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OPEN MARKETS, COMPETITIVE DEMOCRACY, AND TRANSPARENT AND RELIABLE LEGAL SYSTEMS: THE THREE LEGS OF DEVELOPMENT — *James R. Jones* — 25

In the 1990s, reform swept through Latin America. Open markets replaced closed economies. Real democracy replaced one-party rule and rigged elections. For about half of the region's population, economic and political conditions improved—yet the gap between the rich and poor widened. The poor half received little or no tangible benefits from these economic and democratic reforms. This article argues that the most difficult and probably most important reform remains to be accomplished: the reform of the legal and regulatory systems throughout Latin America. Until that happens, dreams of first-world recognition and respectability will elude Latin nations.

INDUSTRIAL AND COMPETITION POLICIES IN MEXICO — *Eduardo Pérez Motta* — 31

Until the 1980s, the Mexican economy was closed and strongly directed and controlled by the central government. However, starting with the second half of this decade and continuing into the 1990s, a marked change in industrial policy sought to create conditions that would open the economy and foster competition and economic efficiency. This process was undertaken by implementing a first gen-

eration of reforms, which included policies designed to attain macroeconomic stability, trade openness, and a modernization of the regulatory framework. A second generation of reforms included the application of horizontal instruments, like standardization and metrology; the passing of new laws, such as the property rights protection law and a law for foreign investments; and the creation of regulatory agencies. Nevertheless, unlike most countries undergoing this process, the opening of the Mexican economy did not include the services sector, where distortions persisted. This article underscores competition problems that persist in certain regulated sectors, such as transport, telecommunications, energy, and financial services. The article proposes specific measures to successfully tackle such challenges, including: (1) providing autonomy to sectoral regulators to avoid regulatory capture; (2) improving coordination between horizontal and vertical regulators; and (3) promoting accountability of these regulators, particularly with Congress and the judiciary. Finally, the author considers that laws can be perfected provided there is an adequate institutional framework. The reverse is not true: well-written laws are useless when the institutions underlying them are flawed.

LATIN AMERICAN COMPETITION POLICY: FROM NIRVANA ANTITRUST POLICY TO REALITY-BASED INSTITUTIONAL COMPETITION BUILDING *Ignacio De León, Ph.D.* 39

The inception of antitrust policy in Latin America is marred with misconceptions about the role of this policy. The seemingly pro-competitive goals declared under the law collide with the pursuit of welfare efficiency goals that could impair the natural outcomes of unfettered market forces. This article argues that the inherent contradiction between the stated goals of antitrust policy and its practical effects ultimately rests on the lack of analytical relevance attached to the institutional milieu within which antitrust policy is to produce its effects. Institutional connections are necessary to convey relevant information across the system; without these, the market would break down. The pursuit of imaginary optimality in the allocation of resources drives antitrust enforcement; yet, its unattainable nature makes this goal meaningless as a policy yardstick. Worse still, it distorts the economic need for institutional links between economic agents that, unavoidably, policymakers take as manifestations of monopolistic behavior.

THE INVESTMENT CLIMATE, COMPETITION POLICY, AND ECONOMIC DEVELOPMENT IN LATIN AMERICA *R. Shyam Khemani and Ana Carrasco-Martin* 67

The merits of fostering effective competition in the economy to encourage economic efficiency, consumer welfare, productivity, innovation, and attract investment have been increasingly and widely recognized by governments around the world. Relative to other regions, developing countries in Latin America have been at the forefront in adopting pro-competition measures such as deregulating industries, liberalizing trade and investment, and enacting competition (antitrust or antimonopoly) laws. However, the quality of the investment climate that determines the risks and transaction costs associated with investing and operating a business, as well as the implementation of competition law and policy, tend to vary widely across Latin American countries. This article argues that to enhance greater coherency and consistency in these policies, competition law-policy needs to be integrated as a central platform. Doing so will improve and buttress the investment climate prevailing in a country. To attain this requires increased efforts to promote better understanding of the instruments, requirements, and benefits of encouraging competition through "competition advocacy"—in government economic policy formulation, private sector business decisions, and civil society at large.

IMPLEMENTING COMPETITION LAW AND POLICY IN LATIN AMERICA: THE ROLE OF TECHNICAL ASSISTANCE — *Ana María Alvarez and Pierre Horna* — 91

Despite all the bottlenecks faced in implementing competition law and policies (CLP) in Latin America, several countries have been able to organize competition regimes and establish effective competition agencies. Experience has shown that the adage "no one size fits all" holds true; each country adheres to its own agenda. Therefore, technical assistance (TA) entails a bottom-up progressive approach and reflects national priorities. At the outset of implementing a CLP in developing countries, it is worth keeping in mind certain questions: Will the new regulation represent an additional burden to the already-charged institutional setting, or will it be an additional rule capable of merging with the existing regulatory agenda? Can countries sign agreements that include competition provisions if they do not have a national law, and if the adoption of a competition law is conditioned upon accepting a package of economic reforms? Does CLP represent a requirement under a cooperation agreement? Is it possible to promote the non-efficiency goals of CLP, which include benefits for consumers and better living conditions for the poor? Based on UNCTAD research and TA, this article draws on (1) an UNCTAD program, Competencia América Latina (COMPAL), on strengthening competition and consumer protection in Latin America; and (2) research on implementing competition provisions in regional trade agreements. This article addresses some policy conclusions in the context of successful implementation of a CLP. It is imperative to continue advocacy programs to raise awareness among policymakers, public officials, local businessmen, pro-consumers, NGOs, and citizens. A TA program to strengthen CLP should be based primarily on local priorities. Once the factors addressing local needs are cemented in place, regional initiatives must be tackled. This depends heavily upon similarities between member countries and on the political will to cooperate.

CONSTITUTIONAL TRANSPLANTS AND THE MUTATION EFFECT — *Horacio Spector* — 129

This article is concerned with constitutional transplantation, that is, the borrowing of constitutional institutions and precedents from foreign jurisdictions. It pursues two main goals. First, it argues that the borrowing of constitutional texts can be successful over long periods of time, and that when the transplanted texts fail, this failure is not easily attributable to transplantation alone. Second, it introduces the notion of a "mutation effect" to the theoretical analyses of judicial transplants. By "mutation" of precedents, the author means the process of continuing to extend the scope of a holding, regardless of its factual basis, to cover situations not even contemplated in the reasoning that grounded the original decision. The article discusses the mutation effect by using the doctrine of economic emergency, as invoked by the Argentine Supreme Court to justify the government's expropriations of bank deposits.

This paper also examines two lines of economic research on legal transplantation. First, the so-called "LLSV paper" implies that developing countries should transplant corporate and financial law from common law jurisdictions, because this legal family affords stronger protection for investors (e.g., creditors and shareholders) than civil law. Second, the label "transplant effect" has been used to describe the ineffectiveness of legal transplants that result from insufficient local demand for the transplanted law. By handling the notion of mutation effect the article seeks to qualify the conclusions that could be drawn both from the LLSV and the transplant-effect papers.

DOMESTIC BONDS, CREDIT DERIVATIVES, AND THE NEXT TRANSFORMATION OF SOVEREIGN DEBT *Anna Gelpern* 147

Financial markets in poor and middle-income countries are experiencing a fundamental shift. Until recently, most of them were shallow-to-nonexistent and closed to foreigners. Governments often had to rely on risky borrowing abroad; the private sector had even fewer options. But between 1995 and 2005, domestic debt in the emerging markets grew from $1 trillion to $4 trillion dollars. In Mexico, domestic debt went from just over twenty percent of the total government debt stock in 1995 to nearly eighty percent in 2007. Over the same period, derivative contracts to transfer emerging market credit risk surpassed the market capitalization of the benchmark bond index. The growth of domestic bonds and risk transfer technology makes the emerging markets look more "mature," or mainstream. Yet a closer look at recent changes suggests that the popular rhetoric of mainstreaming and convergence obscures more than it reveals. Emerging and mainstream markets may share participants and use similar instruments, but this formal resemblance rarely stands for substantive identity. Instead, investors use the same instruments differently in different markets, which, as the examples in the text suggest, can be its own source of risk. Legal scholarship has yet to engage with the shift from foreign-law, foreign-currency to local-law, local-currency bonds and the rise of credit derivatives in the emerging markets. This symposium essay maps the ongoing transformation to highlight gaps between formal and substantive convergence of emerging and mainstream markets and suggest implications for governance, risk management, and future research.

COMMENTARY: THE TRAJECTORY OF COMPLEX BUSINESS CONTRACTING IN LATIN AMERICA *Claire A. Hill* 179

Latin American contract documentation used to be quite short, as is typical in civil law countries. Increasingly, it resembles U.S. contract documentation: long, detailed, and full of boilerplate. This commentary discusses this development, and considers what effect it will have on contracting practice in Latin America; it also considers some broader implications of international convergence in contracting practices.

I argue that the explanation can't be that U.S. contracting practices are superior. That explanation doesn't even work in the U.S., where parties and institutions are geared up to use U.S. practices and documentation. Indeed, most of the virtues of U.S.-style contracting are unavailable when one or both parties are Latin American. My alternative explanation principally relies on agency costs, path dependence, and an arms-race. Once one party presents a U.S.-style contract, the other party is hard pressed not to respond in kind; eventually, U.S.-style documentation becomes the norm.

And it's not just the documentation that may become the norm. The penumbra-constricting ethos, wherein a specific prohibition is deemed to permit anything "up to the line" may be imported along with the U.S.-style documentation. But, given increasing globalization, which brings with it increasing heterogeneity among contracting parties, the adoption of U.S.-style documentation outside the U.S. may be inevitable.

THE COLOR OF BRAZIL: LAW, ETHNIC FRAGMENTATION, AND ECONOMIC GROWTH *Tade O. Okediji* 185

The influence of ethnic fragmentation on economic performance has been the subject of much scholarly inquiry in economics and political economics literature. Studies have shown that ethnic fragmentation has a distinct impact on the prospects for economic growth through its effect on government policies and in particular macroeconomic stabilization strategies. It has also become relevant in legal

scholarship, especially with regard to developing antidiscrimination laws to ameliorate incessant conflict in plural societies. Accurate measurements of the scale or degree of ethnic fragmentation are important for determining sustainable economic development policies and legal policies for overall development planning. The multiple, complex, and often intractable variations of ethnic identity are muted in existing measurements of ethnic fragmentation, including the prevailing ELF Index. Using Brazil as a case study, this article illustrates how a newly-derived index of ethnic fragmentation called the Social Diversity Index (SDI) is more robust and does a better job than the prevailing index in illustrating the multiple dimensions of ethnic fragmentation. Further, the analysis explores the link between ethnic fragmentation and economic growth in Brazil and examines legal remedies designed to address racial inequality in Brazil.

CORPORATE SOCIAL RESPONSIBILITY: THE ROLE OF LAW AND MARKETS AND THE CASE OF DEVELOPING COUNTRIES *Antonio Vives* 199

In order for the corporation to engage in responsible practices, many obstacles must be overcome. One such obstacle is the belief of many managers that the corporation would be violating its fiduciary responsibility if it engaged in activities that go beyond what is required by the law. Another obstacle is that many of those practices have a real cost but are perceived not to have a corresponding tangible benefit. The article discusses and dismisses these perceived obstacles and argues that it is both through law and the workings of the market that responsible behavior can enhance society's welfare. It is precisely the market that can induce the corporation to go beyond the minimum requirements of the law, thereby avoiding the need for constraining laws and regulation that would stifle creativity and innovation. In the case of developing countries, the situation is more critical; those same two obstacles are at work, but laws and regulations are deficient and poorly enforced and markets are even more imperfect. There is a strong need to develop institutions and markets and to educate managers on the long-term benefits of responsible behavior for society and, consequently, for the corporation itself through its contribution to economic development.

ORDER WITHOUT (ENFORCEABLE) LAW: WHY COUNTRIES ENTER INTO NON-ENFORCEABLE COMPETITION POLICY CHAPTERS IN FREE TRADE AGREEMENTS *D. Daniel Sokol* 231

There has been an explosion in the past ten to fifteen years of bilateral and regional free trade agreements in Latin America (together, preferential free trade agreements or PTAs). The purpose of PTAs is to increase trade, regulatory, and investment liberalization. As trade liberalization requires more than just a reduction of tariffs, PTAs include "chapters" in a number of areas of domestic regulation. These chapters that address domestic regulation create binding commitments to liberalize domestic regulation that may impact foreign trade. Among chapters that address domestic regulation, many of the Latin American PTAs include a chapter on antitrust or competition policy. Until now, the effectiveness of such chapters has remained undefined. This article undertakes the first empirical analysis of Latin American antitrust or competition policy chapters in PTAs.

To understand the dynamics of PTAs, this article begins with some context of Latin American development. First, the article provides an overview of the process of liberalization in Latin America. It then describes how domestic antitrust fits within Latin American liberalization. The article describes competition policy chapters within Latin American PTAs based on the results of coding these provisions. The standard practice in PTAs is to create binding commitments that have third-party adjudication for potential disputes. The choice of binding international institutions, such as PTAs, is based on the perception of the relative strength of PTAs over purely domestic approaches. A comparison of the institutional alternatives to PTAs illustrates that this perception is not born out by the facts. This article finds that antitrust chapters within PTAs go against the standard practice of

binding commitments. Competition policy chapters, unlike other chapters of the same trade agreement, lack binding dispute settlement. All Latin American PTAs lack dispute settlement for core antitrust issues of mergers, collusive agreements, and monopolization within the competition policy chapters. This departure from the standard PTA practice is more striking given that other chapters in the same trade agreement have binding dispute resolution. These other chapters include some competition element to them, such as services and intellectual property. The remainder of the paper explores the dynamics of these chapters, including why PTAs treat antitrust differently from other areas of domestic regulation.

THE FUTURE OF THE ECONOMIC ANALYSIS OF LAW IN LATIN AMERICA: A PROPOSAL FOR MODEL CODES — *Juan Javier del Granado and M.C. Mirow* — 293

Nothing excites civilian lawyers and judges more than commissions for codification. Codification is more than an academic enterprise. Codification projects directly cut across the interface between law and life. ALACDE intends to harness this Latin American interest in codification to bring the economic approach to Latin America. A new-generation law and economics civil and commercial code will be a conscious project to restate Roman law's usefulness for coping with today's problems. Through law and economics, Roman law will renew itself. As a paradigmatic private-law system, Roman law is eminently amenable to a state-of-the-art fusion with law and economics. Sensitivity to what drives a particular legal culture is vital to a project meant for generating interest in law and economics among a new generation of Latin American lawyers and judges. We feel that the economic approach to law can only have an impact within the legal and social environment of Latin American countries if law and economics adapts to Latin America. Our suggested adaptation is the use of codification.

THE HENRY MORRIS LECTURE

WHAT IS THE POINT OF INTERNATIONAL CRIMINAL JUSTICE? — *Mirjan Damaška* — 329

The first part of the article discusses the goals international criminal courts have set for themselves. The author believes that these goals are too numerous, that they are often in conflict, and that the courts are not well suited for the achievement of some of them. This situation generates disparity between the courts' aspiration and achievement, a degree of disorientation, and difficulty in assessing the courts' performance. Disillusionment stemming from unfulfilled expectations, and inconsistencies springing from disorientation, are harmful to any system of justice, and especially to international criminal courts whose legitimacy is still fragile.

In the second part of the article, the author explores ways in which this particular weakness of international criminal justice could be overcome, or at least alleviated. Two main avenues of improvement are recommended. Some proclaimed objectives, the author maintains, should be abandoned or played down, and a goal should be selected as over-arching so that tension among the remaining objectives can be better managed. Having proposed that a didactic function be accorded pride of place, the author then examines several salient problems that this particular choice would entail.

STUDENT NOTES AND COMMENTS

UNCERTAINTY AND LOSS IN THE FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES UNDER *GARCETTI V. CEBALLOS* — *Sarah F. Suma* — 369

Resolving a circuit split, the Supreme Court declared in *Garcetti v. Ceballos* that the First Amendment does not protect speech made pursuant to a public employee's work duties, regardless of whether the speech relates to a matter of public concern or the government's restrictions are justifiable. This article argues that a bright line rule eliminating First Amendment protection for job-duty speech is inconsistent with the theories underlying free speech protection. Further, this article explores practical drawbacks to *Garcetti*'s bright-line rule, including inconsistent judicial determination of the scope of job duties, a disincentive to report government abuse through one's chain-of-command, and a lack of protection for those who are best informed about the subject of their speech and who are under professional or legal obligations to speak.

EX-POST-*BOOKER*: RETROACTIVE APPLICATION OF FEDERAL SENTENCING GUIDELINES — *Christine M. Zeivel* — 395

In *United States v. Booker*, a dramatic decision handed down in early 2005, the Supreme Court attempted to cure Sixth Amendment issues by excising the mandatory provisions of the U.S. Sentencing Guidelines and changing the binding role of the Guidelines to advisory. For close to twenty years, federal circuit courts had used the Ex Post Facto Clause to prohibit sentencing judges from retroactively applying revisions of the federal Guidelines. However, after *Booker*'s advisory mandate and the Guidelines' supposed loss of force in sentencing decisions, some circuits have now found that the same retroactive application no longer violates the Ex Post Facto Clause. This article argues that, despite these early-occurring precedents, courts need to continue applying the Ex Post Facto Clause to the revisions of the now-advisory Guidelines. Applying the Guideline revisions to defendants who committed their crimes prior to the date the revisions become effective is still retroactive and substantially disadvantages such defendants. Moreover, the national trend since *Booker* indicates that the Guidelines continue to have the force and effect of law, create high hurdles for judicial discretion, and directly and adversely affect the sentence a defendant receives.

TO DISCLOSE OR NOT TO DISCLOSE: DUTY OF CANDOR OBLIGATIONS OF THE UNITED STATES AND FOREIGN PATENT OFFICES — *Gina M. Bicknell* — 425

Many patent offices around the world have rigorous prior art disclosure requirements. U.S. patent applicants not only must meet each individual country's criteria for disclosure, but also must contend with allegations of inequitable conduct from patent infringers which may render their patents unenforceable. This article argues that the new prior art disclosure rules promulgated by the USPTO unfairly shift the burden of examining patent applications onto patent applicants, and create a situation ripe for allegations of inequitable conduct. This article also examines how other countries handle disclosure obligations, and recommends several alternative systems that would meet the USPTO's objectives of increasing quality and efficiency while relieving the "plague" of inequitable conduct cases.