282]

As with horizontal mergers, Canada also takes an approach similar to the United States with respect to to vertical mergers, yet there are slight differences. In the 1984 Merger Guidelines, the

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278. *Id.* § 68(3).
279. *See generally* Nielson-Jones, *supra* note 113.
280. *Id.*
281. Grover & Kwinter, *supra* note 168, at 273.
282. *Id.*

United States elevates the significance of entry barriers above market foreclosure to competitors.[283] The approach set out in the Guidelines may be useful to Canadian lawyers attempting to convince the Director not to act, but the U.S. court decisions are only persuasive for little more than interpretation of the statute.[284]

In sum, Canada and the United States certainly take similar approaches under merger laws. The most significant difference appears to be the Canadian rejection of statistical assumptions and the U.S. strict presumption that horizontal mergers threaten consumers. The strenuousness that the United States chooses to utilize in enforcing its antitrust laws, however, often depends on the administration in place at the time.[285]

3. *Mexico*

The mergers and acquisitions analysis has been the area most affected by the new competition law in Mexico.[286] When referring to mergers, the Federal Economic Competition Law also includes the term "trusts"[287] A trust, or merger, is "the acquisition of control, or any other act, whereby companies . . . are concentrated among competitors, suppliers, distributors or any other economic agents."[288]

As in the United States and Canada, there is a notification requirement in Mexico for mergers.[289] Since June 1993, large mergers cannot be completed until the Federal Competition Commission has been informed.[290] Notification is required if the

283. *Id.* at 279.

284. *Id.* at 280.

285. *See generally* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49 (1991). Kovacic argues that the federal antitrust system gives federal judges considerable discretion with which to determine the rules of competition. He concludes that "[i]n choosing federal judges, the Reagan/Bush appointees have adhered to conservative antitrust preferences more frequently than their Carter counterparts." *See also* Robert S. Stein, INVESTOR'S BUSINESS DAILY, Sept. 8, 1993, *available in* LEXIS, BNA Library, IBD File. Stein contrasts the different different philosophies of the Reagan and Clinton administrations and argues that "there are few areas where President Clinton will have greater opportunity to reverse President Reagan's legacy than in antitrust." *Id.*

286. ANNUAL REPORT, *supra* note 43, at 11.

287. Federal Economic Competition Law, *supra* note 67, ch. 3, art. 16.

288. ANNUAL REPORT, *supra* note 43, at 17.

289. Federal Economic Competition Law, *supra* note 67, ch. 3, art. 20.

290. *Id.*

transaction: (1) has a value of more than 12 million times the Mexico City minimum wage,[291] (2) if the deal involves the accumulation of thirty-five percent or more of the equity in a company with assets or sales greater than $55 million,[292] or (3) if the negotiation includes two or more agents whose combined annual sales exceed $220 million and involves an equity interest of more than $22 million.[293]

Furthermore, corporations should notify the relevant authorities in anticipation of any transaction in Canada, the United States, Japan, Australia, New Zealand, and most nations in the European Community.[294] The Commission will generally have forty-five calendar days after notification to approve the merger.[295] Because the time limits are similar to the laws in other countries, Mexican mergers and acquisitions should not be hampered by a slow administrative process.[296]

The Commission challenges and penalizes those trusts that have the purpose or effect to "diminish, impair or impede competition and free market participation in regard to equal, similar or substantially related goods or services."[297] As in the United States, the Commission considers the relevant market and the market power of the economic agents in that market.[298]

> The relevant market is defined by grouping goods or services that can substitute for each other, in terms of use and price. For this purpose, the Commission takes into consideration product characteristics, their geographic location and the ease of access to the product and its substitutes.[299]

After defining the relevant market, the Commission applies "concentration indices" to determine whether market concentration is significant.[300] If the merger in the relevant market is not significant, the Commission does not challenge the merger. If the

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291. *Id.* ch. 3, art. 20 (I).
292. *Id.* ch. 3, art. 20 (II).
293. *Id.* ch. 3, art. 20 (III).
294. *Id.* ch. 3, art. 21 (II).
295. *Id.* ch. 3, art. 21 (III). The mean response time was 27 days, as of June 1994. ANNUAL REPORT, *supra* note 43, at 17.
296. Joel Russell, *New Monopoly Law Limits Anti-Competitive Practices; A Level Playing Field*, BUS. MEX., Aug. 1993, *available in* LEXIS, Nsamer Library, Mexico File.
297. Federal Economic Competition Law, *supra* note 67, ch. 3, art. 16.
298. *Id.* ch. 3, art. 18.
299. ANNUAL REPORT, *supra* note 43, at 27.
300. *Id.*

merger in the relevant market is significant, but the Commission does not find any substantial power and it is not feasible to obtain such power as a consequence of the merger, the Commission does not challenge it either. If there is significant market concentration, the Commission determines whether the party or parties would acquire "substantial power" in the relevant market, by virtue of the transaction.[301]

The Commission considers the following factors in determining whether the merger impairs or impedes competition: (1) the merger allows the merging party to unilaterally fix prices or substantially restrict the stock or supply on the relevant market, without competitors able at present or potentially to offset the power; (2) actual or possible intent, on the part of the merger's beneficient, to wrongfully displace other economic agents or prevent their access to the relevant market; and (3) the merger substantially facilitates monopolistic practices.[302]

If, as a result of its investigation, it is apparant that the trust impairs or impedes competition, the Commission may impose penalties.[303] In addition, the Commision may: (1) make the merger contingent upon compliance with conditions or (2) order a partial or total breaking up of the trust which has been wrongfully created.[304]

In compliance with the new merger law, the Commission received fifty-two notifications, of which forty-five had been decided as of June 1994.[305] Of the forty-five decided cases, thirty-nine were approved as filed.[306] In the remaining cases, the Commission challenged the merger or imposed conditions on the merging parties to eliminate the possible anticompetitive effects of the transaction.[307]

V. CONCLUSION

Several factors existed at the time NAFTA was drafted that could have undermined the success of the Agreement. First, the

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301. *Id.*
302. Federal Economic Competition Law, *supra* note 67, ch. 3, art. 17.
303. *Id.* ch. 3, art. 19.
304. *Id.*
305. ANNUAL REPORT, *supra* note 43, at 17.
306. *Id.*
307. *Id.* For a discussion of specific merger cases, see *id.*, *supra* note 43, at 17-29.

Agreement did not employ a common body of antitrust law to which each signatory would subscribe. Second, Mexico did not have any effective antitrust laws at the time. The Agreement does not even require Mexico to adopt antitrust legislation in the future. Third, though the United States and Canada shared a similar antitrust tradition, their antitrust approaches still differed in many ways. The differences among the three countries' antitrust laws and antitrust law enforcement could have caused disputes.

Most importantly, the Agreement specifically exempts competition disputes from formal dispute resolution procedures. Under NAFTA, competition dispute resolution depends on the success of consultations between disputing signatories and their efforts to cooperate. Effective consultation and cooperation could, in turn, hinge on whether the countries share similar antitrust philosophies.

These factors could have undermined the success of the Agreement. Instead, the countries appear committed to achieving the NAFTA's primary goal—to promote conditions of fair competition in the free trade area. To this end, Mexico has taken revolutionary steps.

Mexico's Federal Economic Competition Law represents the country's dramatic break with its history of protectionism and state participation. The new law, modeled after U.S. antitrust laws, signifies Mexico's committment to achieving a more efficient and equitable trade environment. The law transforms the Mexican government's role in the economy and seeks to eliminate hinderences to efficient market operations. The effects of the new law might not be realized immediately, however, due to the long-lasting effects that Mexico's past monopolistic practices will likely have for many years to come.

Nevertheless, Mexico is striving to set the foundations of a modern market economy. Its new law promotes equity and opportunity in the free trade area. The Commission's actions since its inception indicate a strong commitment to its new antitrust philosophy. This committment, along with continued harmonization of U.S., Canadian, and Mexican antitrust laws, is critical to NAFTA's success.

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I would like to thank my parents, Thomas and Mary Murtaugh and my husband, Eric Collins, for their love and support.