

**CHILEAN COMPETITION LAW AND POLICY:
THE EXTRATERRITORIAL TRANSPLANTATION OF AMERICAN ANTITRUST
LAW AND CHICAGO SCHOOL OF ECONOMICS IN THE CHILEAN CONTEXT¹**

¹ Michael David Bauer, Juris Doctor Candidate, Chicago-Kent College of Law; Editor-in-Chief, JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW.

INTRODUCTION

Competition laws are born and develop from historical necessity and recognition that market control by a few dominant firms runs counter to the best interests of the majority. Typically, competition policies aim to increase economic welfare by ensuring that prices are naturally kept at efficient levels and that firms with dominant positions do not hurt consumers. In that pursuit, competition laws act as referees, allowing individual economic actors to interact and transact with one another freely and efficiently interrupting only to ensure that these players do not break the rules of the game.

The Chilean experience provides an interesting example of the introduction and development of a competition policy both because of the tumultuous time during which it was implemented and the discipline and flexibility with which it was created. Chile's first attempt at a competition law was a failure both because of the internal weakness of the law and because of political resistance to the enforcement of the law itself. Then, during a period of military dictatorship,² American economists were called to assist Chile in the implementation of a workable competition law that has lasted well beyond the end of the dictatorship.

Chile's experience provides a possible model for other jurisdictions that are considering introducing a competition law into their own legal system. Competition law and policy in Chile borrowed certain aspects of the antitrust policy of the United States and was

² The purpose of this article is not to pass judgment on the methods used by the Pinochet government to obtain and maintain political control in Chile during the military dictatorship. The human rights violations of the Pinochet government are, of course a cause for concern and deserve presentation, discussion, and, ultimately, condemnation. However, the focus of this article is the transplantation and introduction of competent competition policy, and to address the human rights concerns associated with the Pinochet dictatorship in a cursory fashion would be tangential and inappropriate for this context.

the collaborative effort of both Chilean and American economists. The transplantation of American competition law to Chile merits study because of both its successes and its failures, and provides valuable perspectives for the responsible transplantation of competition law elsewhere.

The paper is organized as follows. Part I begins by analyzing, first, the history in which the current competition was conceived and, second, the involvement of American economists in its development. Part I concludes by discussing the current law itself, typical substantive violations, the adjudicative body and the prosecutorial agency that comprise the competition institutions, and the interplay of those organizations and the law in practice. Part II extrapolates the Chilean experience to other possible receiving jurisdictions and explores whether the transplantation of competition policy in Chile is a valuable model.

PART I: CHILEAN COMPETITION LAW

In the American context, the genesis of competition law was the large trusts that were formed in the late 19th Century to protect the public from overbearing and dominant firms. In contrast, the Chilean experience required a suitable competition policy for a different reason: a tradition of government participation in the economy coupled with a significant unequal distribution of income caused by a market dominated by a relatively small minority. Thus, Chile's historical context produced a unique and important competition law.

A. Early Attempts to Introduce Competition Policy in Chile

Chile's central government took a largely *laissez-faire* approach to the regulation of its economy, pursuing relatively few policies to exact control over the market in a meaningful

way until the 1930s.³ However, because its economy was largely dependent on foreign capital from trade, when the Great Depression caused economic turmoil abroad and, as a result, significant reductions in foreign investment of capital, Chile's economic output predictably shrank.⁴ The Chilean legislature responded by redirecting the country's economic legislation toward state participation to minimize the effect of the Depression.⁵ To that end, the government enacted price and wage controls to temporarily stimulate demand and curtail further depression.⁶

Thus, the role of the government with respect to the economy changed significantly in response to the economic difficulties presented by the Great Depression. The government became "the promoter of business activity in the private sector, as a major propellant of the industrialization process, and as an important economic agent in its own right."⁷ Indeed, the government became a producer itself by creating price and wage controls to manage and create market demand, which in turn created significant barriers to the formation of new businesses to support existing ones.⁸ The shift to more government control took Chilean markets from existence within a *laissez-faire* state to depending on capital from a government that acted as a guarantor of market demand.⁹

While some believed that the legislature was "forging a new permanent public economic order" when it enacted these new economic policies, the legislation was intended to

³ Dale B. Furnish, *Chilean Antitrust Law*, 19 AM. J. COMP. L. 464 (1971).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ JUAN GABRIEL VALDÉS, PINOCHET'S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE, 8 (Cambridge University Press 1995).

⁸ *Id.*

⁹ *Id.* at 59.

act as a short-term fix to the present economic problems caused by the depressed economy.¹⁰ By the 1950s, however, these “temporary” fixes had developed a permanent character and appeared to be a lasting fixture in Chilean economic legislation.¹¹ Unfortunately, the economic policy proved unable to curb the inflation caused by the Depression.¹² Still, the government was committed to expansionary policies through the early 1950s.¹³

The government did attempt to take alternative steps to try to resolve the lack of economic recovery. In 1955, President Carlos Ibáñez’s government hired the American firm Klein-Saks to analyze the economic situation and make recommendations as to how to improve the Chilean economy.¹⁴ Klein-Saks noted that “price controls were impossible and skewed the Chilean economy badly where they did have an effect.”¹⁵ The firm recommended that the central government adopt a free-market approach and enact an anti-monopoly regime as a policing agent.¹⁶ However, the suggestions were ignored because of political pressure, and, in many instances, the government acted against the advice of the firm.¹⁷

Then, in 1958, newly-elected president Jorge Alessandri espoused an ideology that focused on disengaging the government from economic activity.¹⁸ Alessandri gained political prominence for his opposition to the *Radical* party, which had been in power from 1938 to 1952 and whose economic policy of expanding government participation had created

¹⁰ Furnish, *supra* note 2, at 464.

¹¹ *Id.*

¹² *Id.* at 465.

¹³ See VALDÉS, *supra* note 6, at 105.

¹⁴ Furnish, *supra* note 2, at 465.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ VALDÉS, *supra* note 6, at 104.

significant inflation.¹⁹ When Alessandri took office, inflation was over 30 percent per year.²⁰ In response, Alessandri proposed encouraging free-market competition and reducing price and wage controls.²¹ The plan would allow the deregulated, competitive markets to “control” prices and keep them at naturally efficient levels without the need for state intervention.²² Where the Klein-Saks suggestions had failed, this was now politically feasible for two reasons: first, the public generally supported any program that could end inflation; and second, Alessandri suggested these changes as additions to the existing law, rather than measures that would entirely supplant it.²³

Alessandri’s government introduced the competitive market regime with *Ley no. 13,305*. This law disallowed the state from making concessions that would create a monopoly²⁴ and prohibited any agreements that had the effect of impeding competition.²⁵ However, monopolies were permitted where created by law,²⁶ and the president could authorize conduct that was otherwise illegal.²⁷ The law created an Anti-Monopolies Commission to adjudicate claims of anticompetitive behavior.²⁸ The Commission could order injunctive or monetary-damage relief or refer the case to the criminal court.²⁹

During its first few years of existence, the Commission was relatively aggressive in the application of the law; however, by 1964, the Commission had slowed to hearing less than

¹⁹ Furnish, *supra* note 2, at 466.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 466-67.

²⁴ Ley no. 13,305, art. 172.

²⁵ Ley no. 13,305, art. 173.

²⁶ Ley no. 13,305, art. 172.

²⁷ Ley no. 13,305, art. 174.

²⁸ Ley no. 13,305, art. 182.

²⁹ Furnish, *supra* note 2, at 470.

half a dozen cases per year.³⁰ More importantly, as a matter of policy, the Commission and the Chilean Supreme Court resisted using the law to change the tradition of state intervention in and control of the economy,³¹ which was possible because the law specifically allowed for the continued control of “economic and industrial activities.”³² Therefore, because the law was internally weakened by its own provisions, it was ineffective in practice and failed to facilitate a more efficient economy.

Thus, the government continued to act as a propellant and guarantor of demand in the Chilean economy by infusing the industrial sector with public funds. However, because of the significant inflation that continued during the time and because the Chilean industrial sector was controlled by a small minority of the population, such intervention generally tended to worsen the already problematic wealth gap in Chile.³³ Where Alessandri’s free-market approach had seemingly failed in Chile, socialism offered a plausibly acceptable alternative to try to remedy the impermissibly inequitable state of the Chilean economy.

B. The Legal Route to Socialism and Ensuing Unrest in Chile

In 1970, newly-elected president Salvador Allende claimed that his election represented a “legal route to socialism” in Chile.³⁴ Allende intended his government to be “anti-imperialist, anti-oligarchical, and anti-monopolistic.”³⁵ Although politically opposed to private monopolistic control of industries, the Allende government nationalized productive sectors of the economy, expropriated large amounts of land, and enacted significant price

³⁰ *Id.* at 471.

³¹ *Id.* at 481.

³² Ley no. 13,305, art. 181.

³³ See VALDÉS, *supra* note 6, at 7–9.

³⁴ *Id.* at 1.

³⁵ *Id.* at 6.

control.³⁶ The goal was to restructure an economy in which a few dominant firms controlled the market at the expense of the majority of the population.³⁷ This legal restructuring solidified the state's role in the economy.

Within Chile, Allende's policy generated almost immediate hostility from right-wing elements of Chilean politics, not only because the changes negatively affected the leaders of Chile's industrial sector, but also because the economy continued to deteriorate while inflation soared.³⁸ The Chilean periodical *El Mercurio* urged that, to modernize Chile, it was essential to move away from state-controlled economy towards a market economy.³⁹ Although Chile had previously enjoyed political stability unique to most of Latin America discussions of military intervention against the socialist government took on a serious and threatening character not long after Allende's election.⁴⁰

Outside of Chile, it appeared that the election of Allende firmly established Chile as a socialist country. In other Latin American countries, Chile became known as the "fatherland of the state" because of its commitment to heavy government participation in the economy.⁴¹ Chile seemed to be eternally committed to price controls and state participation.⁴² In an article published in 1971 on the state of Chilean antitrust law and policy under President Allende, an American law professor argued that competition laws failed in Chile because of the nation's long-term commitment to bureaucratic control and state intervention in the

³⁶ *Id.* at 7.

³⁷ *See id.* at 7–9.

³⁸ *Id.* at 249.

³⁹ *Id.* at 29 (citing *El Mercurio*, "La Semana Política," 23 July 1980).

⁴⁰ *Id.* at 242.

⁴¹ *Id.* at 100.

⁴² Furnish, *supra* note 2, at 487.

economic affairs of the country.⁴³ The professor concluded the article by declaring: “Antitrust plays almost no part in regulating the Chilean economy today. Barring an unlikely turn of events under the present or some future administration, antitrust will never be an important law in Chile...”⁴⁴

Two years after the publication of that article, General Augusto Pinochet led a military coup to overthrow the socialist government and establish a military dictatorship that would dismantle the state’s role in the economy and liberalize the Chilean markets.⁴⁵ While the past four decades were characterized by a government obsessed with controlling the economy in an attempt to create a just economy in Chile, the Pinochet government was willing to disregard the ethical and social repercussions of the indiscriminate liberalization of the economy.⁴⁶ In the same way that Allende’s government intended to radically change the essential character of the Chilean government into an entirely socialist state, Pinochet similarly sought to drastically restructure the Chilean political structure to dismember the socialist state.⁴⁷

C. Modern Chilean Competition Law

(1) The Chicago School of Economics

In the 1950s, a group of economists in the University of Chicago’s Economics Department began developing a school of thought that abandoned Keynesian faith in the necessity of government participation in the market and embraced market-oriented

⁴³ *Id.*

⁴⁴ *Id.* at 485.

⁴⁵ VALDÉS, *supra* note 6, at 7.

⁴⁶ *See id.* at 259.

⁴⁷ *See id.* at 8.

economics.⁴⁸ Known as the Chicago School of Economics,⁴⁹ this neo-liberal approach assumed that markets were capable of self-correction and the elimination of dominant market positions without the need for most government intervention.⁵⁰ These economists rejected the notion that the government was the engine through which the economy would grow in favor of viewing the market as the basis for free and efficient economic exchange between individuals.⁵¹ They advocated a Pareto-efficient economy⁵² through the un-coerced actions of rational, optimizing individual actors.⁵³

Thus, a significant concern for the Chicago School was the appropriate role of the government in the economic affairs of the country. In the Chicago School's view, rather than acting as a participant, the government should limit itself to establishing the rules that govern the transactions and production activities of the individual actors and to enforcing those rules as an external actor to the transaction.⁵⁴ In pursuit of that end, the government should refrain both from behaving as a competitor with the ability to act without concern for the competitiveness of its operations, as well as from supporting firms that proved to be too inefficient to survive on their own. The Chicago School also advocated a more limited capacity for the government with respect to price and wage controls: instead of enacting such

⁴⁸ *See id.* at 60.

⁴⁹ *See id.*

⁵⁰ DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION, 142 (Oxford University Press 2010).

⁵¹ VALDÉS, *supra* note 6, at 67.

⁵² An economy is Pareto efficient where an individual can, through his individual economic transactions, make himself better off without making any other individual actor worse off than before the transaction. The presumption is that state intervention distorts individual preferences, and the costs and inefficiencies associated with government participation in the market make "optimal" choices impossible. Instead, the individual actor should be free from any coercion or authority that does not come from the rational desire to maximize utility.

⁵³ VALDÉS, *supra* note 6, at 68.

⁵⁴ *Id.* at 69.

rigid price control, the government should allow the newly liberalized market to set its own efficient prices.⁵⁵ The Chicago School placed its faith not in the salvation of state spending, but rather entirely in the self-correcting capacity of the market.

With respect to competition laws, the Chicago School campaigned for a policy that would be predicated on neo-classical economic theory that deters pro-competitive conduct.⁵⁶ This approach placed an emphasis on improving economic efficiency and increasing consumer welfare and defined anti-competitive behavior as conduct that increased market prices above the competitive price.⁵⁷ While earlier conceptualizations of competition policy in the United States primarily relied on concerns for equity to justify the law, the primary concern now shifted to economically inefficient increases in market price.

In the 1950s, the Chicago School economists saw in Latin America a nearby laboratory in which they could test their developing theories and gather empirical research.⁵⁸ The University of Chicago entered into a contract with the Universidad Católica de Chile through which the University of Chicago would establish a school of economics at the Universidad Católica.⁵⁹ The university setting would allow the Chicago School economists to implant their market-oriented ideology.⁶⁰ The University of Chicago sent a group of economists, who came to be known as the “Chicago Boys,” to Chile to teach and train new economists.⁶¹ By the time that the Pinochet dictatorship began, Chicago School economics

⁵⁵ *Id.* at 21.

⁵⁶ GERBER, *supra* note 49, at 143.

⁵⁷ *Id.*

⁵⁸ VALDÉS, *supra* note 6, at 93 .

⁵⁹ *Id.* at 127.

⁶⁰ *Id.* at 162.

⁶¹ *Id.*

had become the pervasive theory at the Universidad Católica.⁶² Thus, when Pinochet seized power in Chile with the stated purpose of reducing state presence in the economy, the Chicago School economists were poised to wage their ideological battle against Keynesian economics in the broader Chilean context outside of the Universidad.

Part of the goal of the Chicago School's endeavor into developing economies was the desire to increase social freedoms through economic liberalization. According to the Chicago School, "[f]or the preservation of personal freedom it is essential to have a large sector of economic life organized privately and competitively."⁶³ Given the nature of Pinochet's government, it is ironic that the avenues chosen to pursue the lofty goal of freedom were paved during a brutal military dictatorship. Pinochet's disregard for the manner in which economic liberalization occurred gave the Chicago School economists the opportunity to transplant their neo-liberal economic ideology into a viable testing ground in a country with decades of strong state presence.⁶⁴

Thus, while Pinochet's government demanded that the economy be liberalized, the Chicago Boys had discretion to determine the manner in which they approached the liberalization process. Upon the Chicago Boys' suggestion, price controls were removed; large firms that had been controlled by the government were privatized; international tariffs were reduced; and other barriers to trade were eliminated.⁶⁵ No longer would the government act as producer⁶⁶ or as guarantor of the industrial sectors of the economy.⁶⁷ Instead, the government would be limited to regulating the economy and would play a supportive role

⁶² *Id.* at 252.

⁶³ *Id.* at 56.

⁶⁴ *See id.* at 127.

⁶⁵ *Id.* at 22.

⁶⁶ *Id.* at 23.

⁶⁷ *Id.* at 24.

only to aid those in extreme poverty.⁶⁸ Chile's current competition law, the Law in Defense of Free Competition, was part of this economic reorganization.

(2) The Competition Law

Chile enacted the Law in Defense of Free Competition in 1973 to promote and defend free market competition in Chile.⁶⁹ Aside from stating the broad policy goals of the law, Article 1⁷⁰ contains a broad prohibition that criminalizes acts or agreements that are against free competition in economic activities.⁷¹ This ban applies to all individuals, regardless of any percentage of state ownership.⁷²

Article 3 delineates anticompetitive practices.⁷³ Originally, these categories were considered to be *per se* violations based upon the assumption that there was such a low likelihood that "anticompetitive" practices could have pro-competitive benefits that it was

⁶⁸ *Id.*

⁶⁹ Decreto Ley No. 211 de 1973, Title I, Art. I.

⁷⁰ Decreto Ley No. 211 de 1973, Title I, Art. I ("The object of this law is the promotion and defense of free competition in the markets. Those who act against free competition in economic activities will be corrected, prohibited, or reprimanded according to the provisions of this law") (translated from Spanish by the author).

⁷¹ *Id.*; TERRY WINSLOW, COMPETITION LAW AND POLICY IN CHILE: A PEER REVIEW, 31 (Organisation for Economic Co-operation and Development Competition Division 2004).

⁷² *Id.* at 33.

⁷³ Decreto Ley No. 211 de 1973, Title I, Art. 3 reads: "Anyone who makes or enters into, either individually or collectively, any act or agreement that impedes, restricts or damages free competition, or that tends to produce such effects, will be sanctioned according to the Article 26 of this law, with detracting from the preventative, corrective or prohibitive measures that could be applied to each case. Such acts include:

- (a) Express or tacit agreements among competitors, or arranged or agreed upon practices between them, that grants them market power and that consists of fixing prices, limiting production, assigning market zones or quotas, excluding competitors, or affecting the results of tender offers.
- (b) The abusive exploitation by a firm, or group of firms, with a dominant market position, though fixing prices, tying arrangements, assigning market zones or quotas, or imposing other similar abuses.
- (c) Predatory practices, or unfair competition, that seeks to establish, maintain or augment a dominant market position" (translated from Spanish by the author).

better to ban such practices entirely.⁷⁴ Now, the enumerated activities listed in Article 3 are interpreted to be a guide for conduct that *tends* to be anticompetitive but still requires additional economic analysis to show actual negative effects.⁷⁵ With its reference to Article 26 of the Act, Article 3 also grants the adjudicative tribunal for competition-law violations the power to modify or terminate violative acts or agreements, order the modification or dissolution of violative corporations or companies, and issue fines, where it has been found that an activity falls into one of the enumerated categories and has an anticompetitive effect.⁷⁶ Similarly, Article 4 outlaws monopolies, except where otherwise authorized by law.⁷⁷

(3) Substantive Violations of the Competition Law

Much like its American equivalent, Chile's Law in Defense of Free Competition is a broad law that generally bans acts and agreements that restrain or attempt to restrain free competition.⁷⁸ Chile is a civil law jurisdiction, so its precedent is not binding in the way that common law jurisdictions are bound by prior rulings. However, Chile has been able to develop some jurisprudence regarding typical competition-law substantive issues.

(a) Horizontal Agreements A horizontal agreement is an agreement among competitors, often called a cartel.⁷⁹ There have been relatively few challenges alleging the actual existence

⁷⁴ WINSLOW, *supra* note 70, at 32.

⁷⁵ *Id.*

⁷⁶ Decreto Ley No. 211 de 1973, Title I, Art. 3, 26.

⁷⁷ Decreto Ley No. 211 de 1973, Title I, Art. 4 (“It is impossible to grant concessions, authorizations, or acts that imply the permission to create monopolies for the exercise of economic activities, unless the law so authorizes”) (translated from Spanish by the author).

⁷⁸ Decreto Ley No. 211 de 1973, Title I, Art. 1.

⁷⁹ GERBER, *supra* note 49, at 129.

of a cartel because its existence is hard to investigate and prove.⁸⁰ Moreover, given the relatively small size of the Chilean economy, a “small business elite may be able to restrict output and increase price through tacit collusion,” rather than via express, well-documented agreements.⁸¹ The prosecutorial agency’s solution to the clandestine nature of cartelization is to prove price fixing by surveying prices and demonstrating that no other plausible reason for price uniformity exists, save collusive agreement.⁸²

(b) Vertical Agreements

By contrast, a vertical agreement is an agreement between firms at different levels of the distribution chain.⁸³ The Chilean government has devoted significantly more resources to the prosecution of anticompetitive behavior based on vertical agreements than on horizontal agreements.⁸⁴ Vertical agreements were prevalent among the early cases in Chile prosecuted as *per se* violations of the competition law.⁸⁵ Now, however, vertical restraints and price discrimination are evaluated to determine whether they have efficiency justifications, and typically are not found to be anticompetitive where the firm imposing the restrictions does not have market power.⁸⁶

(c) Abuse of Dominance

Called monopolization in the United States, abuse-of-dominance violations arise where one firm has the ability to harm consumers and inhibit competition by setting prices

⁸⁰ WINSLOW, *supra* note 70, at 38.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 41.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

below cost to drive out competitor firms and then raising prices above the competitive price.⁸⁷ In the United States, firms that abused their dominant positions engendered some of the original support for the United States' competition law.⁸⁸ Similarly, given state ownership and control of many important Chilean industries, abuse of dominance became the focus of the enforcement of the competition law upon its enactment.⁸⁹

While there have been a large number of abuse of dominance cases, they tend to deal only with the infrastructure industry, like telecommunications.⁹⁰ This could be due to the lack of formal and informal guidelines regarding market definition and dominance assessment.⁹¹ Thus, to expand and mature the role of the abuse of dominance concept in the deterrence of anticompetitive behavior, it will be necessary for the adjudicative body to more accurately and succinctly define these terms for the prosecutorial agency.

(d) Mergers and Acquisitions

Mergers and acquisitions are the combining of corporate entities that cause high levels of economic concentration and can create significant potential for the restraint of competition.⁹² While Chile originally had difficulty controlling mergers, this area has become increasingly important in the prosecution of anticompetitive behavior in Chile.⁹³ The adjudicative body has actively sought to prevent mergers that would deter the development of

⁸⁷ GERBER, *supra* note 49, at 130–31.

⁸⁸ *Id.* at 130.

⁸⁹ WINSLOW, *supra* note 70, at 42.

⁹⁰ *Id.* at 43.

⁹¹ *Id.*

⁹² *See* GERBER, *supra* note 49, at 131.

⁹³ WINSLOW, *supra* note 70, at 44.

competition.⁹⁴ Though the law previously lacked a requirement that merging parties notify the government, amendments have established procedures requiring the presentation of information about the merger and its possible consequences for competition to the prosecutorial agency.⁹⁵

(e) Unfair Competition

Finally, the competition law does not explicitly enumerate unfair competition as a violation, but the adjudicative body has found that Article 1 is broad enough to include unfair competition.⁹⁶ Unfair competition claims typically involve private disputes, and it has been suggested the competition institution is not the appropriate forum for these debates.⁹⁷ Still, it is in the aggregate that unfair competition is found to be anticompetitive, such that it undermines confidence in the market's integrity, distorts market information available to consumers, and affects purchase decisions.⁹⁸ But the appropriate venue for the adjudication of private claims that have competition objectives is probably not the court that oversees violations of the competition law.

(3) The Adjudicative Body and the Prosecutorial Agency

Originally, Title II provided for two separate adjudicative bodies: the *Comisión Resolutiva* (“Resolving Commission”) and the *Comisión Preventativa* (“Preventative Commission”). The Resolving Commission was a special court whose main function was to resolve cases brought either by individual complainants or by the prosecutorial body-the

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Fiscalía.⁹⁹ The Preventative Commission was a “consultative organ” to which individuals, firms, and government entities could submit questions regarding whether given activities were violative of the competition law.¹⁰⁰ Now, both adversarial claims, in which there is a live controversy, and cases brought for non-adversarial advisory declarations are presented to the same court: the *Tribunal de Defensa de la Libre Competencia* (“Competition Tribunal”).

The *Tribunal* is now the sole adjudicative authority that “prevents, corrects and sanctions anticompetitive behavior.”¹⁰¹ The new adjudicative body still has the power to issue non-adversarial declarations and to suggest changes to the competition laws when it thinks that they are adverse to fostering competition.¹⁰² The verdicts issued by the *Tribunal* can be appealed to the Supreme Court.¹⁰³ Unfortunately, the economic analysis presented to and used by the *Tribunal* is generally of poor quality and it “is seldom the case that claims are supported by rigorous conceptual analysis.”¹⁰⁴ The *Tribunal* is unable to initiate cases itself; instead, it must rely on the prosecutorial body called the *Fiscalía*.

The *Fiscalía Nacional Económica* (“National Economic Prosecutor’s Office”) is the prosecutorial body that investigates the markets for anticompetitive behavior and brings suit for violations of the competition law.¹⁰⁵ Its goal is to defend the public interest by ensuring a competitive market.¹⁰⁶ In that capacity, members of the public may report alleged violations

⁹⁹ WINSLOW, *supra* note 70, at 26.

¹⁰⁰ *Id.*

¹⁰¹ Decreto Ley No. 211 de 1973, Title II, Art. 5 (translated from Spanish by the author).

¹⁰² Alexander Galetovic, *Competition Policy in Chile*, STANFORD CENTER FOR INTERNATIONAL DEVELOPMENT, 11 (July 2007).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 11.

¹⁰⁵ Decreto Ley No. 211 de 1973, Title III; Galetovic, *supra* note 101, at 10.

¹⁰⁶ Galetovic, *supra* note 101, at 10.

of the competition law to the *Fiscalía* for further investigation in lieu of bringing suit before the *Tribunal*.¹⁰⁷

Procedurally, the *Fiscalía* is required to investigate all legally valid complaints presented to it.¹⁰⁸ While originally the *Fiscalía* initiated the majority of the investigations it conducted, complaints by individuals to the agency now comprise the majority of its caseload and investigations.¹⁰⁹ The results of those investigations are presented to the *Tribunal*, along with a recommendation from the *Fiscalía* as to whether it recommends a formal charge.¹¹⁰

Unfortunately, the *Fiscalía* does not help the *Tribunal*'s economic analysis, as the economic analysis put forth by the *Fiscalía* is often basic and of poor quality.¹¹¹ For example, in a case brought before the court in 1998, the *Fiscalía* filed suit against a gasoline distributor for instructing its franchisees to lower their prices, which allegedly constituted fixing prices below competitive levels.¹¹² However, if the *Fiscalía* had analyzed the economic effect of the lower prices, rather than simply finding that lower prices were anticompetitive, it would have found that, because the distributor did have a dominant-firm position in the market and the price margins were high, fixing a profit-maximizing downstream price actually caused a societal gain, rather than a loss.¹¹³

Regardless of the agency's lack of economic finesse, the *Fiscalía* is active in the prosecution of anticompetitive behavior, which has helped to ensure that the current

¹⁰⁷ Decreto Ley No. 211 de 1973, Title III, Art. 43.

¹⁰⁸ WINSLOW, *supra* note 70, at 28.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 20.

¹¹² *Id.*

¹¹³ *Id.*

competition law does not fall into disuse like Alessandri's law in the 1950s.¹¹⁴ Thus, unlike the earlier Anti-Monopolies Commission, the *Fiscalía* and the *Tribunal* have both functioned to ensure the continued survival, relevance, and strength of the Law in Defense of Free Competition.

D. Return to Democracy in Chile

In 1988, a plebiscite led by the opposition parties obliged General Pinochet to hold free elections in Chile.¹¹⁵ In a smooth transition back to democracy, Patricio Aylwin was elected and assumed the presidency in 1990.¹¹⁶ During the presidential campaign, the Chicago Boys suggested that, unless carefully managed, a return to democracy in Chile could lead to the return of state controls on economic activity, a highly protected economy, or heavy state participation in economic production activities.¹¹⁷ Fortunately, the restoration of democracy in Chile has not caused a return to the state interventionism of the 1950s. However, to what degree the state's role vis-à-vis the economy has changed is still the subject of debate.¹¹⁸

One argument is that there is continuity between the economic and developmental policies of the dictatorship and the new democratic government; the other emphasizes differentiation between the social and economic goals of the two governments.¹¹⁹ Because the democratic government has resisted and rejected socialism and populism of the variety that characterized the governments before the dictatorship, it is contended that there has been no substantive change to the country's economic organization since the end of the

¹¹⁴ Galetovic, *supra* note 101, at 11.

¹¹⁵ VALDÉS, *supra* note 6, at 254.

¹¹⁶ *See id.*

¹¹⁷ *Id.* at 256.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

dictatorship.¹²⁰ A fundamental characteristic of the Pinochet government was an indifference to the ethical, political, or social repercussions of the authoritarian approach to economic reorganization. By contrast, the democratic approach is based on consensus, rather than authoritarian control, as well as attention to the social actors affected by economic legislation.¹²¹ Thus, the continuity of policy from the Pinochet government to the democratically elected government is not a commitment to the policies of the dictatorship, but rather a shift in popular opinion as to the best way to approach regulation of the economy.

Such a consensus and movement away from heavy state participation has not remedied the economic ills that popularized the rise of socialism in the 1950s in Chile. Significantly, although the unequal distribution of wealth and income continues to plague the Chilean economy, the government maintains its strong commitment to a market-oriented economy while it tries to remedy the problem.¹²² The Chicago School's acceptance in Chile was successful not because of the tight and brutal control with which Pinochet ruled the country, but instead was because of the flexibility in the approach of the application of the new economic policy that resulted in a viable development model and competition policy for Chile.

E. The Chilean Competition-Law Regime in Practice

The violent time period during which Chile's current competition law came into existence posed significant problems for the acceptance, legitimacy, and longevity of the legal regime. For a law to be accepted and effective in a certain societal context, "it must be meaningful in the context in which it is to be applied so citizens have an incentive to use the

¹²⁰ *Id.* at 257.

¹²¹ *Id.* at 259.

¹²² *Id.* at 255.

law and to demand institutions that work to enforce and develop the law.”¹²³ If the process through which the competition regime had been transplanted had not carefully considered the demands of the Chilean context, the subsequent donor rejection could have seriously inhibited Chile’s ability to have and develop a workable competition law.¹²⁴ Chile’s competition law has remained successful despite a return to democracy because the regime’s goals have taken into account the individualized needs of Chilean society and the law has addressed the important sectors of Chile’s economy.

Since its enactment of the competition law in 1973, the Chilean legislature has developed the law and its accompanying institutions so that it is sufficiently flexible to address the needs of the society it serves. The legal framework ensured that the judicial enforcement remained independent from the strong executive branch by separating the prosecutorial and judicial functions of the competition regime and by restraining the executive’s ability to unilaterally manipulate the judiciary.¹²⁵ The Chilean President chooses the head of the *Fiscalía*, called the National Economic Prosecutor, while the Supreme Court and the Central Bank review *Tribunal* candidates, who are then elected after approval by the President.¹²⁶ Both the *Fiscalía* and the *Tribunal* have made efforts to improve the transparency and accountability of their operations by increasing public access to information about procedural regulations and rulings.¹²⁷ The *Fiscalía* has also made its economic

¹²³ Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003).

¹²⁴ James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. OF INT’L L. 511 (2008).

¹²⁵ Asia-Pacific Economic Cooperation Economic Committee, 2008 APEC Economic Policy Report, 74 (APEC 2008).

¹²⁶ *Id.* at 75.

¹²⁷ *Id.* at 75–76.

analytical guidelines public to inform the nation of its methodology in the prosecution of alleged violations of the law.¹²⁸

In addition to the broad policy goals of the law, the competition law in Chile has proved successful because of its attention to and flexibility towards the most important sectors of the Chilean economy while enforcing the specific prohibitions against anti-competitive behavior. Before the current law, the telecommunications industry was state-owned in Chile and was privatized in the 1980s.¹²⁹ Once privatized, the Spanish telecommunications giant *Telefónica* acquired a significant percentage of the telecommunications systems in Chile.¹³⁰ When these holdings were challenged as violative of the competition law, the court held that *Telefónica* had to sell a large part of its interest in the industry.¹³¹ This would ensure that *Telefónica* could realize gains on its investment, thus ensuring that other companies would not be disincentivized from investing in the industry in Chile, while also protecting against market dominance by a single firm.

Similarly, the electricity sector was publicly owned before the enactment of the competition law.¹³² Upon privatization, the industry was not divided, either horizontally or vertically, but rather, was sold as an already-dominant interest.¹³³ Since then, non-dominant firms have brought suit, and the *Tribunal* has had to approach the dissolution of the dominant position flexibly to ensure that a competitive market was established equitably.¹³⁴ This

¹²⁸ *Id.* at 75.

¹²⁹ WINSLOW, *supra* note 70, at 48.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 50.

¹³³ *Id.*

¹³⁴ *Id.*

approach has created a market in which over 100 firms now compete to provide electricity to Chile.¹³⁵

Interestingly, Chile's national constitution posed a unique problem in the privatization process of Chile's mining industry: the document asserts that the state is the sole owner of all mines, regardless of who owns the surface land.¹³⁶ Once the government decided to privatize the industry, Chile needed to be able to foster competition without violating the language of its constitution. To that end, Chile maintains direct ownership of the mines through state-owned companies, but has established a system of concessions that provides mining rights to numerous firms.¹³⁷ Even with continued state-ownership of the mines themselves, the security that the mining rights provide has enticed both domestic and foreign firms to invest in not only the exploration but also the exploitation of Chile's mines.¹³⁸ Through a flexible approach to the application of its competition law, Chile was able to develop and maintain a lucrative mining industry without violating or amending either its constitution or the competition law.

While the Chilean competition-law regime is not a perfect system,¹³⁹ on the whole the introduction of competition law and policy in Chile should be considered a success. During its creation by the Chicago Boys and in its subsequent development by the Chilean competition authorities, the application of the law has been flexible and meaningful for the Chilean society it serves. Had the process merely transplanted American antitrust laws and

¹³⁵ *Id.*

¹³⁶ *Id.* at 54.

¹³⁷ *Id.*

¹³⁸ *Id.* at 55.

¹³⁹ Significantly, it has been argued that both the *Fiscalía* and the adjudicative bodies lack sophistication in their economic analysis and that, therefore, their ability to discern economically anti-competitive behavior has resulted in inefficient results. *See* Galetovic, *supra* note 101, at 20–23.

policy without regard for the individualized concerns of the Chilean context, there could have been significant over-regulation of competition activities.¹⁴⁰ The individualized approach of the current competition regime saved the competition law in Chile because “[j]urisdictions would adopt different antitrust rules even if they all agreed on the economic principles governing rules and adopted the same goal.”¹⁴¹ The introduction of a competition regime and the subsequent cases that developed from it in Chile demonstrate that “a well-designed strategy for institution building should take into account ‘local knowledge’ and should not ‘over-emphasize best-practice “blueprints”’ observed in developed countries at the expense of local participation and experimentation.¹⁴² Because the competition authorities were able to assess and respond to the local needs and experiences of Chile, the translation of the competition policy was successful.

PART II: THE INTERNATIONAL TRANSPLANTATION OF COMPETITION LAW AND POLICY

As illustrated by the Chilean experience, the transplantation of competition policy is not accomplished by extracting successful competition laws from one jurisdiction and implanting them in another. Instead, it requires sensitivity to the local context into which the competition policy is to be transplanted. An effective introduction of competent competition laws should be flexible and consider the needs and realities of the recipient jurisdiction.

¹⁴⁰ See Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT’L L. 189 (2009–2010).

¹⁴¹ David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT’L L. 161, 162 (2009–2010).

¹⁴² Cooper, *supra* note 123, at 558. (citing Dani Rodick, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 STUD. COMP. INT’L DEV. 3 (2000)).

The success of Chilean competition policy is due to the cooperative approach that the Chicago School economists took in introducing the laws as a manner of policing or refereeing the newly competitive markets. Their approach did not force acceptance of American competition laws or simply transcribe the Sherman and Clayton Acts into the Chilean code. Instead, the economists partnered with local economists at the Universidad Católica and worked with them to develop approaches to curtail anticompetitive behavior. This ensured that, when competition laws were introduced, they would not have an imperial character to them; rather, they would be responsive to the Chilean experience.

In this way, the American economists took the seeds of American antitrust policy and transplanted them into the Chilean context so that their application and development would be meaningful and effective. Such an approach recognizes the similarity of the broad aims of competition laws – to ensure competitive markets – while simultaneously accounting for local objectives. By pairing with a local university, the Chicago School economists also invested local academics in the success of the competition law, incentivizing their cooperation in the creation of a competitive market economy in Chile.

As there is now a globalized economy, there is also a need to develop competition laws in developing economies around the world to ensure efficient international trade.¹⁴³ As Chile's history demonstrates, there are often challenges to establishing a competent and workable competition regime in an economy that has not previously needed or desired such laws. While competition issues tend to be generally domestic in nature, anticompetitive behavior with either international or multi-jurisdictional effects has become increasingly

¹⁴³ Michael S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *FORDHAM INT'L L.J.* 1, 2 (2009–2010).

prevalent.¹⁴⁴ As such, it is advantageous to develop legal regimes that have the ability to recognize and remedy anticompetitive behavior.

Developing economies are often unable to effectively enforce competition laws and “cannot create a credible threat to enforce their laws against large, multinational firms that engage in anticompetitive conduct that harms their economy.”¹⁴⁵ Part of the failure of the competition law introduced by Jorge Alessandri’s government in Chile was the fact that the administrative bodies charged with enforcement were unable or unwilling to do so. By contrast, Pinochet’s government and the subsequent democratic governments had both the political ability and the necessary resolve to enforce the competition law of 1973.

For many developing economies, such ability and resolve do not exist. Because anticompetitive behavior is expected to be enforced unilaterally by the jurisdiction in which its effects are felt, developing economies often lack the resources for effective prosecution.¹⁴⁶ Moreover, when the effects of the anticompetitive behavior are felt in a developing jurisdiction outside of the one in which the anticompetitive activity takes place, there are even more significant barriers to enforcement of competition laws without inter-jurisdictional cooperation.¹⁴⁷ There is often a combination of an inadequate ability to threaten prosecution of violations of competition laws and limited resources with which to combat such anticompetitive conduct.¹⁴⁸

A solution to these enforcement barriers is a flexible approach in the implementation of competition regimes in developing economies. In Chile, the Chicago School economists

¹⁴⁴ *See id.* at 5.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.* at 33.

recognized that a one-size-fits-all style competition law that was entirely based on American antitrust statutes was impossible if the law was to be long lasting and effective. Instead, unlike the earlier attempt at regulating anticompetitive behavior, the new competition law addressed the societal concern that the state had become too great a participant in the market. The new competition law in Chile was successful in part because it took into account the history of the locality in which the law was to have effect.

Currently, there is discussion about the possibility of convergence among the various competition laws around the world and a movement toward a globalized competition policy. Convergence of competition policies attempts to align competition-law systems with each other.¹⁴⁹ In contrast to the idea of flexible transplantation of competition laws based upon the unique experiences and needs of the recipient jurisdiction, if not done carefully, convergence could force the adoption of competition laws that ignore those unique concerns. Because, as in the Chilean experience, competition policy has a greater chance for survival if the laws enacted address the individual challenges present. It is necessary for the convergence movement to carefully implement laws that permit flexibility in their application based upon unique historical contexts. Provided that, as in Chile, the development of those policies seriously considers not only what worked well in the exporting jurisdiction, but also the individual, specific concerns of the importing nation, the convergence between competition-law systems and the international transplantation of competition regimes has the potential to promote the efficiency and equity benefits of competent competition policy worldwide.

CONCLUSION

¹⁴⁹ GERBER, *supra* note 49, at 9.

The competition law in Chile as it exists today, as well as the history that produced the law, provides both a model and a cautionary tale for jurisdictions that seek to establish their own competition regimes. Chile's tumultuous history during the past half-century produced a competition law that is unique in its development and its success. While it came about under the authoritarian control of a dictatorship, it was the flexibility with which its founders drafted the law and the commitment to its preservation by subsequent democratic governments that ensured the longevity and importance of Chile's competition law. The law has adhered to the economic principles that its drafters espoused, but has also managed to respond to the needs of the public that the law protected. Thus, if another country is to look at the Chilean experience as illustrative or instructive, it must do so with the historical context and practical concerns that fostered the development of the law. It is not merely the law itself that made the Law in Defense of Free Competition a success in Chile; instead, the law owes its success to its flexibility, individualized implementation, and contextualized specificity.