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THE U.S. FEDERAL TRADE COMMISSION AND
COMPETITION ADVOCACY: LESSONS FOR LATIN
AMERICAN COMPETITION POLICY

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ABSTRACT:
Competition authorities have several tools at their disposal in crafting a competition policy. Most prominent are litigation and merger review. A less-recognized but often effective tool, however, is “competition advocacy.” Broadly, competition advocacy is using persuasion, rather than coercion, to convince government actors to pursue policies that further competition and consumer choice. Competition advocacy can be especially useful in attacking government-created regulatory barriers to competition and in cultivating a “culture of competition” to educate the public on the economic benefits of competition as the organizing principle of the economy. From a cost-benefit analysis, competition advocacy can often generate substantial pro-consumer outcomes at low marginal cost.

Fostering a vigorous competition advocacy program can be especially valuable in Latin American countries that historically have had heavily-regulated economies and a weak culture of competition. This article draws on the experience of the Competition Advocacy Program of the United States Federal Trade Commission during the past 30 years to provide lessons for Latin American competition authorities seeking to build competition advocacy programs. This article is a chapter in a book on Latin American antitrust law and explains how competition advocacy can be an important and fruitful element of a vigorous competition policy in these developing economies.

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The U.S. Federal Trade Commission and Competition Advocacy:
Lessons for in Latin American Competition Policy

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I. INTRODUCTION

Competition regulators in the United States have a variety of tools available to them to execute competition policy. The most prominent tools that are used are litigation challenging anti-competitive practices and review of mergers for predicted anticompetitive effects. A less-recognized but often effective tool, however, is “competition advocacy.” Broadly, competition advocacy is using persuasion, rather than coercion, to convince government actors to pursue policies that further competition and consumer choice. As the OECD (2004, p.1) has noted, “the mandate of the competition office extends beyond merely enforcing the competition laws. . . . It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.” Apart from formal attempts to change regulatory policy, the domain of competition advocacy also includes activities that contribute to the establishment of a competition culture, such as seminars, press releases, reports, and other endeavors aimed at educating the public on the benefits of

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competition. (International Competition Network’s Advocacy Working Group (“ICN”) (2002, p. iii)). A population that values competition will place indirect political pressure on officials to embrace competition-friendly regulations.

Anticompetitive regulation can result either by design from interest group influence or as an unintended consequence of otherwise well-intentioned regulation. Regardless of the impetus, public restraints on competition can be as harmful to competition and consume welfare as private restraints on trade. Indeed, because of the government’s greater effectiveness in enforcing its restraints on competition, such regulations may be even more harmful in interfering with the competitive process and reducing consumer welfare than private restraints. Whereas private cartels tend to collapse over time because of incentives to cheat, or entry or technological change can erode a monopolist’s position, public restraints are enforced by the government.

Successful competition policy thus must target threats to competition from two fronts, both private and public restraints on competition. (Zywicki 2003). Attempting to protect competition by focusing solely on private restraints is analogous to trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless competition authorities block both channels of anticompetitive conduct, they are not likely to even slow, much less stop, the flow. Eventually all of the water will simply flow toward the unblocked channel. The same is true of antitrust enforcement. If competition authorities create a system in which private price fixing results in a jail sentence, but blocking competition through government regulation is legal, then parties will simply invest in securing a government-sponsored cartel. (Tullock 1967). Federal Trade Commission (“FTC”) Chair Deborah Majoras has observed that government-imposed
restrictions on competition “can exist in the daylight, rather than in the shadows, and those who attempt to evade the restraints may receive official punishment.” (Majoras 2005).

But public restraints on competition need not be intentional, or the result of conscious rent-seeking activity by interest groups. Many regulations are animated by the salutary purpose of consumer protection or other social goals. Nonetheless, many such well-intended regulations may have an unintended negative effect on competition such that the benefits of such regulations are outweighed by the negative effects on competition and consumer choice, or important social goals could be reached with fewer intrusions on the competitive process.

To address these problems of government-created barriers to competition, the FTC has for the past thirty years pursued a competition advocacy program. The purpose of the FTC’s program is to study and critique government-created barriers to competition and where possible and appropriate, to suggest alternative regulatory approaches that can accomplish the same goals at lower cost to the competitive process. This is accomplished through consultations with state and federal regulators to advise them on the economic consequences of their regulatory activities in term of their effect on competition and consumer welfare. These consultations may be formal or informal, public or private. At the FTC, formal advocacy filings can include filing written comments to other administrative agencies, submitting amicus briefs in litigation, presenting testimony before legislative bodies, or submitting letter comments at the request of appropriate federal and state legislative or administrative bodies. Advocacy activities also can be done informally through conversations with administrative agencies, legislators, or their
staffs. Advocacy activities thus can take a wide range of forms, but the purpose is the same, namely to explain to the appropriate decision-makers the likely effect of a proposed regulation on the competitive process and consumer economic welfare. Advocacy filings can thus be either positive (supporting a proposed regulatory change, for instance) or negative (opposing a particular regulation or legislation). Both the success and political support for the program has waxed and waned over time. (Cooper, Pautler, & Zywicki 2005) During this time, the FTC has learned many lessons about what makes for a successful competition advocacy program. Given the extensive governmental regulation of the economy in Latin America, opportunities for a robust competition advocacy program are surely manifest.

This essay distills the lessons of the FTC’s competition advocacy program and explains the impact it has had on the American economy and regulatory structure over time, with an eye toward studying the implications of such a program for competition policy in Latin American countries. Some Latin American countries may already have similar programs in place, but we are not aware of any such program as extensive as that of the United States FTC.

II. COMPETITION POLICY IN LATIN AMERICA

Throughout Latin America competition authorities continue to grapple with the challenges of crafting an appropriate competition policy for developing countries. Indeed, a commitment to competition as the organizing principle of the economy is of relatively recent vintage in Latin America. Various forms of economic planning and interventionism historically have characterized modern economic policy throughout the
region. The economic legacy of South American colonialism was that of the “Encomienda,” imposed by the Crown for the benefit of Spanish conquistadores. The Encomienda system tended toward a high concentration of wealth in a landholding aristocracy, rather than market-based competition. (De Leon 2004). Commerce and competition were subordinated to the institutions and norms of an aristocratic military society.

Independence altered the political institutions of the region, but did not radically transform South American economic institutions. Economic theory and policy in the post-colonial era and through most of the twentieth century stressed state planning and interventionism rather than market competition, tendencies that were reinforced by widespread acceptance of Marxist political ideology. (De Leon 2004). As Professor Ignacio De Leon, former chief of Venezuela’s Competition Authority, Pro-Competencia, observes, “As a result of economic centralization public policy tended to eliminate competition, which was regarded as a dangerous threat to planning development. Economic planning was considered the fundamental means of allocating resources.” (De Leon 2004, p. 421). Competition was replaced with planning and regulation throughout South America. Many industries were either nationalized or subjected to heavy price controls. Compulsory licensing in many economic sectors stifled competition in services. Protectionist trade policy protected domestic producers from competition from abroad, dampening the incentives to become more efficient and improve quality. Entry and exit into markets was heavily regulated.

During this era, government actively suppressed competition and promoted the development of large industrial enterprises and cartel-type arrangements to encourage
economic stability, including widespread professional licensing and other barriers to entry. As De Leon observes, “Cartels and other forms of competition restrictions were not only tolerated but also openly promoted by the State.” (De Leon 2004, at p. 421). He adds, “In Latin America, cartels were actively promoted in view of the interest of governments in ensuring the permanence of inefficient domestic producers in the market.” (De Leon 2004, at p. 422). In turn, these large state-owned and state-protected firms and industries were expected to serve as a sort of mini-welfare state, substituting for poorly-funded and politically unstable governments and distributing benefits to their members. The overall effect was to create a cozy relationship between industry and the government which favored economic stability over competition and the interests of large businesses over that of consumers. (De Leon 1999b).

These heavy regulations tend to create substantial regulatory barriers to entry and thereby stifle competition. In turn, by suppressing competition, these high regulatory barriers retard economic growth and spur political corruption. (Djankov, et al. 2002). This thicket of regulation makes it almost impossible for legitimate small businesses to enter and remain in business, thereby limiting rivalry to incumbent, often politically well-connected, businesses. (de Soto 2000).

III. COMPETITION ADVOCACY AND COMPETITION POLICY IN THE UNITED STATES

A. THE HISTORY OF ADVOCACY AT THE FTC

During the 1970s America suffered “stagflation,” in which the economy simultaneously suffered from low growth (stagnation) and high inflation. American companies became inefficient and unresponsive, consumers suffered, and foreign
competitors gained market share. In 1974, in the midst of this era, the Chairman of the Federal Trade Commission, Lewis Engman, gave a speech to financial analysts in which he tied the country’s macroeconomic problems to its competition policy. In particular, Engman argued that burdensome federal transportation regulations contributed to the problem of slow growth. Engman explained that the Civil Aeronautics Board, which comprehensively regulated routes and fares in the airline industry, raised prices by limiting the entry of new carriers and controlling the distribution of airline routes. He also noted that the Interstate Commerce Commission’s comprehensive rate regulation effectively sanctioned price fixing among freight trucking companies. Misguided efforts to regulate competition in these two industries alone—airlines and trucking—substantially raised transportation costs, raising prices, and hampering economic growth. During the next decade the federal government moved to substantially deregulate airlines, railroads, trucking, and inter-city buses, increasing consumer welfare by tens of billions of dollars annually.\(^1\) During this period the FTC picked up on Engman’s call, using further speeches and formal written submissions to regulatory agencies and legislators identifying the costs of competition-chilling regulations.

Engman’s speech effectively launched the modern competition advocacy program at the FTC.\(^2\) Because Engman’s speech presented competition policy as a means of addressing the country’s pressing economic problems at the time, the speech received substantial coverage in the popular press, including front page coverage in the *New York*

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\(^1\) Estimates of the welfare effects of deregulating many of these industries are provided in Zywicki (2003), at n. 8.
\(^2\) Earlier eras saw some isolated advocacy activity, but only in fits and starts. Engman’s speech launched the modern advocacy program which has continued in various forms to the modern day, thus it is emphasized here. The early history of the program is given in Cooper, Pautler, & Zywicki (2005), at page 1094.
Spurred by this auspicious beginning, throughout the 1980s the Commission continued aggressively to pursue advocacy activities. During this period the Commission repeatedly recognized the valuable role played by the advocacy program in pursuing the Commission’s competition policy agenda. (Celnicker 1989). By the middle of the 1980s the FTC’s advocacy program reached its zenith, with ninety comments issued annually to federal and state regulators. Beginning in the 1990s, however, the advocacy program began to dwindle in importance and resources within the FTC. The reduction in emphasis during this period occurred for a number of reasons, including a general desire by certain FTC Chairs to reduce conflict with other state and federal regulators, as well as a record merger wave in the United States that taxed the resources of the FTC to be able to dedicate assets to the task of competition advocacy activities. Nonetheless, since 1980 the Commission has filed more than 750 advocacy comments with various agencies.

The FTC’s continued activity on the advocacy front may be illustrated with a few recent examples. A particular industry of interest has been the regulated professions. Regulated professions, such as attorneys and optometrists, have a long tradition of self-regulation. Although such regulation is often justified in the name of consumer protection, it provides professionals with both the opportunity and incentive to stifle competition to benefit themselves at the expense of consumers. For instance, in the United States, attorneys have enacted or attempted to enact regulations that restrict
advertising of prices and services, proscribe relationships with commercial firms, and expand the list of services that can be provided exclusively by attorneys. Overreaching professional self-regulation can substantially increase the costs of professional services while providing minimal marginal consumer benefits.³

As a result of these fears, during the past few years U.S. competition authorities have encouraged the states to adopt pro-competitive professional regulations. For instance, the FTC worked with the Attorney General of Connecticut in commenting before the state opticians board, which was considering whether to require stand-alone sellers of contact lenses (such as mail order or on-line sellers) to obtain state optician licenses.⁴ The FTC also has encouraged states to reject proposals that would prevent nonlawyers from competing with lawyers to handle real estate closings, and which would have thereby restricted competition from title companies, out-of-state suppliers of the services, and Internet lenders, resulting in higher prices for consumers. Research in the European Union has reached similar conclusions about the welfare effects of overly-extensive professional regulation and can generate support for member states to ease overly restrictive rules. (Monti 2003).

Another recent comment that shows the positive effect of the Commission’s advocacy program was the FTC’s comment filed with the Commodities Futures Trading Commission (“CFTC”) in January 2004. (Majoras 2005). The comment concerned the application by Eurex, a German-Swiss financial exchange, to establish an all-electronic market in the United States to compete with the Chicago Board of Trade and the Chicago

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Mercantile Exchange. The incumbent exchanges opposed the application. The FTC’s submission to the CFTC noted the theoretical and empirical economics literature that generally found that competition among rival financial exchanges can benefit consumers by leading to lower bid-ask spreads. Moreover, Eurex’s innovative electronic exchange would likely reduce costs relative to the traditional exchange, generating technological improvements in the market.

CFTC Commissioner Lukken specifically indicated that he had placed great weight on the FTC’s analysis in supporting the CFTC’s decision to approve another U.S. futures exchange. Subsequent reports in the business press found that the incumbent exchanges did in fact lower their trading fees substantially in reaction to the new competitive threat in the market for U.S. Treasury futures contracts leading to increases in the volume of trades. (Business Week 2004).

One of the FTC’s most notable recent advocacy successes was on the question of the interstate direct shipment of wine. In October 2002, the FTC held several days of hearings on the problem of state regulatory barriers to e-commerce in a variety of industries, including on-line sales of funeral caskets, contact lenses, and wine.

Regulation of e-commerce provides a ready example of the failures in the political system that can give rise to anticompetitive regulation. The efficiency of e-commerce flows from the fact that on-line sellers can service the entire country without the need to maintain high-overhead storefronts in specific geographic areas. Further, because consumers can shop among online sellers more cheaply than offline sellers, online firms

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are likely to compete more intensely on price than their offline counterparts. As a result, Internet sellers can drive down prices and increase consumer choice.

This business model, however, threatens incumbent bricks-and-mortar sellers who fear this new competition. Moreover, because the operations of on-line sellers are diffused all over the country, whereas traditional sellers are located in a specific geographic area, on-line sellers are politically weaker than local special interests and face the potential obstacle of an array of costly and inconsistent regulations. As a result, just as domestic industries have incentives to seek tariff protection notwithstanding its negative impact on consumers, traditional bricks-and-mortar sellers have the incentive to seek regulations that protect them from out-of-state competitors, such as on-line sellers.

In July 2003, the FTC issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers. In the United States, most alcohol is sold through the “three-tier” system of producers, licensed wholesalers, and retailers. Direct shipment of wine allows the producer to sell directly to consumers using common carriers such as Fed Ex to deliver the products. This ability to bypass one or two levels of the “three tier” system can reduce prices and increase consumer choice. In addition, because of the rapidly proliferating number of small wineries in the United States, many wineries are unable to find a wholesaler that will distribute their wines for them. Direct shipment thus permits these wineries to distribute their products to consumers that would be impossible to reach by any other means. Research conducted by economists at the FTC found that on-line sales of wine led to increased consumer

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6 See, e.g., Bakos (1997) (developing a theoretical model of lower online search costs); see also Cooper (2006) (finding online prices lower and less dispersed than offline prices); Brynjolfsson and Smith (2000) (same).

choice and lower prices than sales through traditional channels. (Wiseman & Ellig 2004).

Opponents of direct shipment of wine, including most prominently those liquor wholesalers disintermediated by direct shipment, raised concerns that permitting direct shipment of alcohol could lead to increased access to alcohol by minors. This is unquestionably a legitimate public concern. But this sort of “all-or-nothing” approach is unwise as a matter of sound policy-making. At most, it suggests that regulators should attempt to balance the attainment of other social goals against the desire for greater competition, and should seek to attain those social goals with the least restrictive incursions on competition.

The FTC considered these clashing policy concerns in the Wine Report. In fact, the opponents of direct shipping, including state regulators, had expected their expression of concern to simply be taken at face value as the sort of “trump” described. Rather than simply taking their expression at face value or simply ignoring them, however, the FTC surveyed alcohol regulators in a number of states that had permitted wine direct shipment to discover their opinion on the validity of the underage drinking concerns that had been raised. The FTC found that in fact the concerns about underage drinking were largely groundless in practice, due to the economic constraints of direct wine shipment (because of fixed shipping costs, only more expensive wines were less costly when purchased on-line), the delay involved between order and receipt, and the inherent difficulties associated with on-line acquisition of alcohol (such as the requirement of a credit card).

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8 Note, however, that at most this concern would lead to a requirement that all alcohol be sold to the public through appropriate retailers; the wholesaler link between producers and retailers seems to offer no additional security against underage drinking.
The experience of state alcohol enforcement officials revealed that alcohol was easily available to most minors through traditional bricks-and-mortar channels, making it unnecessary for minors to incur the additional expense, delay, and risk of ordering wine on-line. Finally, the FTC found that by adopting safeguards, such as checking age identification at delivery, could further address these social concerns without the adverse competitive impact of a prohibition on direct shipment.

The impact of the FTC’s Wine Report was felt dramatically a few years later when the United States Supreme Court declared unconstitutional certain state laws that discriminatorily permitted direct shipment to consumers from in-state wineries, but prohibited similar shipment from out-of-state wineries. (Granholm v. Heald 2005). Under applicable principles of constitutional law, a state law that facially discriminates against out of state manufacturers of a good can be justified only if the discrimination is necessary to accomplish a legitimate regulatory purpose and is the least-intrusive means of accomplishing the regulatory end. (Agarwal & Zywicki 2005; Ellig, Agarwal, & Zywicki 2004). In order to support the regulation, therefore, the state must produce concrete empirical evidence to support the regulation. In striking down the discriminatory state regulations, the Supreme Court in Granholm relied extensively on the FTC’s findings in the Wine Report, both with respect to the consumer welfare benefits of direct shipping as well as the plausibility of the states’ justifications for its discriminatory regulatory regime (such as prevention of underage drinking). By contrast, the states offered no empirical evidence to justify its discriminatory regulatory regime.
As a result, the Wine Report played a pivotal role in the Supreme Court’s decision in the case.9

As these examples demonstrate, an energetic competition advocacy program can provide an important complement to traditional competition policy tools, thereby generating improvements in consumer welfare. Despite successes such as these which have increasingly illustrated the benefits of a vigorous competition advocacy policy, the FTC’s commitment to the program has waxed and waned over time. Examining the sources of these changing fortunes can provide lessons as to how to maintain the effectiveness of and support for the program over time.

B. EXPLAINING VARIATION IN ADVOCACY ACTIVITY OVER TIME

1. Political and Economic Developments

Developments exogenous to decisions made within the Commission may explain some of the changing fortunes of the advocacy program over time. In the late 1970s and 1980, regulation of several inherently competitive industries, such as certain transportation markets, were obvious targets for advocacy efforts. By the mid-1990s, however, most of those easy de-regulation targets were gone, as regulation of transportation, certain utilities, and telecommunications had been altered significantly or eliminated. Thus, there may have been somewhat less need for an advocate for rational analysis of federal regulatory and competition issues at some times rather than others.

Other political and legal developments may also generate increases or decreases in advocacy activity. In recent years, for instance, a series of important decisions regarding commercial speech and product health claims has generated an overhaul of the FDA’s regulation of these claims. Given the FTC’s expertise in this subject area, the FTC has filed a series of comments on topics ranging from the scope of the First Amendment, to qualified health claims and regulatory responses to rising obesity among the U.S. population.

Dramatic economic and technological innovations also may create conditions that call forth a higher level of advocacy activity; as new technology displaces existing business models, incumbents often turn to regulators, demanding protection from new competitors. In this vein, the development of the Internet and e-Commerce has been a stimulus for advocacy filings because the Internet creates a new form of competition to established businesses. Various existing laws that have been used to limit competition and consumer choice have now been extended to block competition from the Internet as well. In areas such as direct shipment of wine, Internet casket sales, contact lenses, and other industries, renewed efforts have been made by entrenched interests to block this new form of competition. In many situations, moreover, the beneficiaries of anticompetitive regulations are in-state merchants, whereas many Internet sellers do a modest amount of business in many states. As a result, in-state merchants have the incentive and influence to lobby effectively for protection, whereas out-of-state sellers

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11 The FTC’s various comments on these topics are described in greater detail in Cooper, Pautler, & Zywicki (2005); see also Zywicki, Holt, & Ohlhausen (2004).
lack the ability to compete as effectively in the political market as in the economic market.

2. **Lack of internal/external political support**

The FTC’s advocacy program has been controversial from its inception because it cannot avoid offending powerful interest groups and other regulatory authorities on each issue it pursues. Each regulation generally has some identifiable and well-organized political support inside and/or outside government. By contrast, as will be shown in more detail below, consumer interests in increased competition is supported in the abstract, but rarely finds a strong political voice in particular contexts. Some of the political animus toward the program was likely based on disputes over specific policy suggestions, while more general objections may have arisen regarding the proper role (if any) of a federal agency in providing suggestions regarding competition or regulatory policies to a state legislature or regulatory body. Additionally, certain Congressional critics also argued that the advocacy program was sufficiently resource intensive that it kept the Commission from aggressively pursuing predation and other nonmerger antitrust activities.

This latter concern, however, seems largely unfounded. The resources that the advocacy program consumed were never sufficient to significantly constrain the Commission from pursuing other activities. (Celnicker 1989, p. 399). Advocacy consumed about 3 to 4% of FTC staff resources (30 to 40 employee workyears) at the 1987 zenith.\(^\text{12}\) Advocacy resources were about 2% of FTC resources in 1989 and by 1994 had fallen to less than \(\frac{1}{8}\)% of FTC resources (4 to 5 employee workyears). By

\(^{12}\) Celnicker (1989, p. 399) (citing Memorandum from James Giffin, Associate Executive Director, to Andrew J. Strenio, FTC Commissioner, (July 28, 1987)).
2000, the percentage was so small that the program was virtually invisible - a maximum
guesstimate regarding agency-wide advocacy resources would have been two workyears.
(The data for that year, such as they are, indicate that less than one workyear was devoted
to advocacy across the agency). As of 2002, the total agency workyears devoted to
advocacy might have been closer to five. Majoras (2005) estimates that resources
expended on the advocacy program in 2005 was less than one percent of the FTC’s
budget, or less than $2 million total.

Although the advocacy program itself is unlikely to have affected enforcement
activities negatively, it is possible that internal resources constraints, such as the U.S.
merger wave of the 1990s, may have had an indirect effect of slowing the advocacy
program. The need to examine the large number of mergers may have drawn off Bureau
of Economics resources from the primary research necessary to generate effective
advocacies, as well as taxing the small staffs of the individual Commissioners which
remain fixed in size over time. Thus, there are various chokepoints in the advocacy
production pipeline that can be affected by resource constraints that are not captured
simply by noting the relatively small size of the program.

C. Relation to Sectoral Regulators

A final question that arises in carrying out advocacy activities is the relationship
between agencies that regulate competition generally, such as the FTC, and agencies that
regulate particular sectors of the economy, such as the FCC, FDA, Department of
Transportation, or Department of Agriculture. The mission of competition authorities to
promote competition and consumer welfare may come into conflict with the missions of
these other sectoral regulators that are responsive to their own constituencies and
regulatory goals. Consumer welfare may be one of the goals of sectoral regulators, but it is not their primary charge. For instance, while the Department of Agriculture surely cares about competition and low prices for consumers, its primary political constituency is U.S. farmers and members of congressional agriculture oversight committees, who generally will prefer reduced competition and higher and more stable prices. Given inevitable clashes between interests of consumers and interests of the agency’s primary constituencies (here, farmers), the interests of consumers generally will yield.

In addition, agencies themselves will have their own motivations, and will tend to seek to expand their authority, power, and budget. (Niskanen Bureaucracy, Wilson Bureaucracy). As a result, sectoral regulators will be chary about sharing their regulatory authority with other agencies, such as competition authority. Moreover, sectoral regulators will tend to have an inherent internal bias towards greater regulation, especially of the command-and-control variety. (Zywicki 1999). More detailed and command-and-control regulation has a higher rate of planned obsolescence built into it, necessitating more frequent amendment and updating. This dynamic creates a natural constituency for the regulator’s product, requiring interest groups to exert repeated lobbying efforts to update obsolete regulations in light of changing circumstances. In turn, this boost in demand for the regulator’s services is met by a need for larger budgets and regulatory discretion on behalf of the regulators themselves. A competition-based policy, by contrast, is essentially a self-governing system, requiring only minimal oversight and infrequent intervention only to ensure that the system is functioning properly. (Zywicki 1999). Absent such malfunctions, no further regulatory activity is needed. By contrast, a regulation-based system requires ongoing maintenance, review,
and updating, thus creating a steady stream of demand for the regulator’s services and recurrent trips into the regulatory pool. Finally, sectoral regulators may be more prone to the problem of regulatory capture, as their narrow focus and repeat dealings with the industries that they regulate may lead them to adopt the views of the industry that they regulate, confusing the interests of the regulated industry with the interests of the public at large. Sectoral regulators may also be inclined, by disposition and training, toward the status quo, which is predictable and maintains their human capital. As a result of these various factors, sectoral regulators will tend be resistant to intervention by competition authorities, both by mission as well as by bureaucratic maximization principles.

There is no single correct answer on the proper division of responsibilities between sectoral regulators and competition authorities. Sectoral regulators have greater expertise in a given area or industry. But competition agencies may have better appreciation of the social and economic benefits of competition. Sectoral regulators may lack a background in competition policy and may view industry, rather than the consumer and the competitive process as their client. Even if they want to promote competition, sectoral regulators may be subject to intense pressure from the industries that they oversee and from the legislators that oversee them, a problem of regulatory capture.

Moreover, sectoral regulators may lack the breadth of knowledge to distinguish between legitimate and illegitimate requests for exemptions from the rigors of the competitive marketplace. Almost every economic sector can plausibly claim that it is somehow “different” and should be exempt from the competitive process, or sufficiently “complex” that it should be subject to a unique competition policy. Because of their breadth of knowledge of competition in many economics markets, competition
authorities may be better able to distinguish legitimate from illegitimate claims for preferential treatment. Rather than promoting competition and consumer welfare, sectoral regulation often has harmed consumers by imposing needless controls on entry, pricing, and new product development. (Muris (2002); Joskow & Rose (1989)). Because of these differences in focus and expertise, competition authorities pursuing advocacy activities may come into conflict with sectoral regulators, conflicts that are unavoidable, although steps may be taken to minimize this conflict.13

IV. THE NEED FOR COMPETITION ADVOCACY

A. ADVOCACY AND THE ECONOMIC THEORY OF REGULATION

Because markets sometimes will fail to produce goods or services that consumers value, regulations that restrict competition may arguably be justified. For example, some markets may be so fraught with informational asymmetries between producers and consumers that governmental assurance of quality is warranted. Although regulation in these instances may deprive consumers of the some of the benefits of competition, it may be warranted when the benefits of correcting market failures exceed the opportunity costs of displaced competition.

Regulation, however, also can be used to restrict competition not to improve consumer welfare but to transfer wealth from consumers to a favored industry. It has long been recognized that because of industry’s superior efficiency in political organization relative to consumers, consumer interests often are subservient to industry

13 Zywicki (2003) at pp. 9-10 describes some of the techniques used by the FTC to minimize this conflict and to maintain an appropriate balance with sectoral regulators.
interests in the regulatory process.\(^{14}\) Beginning with the seminal work of Stigler (and later more formally developed by Peltzman and Becker), however, the notion that regulation is produced in a black box to maximize social welfare has given way to what has become known as the economic theory of regulation (ETR). (Becker 1983; Peltzman 1976; Stigler 1971). The foundation of ETR is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state’s coercive power to supply it in return for political support. When adopting a policy, regulators weigh the political support from those who stand to gain against political opposition from those who stand to lose. The interest group most able to translate their demand for a policy preference into political pressure is the one most likely to achieve their desired outcome.

Building on the work of scholars such as Anthony Downs (1957) and Mancur Olson (1965), ETR explains why information and organization costs will limit the size of effective interest groups. As a threshold matter, individuals must expend resources to gain enough information to recognize their interests. As Stigler notes, “[t]he costs of comprehensive information are higher in the political arena [than the marketplace] because information must be sought on so many issues of little or no direct concern to the individual, and accordingly he will know little about most matters before the legislature.” (Stigler 1971, p. 11). Holding constant the size of a wealth transfer, the larger the interest group size, the smaller the per capita benefit; as per capita benefits diminish, the less likely it is that informing one’s self on the impact of a regulation makes economic sense.

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\(^{14}\) As Peltzman (1976, p. 212) noted, “[a] common, though not universal, conclusion has become that, as between the two main contending interests in the regulatory processes, the producer interest tends to prevail over the consumer interest.”
Second, once individuals recognize their interest in the outcome of the regulatory process, they must organize to translate their demand for policy into effective political pressure. Because the benefits from acquiring a desired regulatory outcome is a public good for members of an interest group, however, each member has an incentive to shirk his obligation to the group and free-ride of the contributions of others.

The important implication of this insight is that policies that reduce the welfare of a majority for the benefit of a minority are within the set of feasible outcomes. As Peltzman (1976, p. 213) observes, “In consequence the numerically large, diffuse interest group is unlikely to be an effective bidder, and a policy inimical to the interest of a numerical majority will not be automatically rejected.” Indeed, one readily can see how consumer interests give way to the interests of a small industry in the regulatory process. Beyond a certain point, per capita benefits from a preferred regulatory outcome are diluted such that it becomes irrational to take part in the political process. A practical consequence of this is that small, concentrated groups with similar interests — like members of a particular industry — can organize political support more effectively than large diffuse groups — like consumers generally. Thus, the equilibrium outcome of the political process is likely to be regulation that harms consumers by protecting a favored industry from competition.

Of course, such regulation seldom will be presented to the public as what it truly is. Instead, proponents likely will cloak their protectionist desires in the robe of “consumer protection,” proclaiming that, left to its own devices, the market will do more harm than good. Indeed, a common criticism of competition advocacy is that competition is not the only value that government should promote and that there will
often be other social goals that conflict with greater competition and consumer choice. These sorts of consumer protection concerns are often raised as a sort of “trump card” against all other public policy goals, such as competition and consumer choice. But, because consumer protection concerns may be offered strategically as well as sincerely—special interest groups often raise them as a fig leaf for their own narrow economic benefit—they should not necessarily be taken at face value.

Consider the example of unauthorized practice of law (“UPL”) rules that prohibit non-attorneys from handling routine tasks associated with the closing of a residential real estate transaction. By protecting attorneys from having to compete against non-attorneys, UPL restrictions raise the prices for legal services. Although proponents of these restrictions tout their necessity in protecting uninformed consumers, empirical examination shows that these restrictions provide consumers with no cognizable benefits in terms of increased protection from fraud or incompetence. But consumers are unlikely to mount a challenge. First, bar associations often promulgate these rules and state supreme courts adopt them through processes that only members of the bar—the beneficiaries—are likely have knowledge.15 Second, even if consumers become aware that UPL restrictions are being considered, they would have to expend resources to understand that, despite the rhetoric from the bar associations, these restrictions are almost certain to harm consumers. Finally, once aware of the costs associated with a

15 For example, in Massachusetts, a task force of the Massachusetts Bar Association proposes a definition of the practice of law to the Massachusetts Bar Association House of Delegates. If the House of Delegates approves the definition, it will recommend that the Massachusetts Supreme Court adopt the definition as part of the ethics rules that govern the practice of law. Outside of the legal community in the state, such efforts rarely receive any publicity despite their potential to exact large costs on consumers. See Letter from the Federal Trade Commission & the United States Justice Department to the Massachusetts Bar Association (Dec. 16, 2004), at http://www.ftc.gov/os/2004/12/041216massuplltr.pdf.
proposed UPL restriction, organizing to fight it would be difficult given the expense involved and the collective action problems discussed above.

2. **Advocacy as Representing Consumer Interests in the Political Process**

   ETR suggests that because consumers will be relatively ineffective at representing their interests in the political system, political outcomes may tend to restrict competition and consumer choice more than is economically justified. Tasking a public entity with the responsibility of representing dispersed consumers by promoting the principle of competition in the political process is one way to ameliorate this political market failure.\(^\text{16}\) Indeed, because anticompetitive regulation that results from a political market failure can have just as pernicious effects on consumer welfare as private conduct that harms competition, there does not appear to be a reasoned justification for the FTC to police the former but not attempt to ameliorate consumer harm from the latter.\(^\text{17}\)

   By representing consumer interests in the political process, the FTC is able to affect political outcomes through three, non-mutually exclusive channels. First, to the

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\(^\text{16}\) As De Leon notes, “[T]he logic justifying this ‘competition advocacy’ is completely divorced from that which led to the emergence of antitrust statutes. In this regard, antitrust provisions emerged from a recognition that ‘markets fail’ to deliver social good, whereas competition advocacy is justified on the basis that ‘government fails’ to provide for suitable ‘official’ institutions within which to work out social and economic interaction.” (De Leon 1999a, p. 302). Similarly, as the 1989 “Kirkpatrick Report” observes:

   The FTC’s competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program’s continuance and expansion. Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.


\(^\text{17}\) See McChesney et al. (1982, pp. 7-8) ([T]he Commission should allocate its resources to the areas where net consumer benefits are greatest, regardless whether the injuries arise from restrictions by private parties or public agencies.”). *See also* Remarks by FTC Chairman Daniel Oliver (Oliver 1986) (“It is now convincingly argued that state and local governments create some of the most blatantly anticompetitive combinations to be found in the economy.”).
extent that a comment informs the public of the way a proposed regulation is likely to affect them, it can spur political action, and thus increase the political costs associated with supporting anticompetitive regulation. In this manner, competition advocacy can move the political equilibrium towards one that is more favorable to competition.

Second, an FTC comment can provide “political cover” for public spirited politicians seeking to benefit consumers but opposed by a powerful industry; regardless of whether an FTC comment increases the political cost to supporting anticompetitive regulations, a politician can claim that it has as an excuse for not supporting a favored industry.

Finally, a comment simply may persuade a politician to oppose regulation by presenting a compelling case that a certain regulation restricts competition more than is necessary to promote some consumer protection goal, and therefore is not in the public interest.\textsuperscript{18}

ETR may also justify tasking a federal agency with carrying out the advocacy function. As noted by James Madison in Federalist 10, state and local governments are often the most prone to the sort of factions and interest-group activity that generates anticompetitive regulation. Thus, a particular interest group may be especially concentrated or strong in a particular state, and that group may have undue influence in the political process of that state. In addition, the anticompetitive regulations of one state may have major spillovers, or other externalities, that impose burdens on national markets.\textsuperscript{19} As a result, it is appropriate for the advocacy function to rest with a national

\textsuperscript{18} As discussed \textit{infra}, the strength of this effect is likely to vary directly the degree of insulation a politician has from constituency interests. \textit{See} Kalt & Zupan (1990).

\textsuperscript{19} These spillovers may occur in many different ways. For instance, restrictions on the ability of in-state consumers to receive direct shipment of wine from out-of-state wineries have been called “the single greatest barrier to e-commerce in wine.” \textit{See} Staff of the Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003) (“Wine Report”). In addition, so-called “sales below cost” laws prohibit the sale of gasoline below certain minimum prices and have the likely effect of chilling aggressive competition and potentially raising prices to consumers. By affecting out-of-state
actor that will be less prone to capture by parochial interest groups, but instead will be attenuated from some local political pressures and will be able to look out for the national goals of preserving robust economic market competition. In addition, the FTC’s status as a bipartisan independent agency may also increase its effectiveness on advocacy issues. Because critics often will characterize FTC interventions as “taking sides,” the Commission’s status as a bipartisan expert agency may insulate it from some of the attacks that might otherwise be leveled at its advocacy activities.20

Despite these justifications for an advocacy program, there are some inherent limits on the benefits that advocacy can provide. First, advocacy only can inform the debate and suggest appropriate action; it cannot compel that action. Although advocacy provides regulators with information concerning the likely economic consequences of a policy choice, the FTC is not a constituent. FTC opposition to an unwise or protectionist piece of legislation, therefore, is not the same as constituent opposition because the FTC cannot provide political support in the form of votes or campaign contributions. In the context of ETR models, by subsidizing the collection and dissemination of information, advocacy increases consumers’ efficiency in mounting political pressure.

Another important consideration is that the FTC is itself a regulatory body and may be subject to political pressure from interest groups in much the same manner as federal or state agencies or legislatures. As Timothy Muris, who has served as chairman and bureau director, has observed, “Congress can, and often does, exert considerable

consumers who purchase gas in states with such restrictions, the impact of the anticompetitive law is felt in interstate commerce.

20 The FTC’s advocacy activities are often criticized as an improper “meddling” in the affairs of state governments. This criticism, however, is fundamentally misplaced, as the Commission has followed a general long-standing policy of pursuing advocacy filings with state officials only where public comments are invited or when expressly invited by an appropriate state official.
influence over an agency such as the FTC. (Muris 1986). Indeed, some studies have found a relationship between the preferences of congressional oversight members’ constituencies and FTC policy.\(^{21}\) And due to complaints from adversely affected interest groups, in the late 1980s Congress attempted to cripple, if not totally eliminate the advocacy program.\(^ {22}\) That the FTC is an independent and bipartisan agency, however, is likely to limit the ability of any particular industry to capture it. Almost uniformly, the Commission gives unanimous approval for the staff to issue its comments. Because one industry would be unlikely to effectively capture all these Commissioners, the views put forth in advocacy comments are highly unlikely to have resulted from interest group pressure. Further, unlike other agencies with similar structures (e.g., FERC, FCC), the FTC deals with a wide range of industries, making it less likely than agencies that serve only one or a few industries to be subject to capture by any single interest group.

V. ASSESSMENT OF THE COMPETITION ADVOCACY PROGRAM

One of the FTC’s core goals is to prevent anticompetitive business practices. Competition advocacy furthers this goal by attempting to prevent government action that restricts competition. Important to determining the cost-effectiveness of the advocacy program is examining its efficiency in preventing anticompetitive regulations versus that of FTC enforcement.

\(^{21}\) Weingast and Moran, for example, provide some empirical evidence that FTC enforcement priorities — as measured by Robinson-Patman, textiles, and credit caseloads — track the preferences of the Congressional committees that oversee the FTC. Weingast & Moran (1983). Similarly, Faith et al., find that the FTC is statistically significantly less likely to challenge a merger that involves the district of an FTC oversight committee member. Faith et al (1982). Future Chairman Muris — then head of BCP — in a response to Weingast and Moran’s paper expressed skepticism that their evidence was sufficient to prove that point. In particular, he noted the authors’ failure to consider forces other than Congress — such as staff, the courts and the White House — that also shape FTC policy. See Muris (1986).

\(^{22}\) See Celnicker (1989), at 393-400.
A. FACTORS AFFECTING THE SUCCESS OF COMPETITION ADVOCACY

The value of competition advocacy should be measured by (1) the degree to which comments altered regulatory outcomes times (2) the value to consumers of those improved outcomes. For all practical purposes, however, both elements are difficult to measure determine with any degree of certainty. Although certain advocacy comments almost surely had some effect on final outcomes and others clearly did not, there is no reliable way to determine the marginal impact of a particular comment on the political process. Moreover, even if decision-makers later indicate that they relied on particular evidence or arguments, one can never be sure that such statements are not just after-the-fact justifications.

One study that attempted to assess the advocacy program’s impact on regulatory outcomes between 1987-89 found that 40 percent of comment recipients reported that the comments were at least “moderately effective,” meaning that “the governmental entity’s actions were totally or in large part consistent with all of the FTC’s recommendations, and that any action taken was largely or partly because of those recommendations.”

The author concedes, however, that this “does not establish that the FTC effect on those decisions improved them; that is what cannot be measured.”

With these caveats in place, we note four factors — two of which flow directly from ETR — that appear to play a role in the likelihood that comments will influence the

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23 Celnicker (1989) at 391. Another 11 percent of the survey respondents found the comments to be “slightly effective,” meaning that “the governmental entity’s actions were to a small degree consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations.” Id. Additionally, the author found that 47 percent of respondents gave the comments “substantial weight because it came from the FTC.” Id. at 322. In 1989, a virtually identical survey was sent by the Director of the FTC’s Advocacy Office to recipients of comments dated June 1, 1987 through June 2, 1989. The responses to this second survey were consistent with those from the first. (Results on file with authors).

24 Id. at 400.
regulatory outcome. First, comments before executive and independent regulatory authorities generally have met with more success than those before elected legislators. For example, comments to the FCC, NHTSA, FERC, FAA, FDA, and CFTC all appear to have positively affected regulatory outcomes.\textsuperscript{25} At the same time, the track record with state regulators appears less successful. For example, although the FTC’s efforts to allow entry into taxicab services in the latter 1980s achieved certain successes, for the most part, cities chose not to listen to the FTC’s advice that free entry in conjunction with fare competition would likely provide a better outcome for consumers. These observations are consistent with ETR, which predicts that regulators who are insulated from direct political influence are more likely to act independently based on policy considerations rather than constituent interests. (Kalt & Zupan (1986); Hammond & Knott (1996); Hammond & Miller (1987)). This insight offers an explanation as to why comments may have more effect before non-elected federal regulators rather than elected state legislators.

Second, in situations where one industry (or a subgroup within an industry) is attempting to secure regulation that would hinder competition by favoring it at the expense of a rival industry (or group), rather than dispersed consumers, competition advocacy is likely to be more successful. This prediction follows from ETR because comments supporting a position taken by another industry rather than only consumers are more likely to be successful given industry’s superior comparative political organization ability. Casual empiricism provides some support for this hypothesis.\textsuperscript{26}
Third, empirical substantiation for a position is important; if a comment can point to careful empirical work demonstrating that the regulation in question is likely to harm consumers, it generally proves more persuasive to regulators and the public. This may be why comments with a substantial empirical component tend to meet with greater success.  

Finally, comments involving issues at the interface between competition and consumer protection policy appear to be more successful. The Commission’s dual expertise in competition and consumer protection will often enable it to speak with great force and credibility on those issues.  

In these areas, the FTC’s input can be especially valuable in debunking consumer protection rationales for anticompetitive regulations or

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27 Comments containing original empirical research on specific regulatory issues were filed with many agencies including the FCC, the DOT, and the FDA. These filings tended to be the most convincing work of the program, because the empirical work made the filings more valuable and more credible than they might otherwise be. See, e.g., Comment on the Federal Communications Commission’s AM/FM Radio and Television Ownership Rules, (July 15, 1987); Comment on Boston’s Airport Authority Program for Airport Capacity Efficiency (Feb. 29, 1988); Comment on the FCC’s Rules Concerning FM Translator stations, MM Docket 88-140 (Jan. 23, 1989); Comments on FCC’s financial interest and syndication rule which restricted ownership of the rights to re-run TV shows (3 filings in 1990-1991); Comment on FCC’s Must-Carry Rules for network TV (Nov. 26, 1991); Comments on Federal Aviation Administration regulation of take-off and landing slots at certain airports (Nov. 15, 1991 & Nov. 23, 1994); Comments on the effects of the Food & Drug Administration’s regulation of health claims for food labeling and food identity standards (Jan. 8, 1990 & Feb. 25, 1992). Empirical work done by a BE economist and the Commission’s report on competition in the health care industry have complemented advocacy filings on “any willing provider” laws involving retail pharmaceutical sales in Rhode Island and California legislation that would impose disclosure requirements on PBMs. See Vita (2001); STAFF OF THE FEDERAL TRADE COMMISSION & THE DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), available at http://www.ftc.gov/reports/healthcare/040723healthcareprt.pdf; Letter from Susan Creighton, Director of the Bureau of Competition, Federal Trade Commission, et al. to Greg Aghazarian, Assemblyman of California (Sept. 7, 2004), at http://www.ftc.gov/be/V040027.pdf. Letter from Susan Creighton, Director of the Bureau of Competition, Federal Trade Commission, et al. to Patrick Lynch, Attorney General of Rhode Island (Apr. 8, 2004), at http://www.ftc.gov/os/2004/04/ribills.pdf. The staff report on barriers to online sales of wine also proved useful in an advocacy filing concerning legislation to allow direct shipment of wine in Florida, Ohio, New York. See note 9, supra.

28 On such matters as occupational licensing, for instance, the FTC has over time developed great expertise on the interrelationship of competition and consumer protection goals. In addition to Comments on the Unauthorized Practice of Law and interstate direct shipment of wine, see, e.g., THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); Contact Lens Report, STAFF OF THE FEDERAL TRADE COMMISSION, THE STRENGTH OF COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (February 2005), at http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf.
in recommending less-restrictive alternatives to a proposed regulation. In most debates on trade protectionism, by contrast, questions of competition and consumer welfare play little or no role; thus, the FTC’s expertise may not be desired in those debates.\(^{29}\)

Of these factors, whether the FTC’s position was touted by a politically organized group may be the most important. For example, recent FTC comments opposing legislation that would have regulated PBMs’ contractual relationships with health plans and pharmacies have appeared to have had an impact.\(^{30}\) PBMs and major health plans, which have powerful lobbies, opposed such legislation as well.\(^{31}\) Comments and amicus briefs opposing UPL restrictions that would bar non-attorneys from performing certain real estate settlement tasks (e.g., title searching, performing closings) have been relatively successful, perhaps in part because the title company industry is affected directly by these restrictions.\(^{32}\) For example, although the FTC staff undertook extensive investigations of

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\(^{29}\) The FTC had focused its main trade advocacy efforts on cases at the ITC that allowed a somewhat broader view of the effects of trade restraints — section 337 (unfair competition) and section 201 (escape clause) cases. Many trade restraints take the form of anti-dumping and countervailing duty cases (sections 701 and 731), where the ITC is less able to consider the broad effects of their actions.


trade restraints issues from the mid-1970s through the early 1990s, with many of the filings containing new empirical and conceptual work, two decades of work did not observably alter policy or individual decisions on tariff or trade policy.  

The FTC’s relative impotence in affecting trade policy, moreover, may be due in part to the fact that trade barriers are the quintessential example of restrictive regulations that provide substantial benefits to specific industries and impose smaller per capita costs widely upon consumers and other industries. The lack of organized opposition to restraints on competition may also offer a partial explanation for the lack of success in taxicab advocacies. Those who might gain from taxi deregulation are unorganized consumers and small, would-be taxi entrepreneurs.

B. Efficiency of Competition Advocacy Versus Enforcement

An additional benefit of competition advocacy is that in the American system advocacy is almost certainly a more cost-effective means than enforcement to attack state-imposed barriers to competition. Moreover, despite the obvious political conflicts created by advocacy filings, overall advocacy may be less conflictual and more susceptible to compromise than enforcement through litigation. Because of various


33 There were many filings with the International Trade Commission from 1975 to 1982; see McChesney et al. (1982, pp. 38-42, A27-A28). See, for example, D. Tarr, Prehearing Brief of the Federal Trade Commission before the International Trade Commission on Stainless Steel and Alloy Tool Steel (Mar. 27, 1987) (No. TA-203-16). This was one of a long line of advocacy filings focusing on international trade restraints on products ranging from softwood lumber to DRAM computer chips. Almost all empirical FTC staff analyses of trade restraints found that the benefits obtained from trade restraints (in terms of jobs “saved”, if indeed any jobs were saved in long-run equilibrium) were overwhelmed by the costs to consumers. But those benefits were very specific to the workers and industries, and the costs were widely dispersed, so trade restraints remain popular despite their negative net impact.
exceptions to the American antitrust laws such as the *Noerr-Pennington* doctrine and the State Action doctrine, the imposition of a governmentally-created restraint on competition is largely immune to subsequent antitrust challenge. The *Noerr-Pennington* doctrine immunizes most attempts to use the political system to effect anticompetitive regulation, and the State Action doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state. Thus, FTC enforcement may be unable to reach some anticompetitive regulations, leaving advocacy as the only tool available to prevent consumer harm.

Even for cases where a court finds immunities not to apply, the high costs and inherent uncertainty of litigation and the extremely small amount of resources needed for advocacy suggest that advocacy is a more efficient vehicle than enforcement to attack state restrictions on competition. Further, by preventing or ameliorating anticompetitive restraints *before* they are imposed, advocacy can avoid, or at least attenuate, consumer harm. To a greater extent than litigation — which often can involve idiosyncratic issues — the FTC often can amortize the cost of advocacy activities over subsequent comments on similar issues; once the fixed costs of analyzing a restraint have been incurred, the marginal cost of each subsequent filing on the same or similar topics is often minimal.

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36 See Pritchard & Zywicki (1999) (noting tendency of state legislatures to “copy” legislative enactments from one state to another, often with minimal debate or study). For instance, the frequency of legislation
Finally, although advocacy is politically controversial, it may be less politically controversial and conflictual than litigation under the State Action doctrine, which requires the competition agency to sue the state or an agent of the state alleging anticompetitive conduct. Overall then, it may be that “an ounce of prevention” through competition advocacy may be worth a “pound of cure” in terms of subsequent remedial litigation.

VI. LESSONS OF THE FTC’S COMPETITION ADVOCACY PROGRAM FOR LATIN AMERICA

The FTC’s experience with competition advocacy provides guidance and an example for similar programs throughout Latin America. Given the history of extensive economic regulation in Latin America the marginal benefits of a robust competition advocacy could be substantial. Moreover, this extensive interventionism generates problems of rent-seeking and political corruption by interest groups seeking favorable regulation. (De Leon 199b). Ignacio De Leon has been a particularly energetic advocate for the use of competition advocacy in Latin America. As he writes, “Competition advocacy is particularly important in Latin America because of the former experience of misled government intervention in the region, which is responsible for the current competition and innovation problems.” (De Leon 1999a, at p. 302).

State-imposed barriers to competition are a substantial obstacle to economic growth and source of political corruption in the developing world. Encouraging competition by clearing away some of these obstacles to entry could be extremely

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involving below-cost gasoline sales and regulation of PBMs, and attempts by state bars to promulgate restrictive UPL rules has made initial investments in advocacy in these fields very productive. The frequency by which anticompetitive regulations spread from one state to another may result in part from the efforts of well-organized interest groups that generate proposals that are then disseminated widely.

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effective at the margin in benefiting those economies. Indeed, De Leon (2004, p. 408) observes, “Regulatory reform is probably the single most important contribution that a competition authority can make to the transition process.” Given the expense and other obstacles associated with litigation as a strategy for executing competition policy, low-cost strategies such as advocacy may be a more practicable and efficient means for carrying out competition policy in less-wealthy countries. Kovacic (1997), for example, notes that newly minted competition authorities should adopt a “gradualist” approach to implementing competition policy. A centerpiece of this approach is to develop a competition advocacy program prior to embarking on extensive enforcement. An early step in the development of a competition enforcement regime would include research to reveal the major government policies that suppress competition. Once identified, the nascent competition authority would use already-developed education and publicity activities to advocate for the removal of such policies.

At the same time, implementing an effective competition advocacy strategy may be more difficult in Latin America than in the United States. The United States has a political culture that embraces competition and free markets as well as political and legal institutions that provide greater protection for private property and place some limits on arbitrary governmental action. The FTC’s competition advocacy program taps into this culture and builds on the traditional commitment to free markets as an organizing principle of the American economy. (Zywicki 2003). In turn, the FTC’s insistence on weighing the virtues of competition and consumer welfare in the regulatory balance helps to reinforce this culture of competition. Thus, investments in advocacy activities can not only improve specific policy outcomes, but can also help to create and nurture a culture
of competition that can not only increase the efficacy of future such activities, but also can help to instill the ethos of competition into regulators and the public more generally. Further, because it entails detailed analysis of competitive effects, successful advocacy also depends on expertise. The FTC has a large staff highly trained – both through academic programs and on-the-job experience – in competition law and economics.

A competition culture and expertise in competitive analysis is a luxury that most developing countries lack. Indeed the reliance of successful advocacy on a competition culture and a highly trained staff helps to explain why in most developed countries, competition advocacy programs have begun far after rigorous enforcement programs. The interdependence between advocacy and enforcement, then, presents a sort of “chicken-and-egg” problem for successful advocacy. As the OECD (2004, p.9) notes, “a competition agency’s reputation will be built largely upon its record in enforcing the competition law, and this reputation will significantly affect its influence as an advocate in other forums.”

Most Latin American countries lack a deep historical commitment to and faith in the virtues of competition. Extensive regulation is both more tolerated and expected in Latin American countries, reinforcing the perception among citizens that economic liberty and property rights depend on the opinions of governmental officials rather than being grounded in the rule of law. In turn, this worldview leads citizens to seek protection of their rights through efforts to influence political officials instead of before courts or independent (and usually non-existent) competition authorities, which further

37 See also OECD (2004 p.9) (noting how building a competition culture through advocacy can have important spill over effects).
reinforces the perception that economic freedom resides in political discretion rather than legal right.38 The soil for growing a culture of competition is somewhat rockier in Latin America than in the United States.39 How, then, does a young competition authority with limited resources engage in successful advocacy if it lacks the requisite expertise and reputation, and if there is no culture of competition on which to draw? Further, Evenett (2006) questions OECD and ICN calls for nascent competition authorities to prioritize developing competition advocacy programs over enforcement. Particularly, he makes three observations: first, ETR predicts that politicians’ self-interest serves as a check on the anticompetitive effect of regulations;40 second, the efficacy of advocacy will be limited due to the inability of the competition authority directly to influence politicians with contributions and other political support; and finally, there is a very little empirical support that advocacy actually works.

One answer to these problems may be to pursue a mixed strategy where enforcement is not eschewed altogether, but rather, is focused on the “low-hanging fruit” of per se violations (e.g., price fixing cartels) and major mergers.41 Cartel and merger enforcement typically do not entail economic analysis as complex as rule of reason or dominance cases, and thus will not require as much expertise. Government restrictions on competition through the granting of formal licenses and permits are also easily identifiable as reducing economic welfare. Further, such cases provide large and obvious

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38 The authors would like to thank Ignacio de Leon for this observation.
39 Kovacic (1998) for instance, notes the problems associated with developing an effective competition authority, including lack of expertise on the part of staff or the judiciary and lack of an academic infrastructure.
40 In Becker’s (1983) model, regulation that enhances efficiency is favored because it increases the amount of surplus available that can be transferred into political support. Further, in Peltzman (1976), a politician will never supply monopoly rents to the favored group because political costs are too high. Thus, equilibrium does not entail a full transfer from producers to consumers. Thus, the anticompetitive effect of protectionist regulation may be somewhat self-limiting.
41 See OECD (2004).
benefits to consumers, thus easily enhancing a reputation and instilling the benefits of competition.

Competition authorities can also focus on advocacy where the decision makers are also the beneficiaries of the regulations. For example, in the United States, most state real estate commissions are made up of practicing real estate brokers and are charged with regulating the state’s real estate industry. In these cases, the self-limiting principles that Evenett (2006) identifies will be at their weakest because the governmental actors benefit directly from regulations with increased income rather than only indirectly with political support. To the extent that regulations issued by such bodies are more clearly protectionist, moreover, they will require less expertise to analyze.

The FTC’s experience with competition advocacy also may provide some pragmatic lessons as to how Latin American competition authorities can craft an effective competition advocacy program. First, the FTC’s status as an independent regulatory agency insulates it from many of the political pressures that might otherwise hamper efforts to engage in competition advocacy. Competition advocacy efforts will face constant pressures to intervene or refrain from intervention at the behest of particular competitors and politically-influential interests. Although political independence may not be a necessary condition for competition advocacy, in the United States it generally has served to make the FTC more effective. The FTC’s advocacy efforts are often directed at more political bodies, and the FTC’s ability to speak as a relatively neutral or bipartisan body provides it some degree of disinterest and authority in these relationships. On the other hand, relative to other agencies, this independence also somewhat removes the FTC from the authority of a close working relationship with the President, thus
depriving the agency of some of its political clout in inter-agency affairs. Despite these drawbacks, on net political independence seems to have strengthened the FTC’s hand in advocacy filings.

Second, if regulators desire to vest primary regulatory authority over a given industry in a sectoral regulator, they should increase their consciousness about promoting an appropriate balance between competition and sectoral regulators, such as by providing for shared jurisdiction, expressly requiring consultation with competition authorities before enacting new regulations, or requiring that any regulations enacted are the least-restrictive means of achieving a given regulatory objective. In fact, some countries have gone beyond merely requiring consultation with competition authorities before enacting anticompetitive regulations. Costa Rica, for instance, formally empowers competition authorities to judicially challenge anticompetitive regulations enacted by governments.\(^\text{42}\)

In practice, concern about regulatory comity and accommodation means that these formal powers are rarely exercised. Nonetheless, such powers may give competition authorities greater leverage to require consultation than would otherwise be the case.

Third, essential to the FTC’s success is a clear definition of its mission to pursue the goals of competition and consumer welfare, rather than fuzzy appeals to the “public interest.” (Zywicki 2003). At first glance, vague objective standards, such as the “public interest,” would seem to enlarge the power and discretion of a regulatory authority. In the context of competition policy, however, such a vague standard weakens a competition authority’s ability to intervene forcefully in the name of competition and consumer welfare as flaccid appeals to the “public interest” can be used to justify almost any

regulatory restraints on competition. Thus, the adoption of a clear mission by the competition authority that its goal is the promotion of consumer welfare can make the agency a more powerful voice for that objective in dealing with legislatures or other regulators.  

VI. CONCLUSION

Each country in Latin America faces different challenges and inherits different cultural and legal traditions and institutions. These differences are important in determining the precise form that competition advocacy efforts may take from one country to another. Nonetheless, Latin America generally shares a tradition of economic regulation and interventionism that is skeptical of competition and its benefits. Thus, there is a need for political and economic education in these countries to resolutely defend the principle of competition and to demonstrate the benefits that such efforts may bring about over time.

References:

Articles, Books, and Speeches


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43 De Leon (1999a, p. 302) similarly notes that a clarification of the competition authority’s mission would strengthen competition advocacy efforts, noting the need for “a clarification or a limitation of those conditions triggering the alibi of ‘public interest,’ which has always invited obstructive government.” See also De Leon (1999b, p. 87-88), noting that promotion of the "public interest” often generates interventionist proposals at odds with promotion of competition.


**Cases**


FTC Staff Reports and Advocacy Filings


Federal Trade Commission, Comments on FCC’s financial interest and syndication rule which restricted ownership of the rights to re-run TV shows (3 filings in 1990-1991).


Federal Trade Commission, Comment on Boston’s Airport Authority Program for Airport Capacity Efficiency (Feb. 29, 1988).

