

1-1-1998

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Jose Tavares de Araujo, Jr & Luis Tineo, *Harmonization of Competititon Policies Among MERCOSUR Countries*, 24 Brook. J. Int'l L. 441 (1998).

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HARMONIZATION OF COMPETITION POLICIES AMONG MERCOSUR COUNTRIES[†]

José Tavares de Araujo, Jr.
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ABSTRACT

This paper analyzes the institutional innovations that are expected from the recent MERCOSUR protocol on competition policy. At the national level, the protocol constitutes a new driving force toward the conclusion of the ongoing economic reforms in the member countries. At the regional level, it provides an additional instrument for controlling the imbalances of the integration process. However, since competition policy is a new subject in the region, the attainment of these potentialities will imply a long-term cooperation effort among MERCOSUR governments. The results of this experience will affect the debate about antitrust issues in other forums such as the FTAA and the WTO.

I. INTRODUCTION

The harmonization of competition policies has been on the agenda of the Common Market of the Southern Cone (MERCOSUR) project since the signing of the Treaty of Asunción in 1991.¹ According to its first article, the treaty

[†] This Article originally appeared in 43 ANTITRUST BULL. 45 (1998).

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1. See Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, (MERCOSUR), Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asunción]. MERCOSUR makes up a market of 200 million people with a GDP per capita of US \$3,168. This subregional area also includes 44.3% of the population and 53.7% of Latin America and the Caribbean. The Treaty of Asunción encompasses two main instruments: (1) a four-year trade liberalization program; and (2) a commitment to implement a common external tariff by January 1, 1995.

involves "[t]he coordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties,"² and therefore, "[t]he commitment by the States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process."³

Under this ambitious framework, MERCOSUR countries signed, in December 1996, a protocol that indicates the guidelines toward a common competition policy in the region.⁴ The implementation of this protocol will imply, among other institutional innovations, that all member countries will have an autonomous competition agency in the near future; that the national law will cover the whole economy; that the competition agency will be strong enough to challenge other public policies whenever necessary, and that the member countries

On December 17, 1994, the presidents of the MERCOSUR countries met at Ouro Preto, Brazil to sign a Protocol containing the Common External Tariff (CET). See Protocol de Ouro Preto, Dec. 17, 1994. The CET ranges from 0% to a maximum of 20%. The Ouro Preto Protocol also established basic institutions to oversee the integration process. The Common Market Council is MERCOSUR's policy-making body and is composed of foreign and economic ministers. The Common Market Group is the executive body in charge of implementing the Treaty. The MERCOSUR Trade Commission is the executive body in charge of enforcing the common external trade policy. The Secretariat of MERCOSUR is in Montevideo, Uruguay. See also José Tavares de Araujo, Jr., *Industrial Restructuring and Economic Integration: The Outlook for MERCOSUR*, in BRAZIL AND THE CHALLENGE OF ECONOMIC REFORM 95, 96 (Werner Baer & Joseph S. Tulchin eds., 1993) (further analyzing the MERCOSUR integration project); Martín Arocena, *Common Market of the Southern Cone: (MERCOSUR)*, in INTEGRATING THE HEMISPHERE: PERSPECTIVES FROM LATIN AMERICA AND THE CARIBBEAN 152, 153 (Ana Julia Jatar & Sidney Weintraub eds., 1997).

2. Treaty of Asunción, *supra* note 1, at 1045.

3. *Id.*

4. Protocolo de Defesa da Concorrência no Mercosul, Decision 18/96, Dec. 17, 1996, reprinted in 19 BOLETIM DE INTEGRAÇÃO LATINO-AMERICANA 73 (1996) [hereinafter Protocol for the Defense of Competition]. See also ORGANIZATION OF AMERICAN STATES, INVENTORY OF THE COMPETITION POLICY AGREEMENTS, TREATIES AND OTHER ARRANGEMENTS EXISTING IN THE WESTERN HEMISPHERE (1997) (offering a version of the Protocol for the Defense of Competition in English); *Working Group on Competition Policy Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere* (visited June 26, 1998) <<http://www.sice.oas.org/trade/mrcsr/ourop/index.stm>> (offering a version of the Protocol for the Defense of Competition in English).

will share a common view about the interplay between competition policy and other governmental actions. Following the MERCOSUR philosophy, the protocol does not create supranational organisms, and the effectiveness of the regional disciplines will rely on the enforcement power of the national agencies.

This paper analyzes the potential roles to be played by this protocol at the national and regional levels. Part II discusses the conflicting situations that can be engendered by the process of economic reform and examines the scope for enduring competition rules under such circumstances. Part III reviews the protocol, highlights the institutional requirements for its implementation, and shows that the concept of competition advocacy is also relevant at the regional level. Finally, some concluding remarks are made in Part IV.

II. INSTITUTIONAL REFORM, ECONOMIC INTEGRATION AND TRANSPARENCY

The economic reforms and the preferential trade agreements launched by MERCOSUR countries in the recent past have, in principle, the same objective, which is the promotion of a new style of economic growth based on market transparency, industrial efficiency, and consumer welfare.⁵ Each reform has a particular role in this endeavor. Macroeconomic stabilization should reduce the uncertainty of market signals, including relative prices and government's credibility. Trade liberalization should expose domestic firms to international competition, thus inducing lower prices and better products and services. Privatization should cut down transaction costs by improving the supply of basic services such as telecommunications, energy and transport. Competition policy should remove entry barriers and monitor business practices. Finally, regional integration should open new opportunities for industrial specialization and stronger international competitiveness.

Despite these promising results, economic reform can also engender conflicting situations. For instance, the use of exchange rate anchors to stop inflation, combined with delays in

5. See, e.g., SEBASTIAN EDWARDS, *LATIN AMERICA AND THE CARIBBEAN: A DECADE AFTER THE DEBT CRISIS* 54-56 (1993) (discussing the long-term growth perspectives generated by recent Latin American economic reforms).

the execution of the fiscal reform, creates trade deficits which bring protectionist pressures and eventual reversals in the trade liberalizing process.⁶ The shortage of tax revenues confuses the privatization process, by highlighting the government's cash flow problems and distracting public attention from more important issues, such as the regulatory framework to be implanted. The reintroduction of protectionist mechanisms and the transformation of public enterprises into private monopolies are government-generated entry barriers that imply additional work for the antitrust authorities. These contradictions diminish the potentialities of the regional integration projects.

Moreover, the process of economic reform inaugurates a transition period wherein the old rules have been abolished and the new ones have yet to be enforced. This is the ideal environment for rent-seeking activities oriented toward one-shot gain. The most typical examples are the procedures used for selling state firms and the temporary changes of import tariffs. These practices provoke long-lasting distortions and stimulate the continual postponement of some reforms, in order to keep the channels open for attending special interests.⁷

Four examples from MERCOSUR are used here to illustrate the aforementioned issues: privatization and anti-dumping actions in Argentina, and tariff swings and the automotive regime in Brazil. By way of the privatization program implemented during 1990-1992, the Argentine government sold 20 public firms and transferred to the private sector the management of the country's most important turnpikes. This program has generated more than 10 billion dollars, which corresponded to about 4% of GDP and 21% of current fiscal revenues. It included *Aerolíneas Argentinas*, one of the largest airlines in

6. See Guillermo A. Calvo & Enrique G. Mendoza, *Trade Reforms of Uncertain Duration and Real Uncertainty: A First Approximation*, 41 IMF STAFF PAPERS 555, 556 (1994); Rudiger Dornbusch & Alejandro Werner, *Mexico: Stabilization, Reform, and No Growth*, 1 BROOKINGS PAPERS ECON. ACTIVITY 253, 254-55 (1994); see generally Guillermo A. Calvo, *On the Costs of Temporary Policy*, 27 J. DEV. ECON. 245 (1987) (discussing the conflicts that can emerge throughout the process of economic reform).

7. See, e.g., A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 210-16 (1994).

Latin America, the entire telecommunications industry, steel, oil, gas, and electricity.⁸ Due to their inter-industry linkages, these sectors affect the productivity levels and the competition conditions of the whole economy. Because of economies of scale and scope, they are natural monopolies or oligopolies, and, therefore, are subjected to stringent regulation in most countries.⁹

The process of technological convergence is transforming several branches of activities into a unified information industry, encompassing telephone, television, computer, software, and consumer electronics. This convergence also creates new inter-industry linkages for a variety of businesses such as newspapers, book publishing, advertising, data processing, and consultant services.¹⁰ From the point of view of competition policy, this process implies a continual review of the criteria for measuring relevant markets, entry barriers, economies of scope, productivity standards and market power. For the regulatory agencies, it means an additional challenge, which is the establishment of accurate rules that circumvent the problems of capture and asymmetric information without hampering the rate of technical progress. In Argentina, like in most Latin American economies, the debate about regulatory reform is just beginning, but its results will delimit the enforcement power of competition law in the country.

Another example of temporary tensions within the process of economic reform is the recent Argentine import policy.¹¹

8. See Comision Economica para America Latina y el Caribe (CEPAL), *La Crisis de la Empresa Publica, las Privatizaciones y la Equidad Social*, 26 SERIE REFORMAS DE POLITICA PUBLICA 125 (1994).

9. Regulatory reform is a sensitive issue everywhere. In the United Kingdom, the rules for the telecommunications industry have been on the public agenda since 1981, when British Telecom (BT) split from the Post Office. The privatization process lasted until 1993, when the final tranche of BT's shares was sold. According to Armstrong et al., policy in this area is still far from settled. See MARK ARMSTRONG ET AL., REGULATORY REFORM: ECONOMIC ANALYSIS AND THE BRITISH EXPERIENCE 202-04 (1994). In the United States, the debate which led to the 1996 Telecommunications Act has been alive since 1982, when the local telephone companies were separated from AT&T, and, apparently, will not be concluded soon. For instance, Klingler argues that the Act is focused on competition problems that were relevant in the past and does not address the current structural changes of the information industry. See RICHARD KLINGLER, THE NEW INFORMATION INDUSTRY: REGULATORY CHALLENGES AND THE FIRST AMENDMENT 15 (1996).

10. For a lively account of this process, see KLINGLER, *supra* note 9.

11. See, e.g., DANIEL CHUDNOVSKY ET AL., LOS LÍMITES DE LA APERTURA:

Following the regional trend, the government introduced a series of trade liberalizing measures during the period 1989-1993. They included the elimination of specific tariffs and several non-tariff barriers, and the introduction of a three-tier tariff structure (0% for raw materials, 11% for intermediate goods and 22% for consumer goods). Although allowing room for tariff escalation, the new structure signified a generalized decline of protection rates throughout the economy. The only sector that remained protected by quantitative import restrictions was the auto industry.

However, the 1991 macroeconomic stabilization plan provoked exchange rate appreciation, trade deficits, and some additional exceptions to the trade opening process. Since 1992, the most relevant measures have been a 10% surcharge on imports (the so-called "statistics tax") quotas on selected products from the paper and food industries, the return of specific tariffs for a few apparel goods, and, most notably, the intense use of anti-dumping actions. As table 1 shows, from May 1992 to May 1996, the Argentine government has initiated 128 anti-dumping cases against 39 different countries.¹² From the viewpoint of competition policy, all trade barriers have a similar effect, which is to strengthen the market power of domestic firms. Among the mechanisms that reduce contestability, anti-dumping measures are particularly efficient, because they hit only the most aggressive potential competitors. Thus, not by chance, Brazilian firms have been the priority targets for the Argentine cases, due to the free trade conditions created by MERCOSUR.

LIBERALIZACIÓN, REESTRUCTURACIÓN PRODUCTIVA Y MEDIO AMBIENTE 157-61 (1996) (analyzing the economic and trade reform process in Argentina extensively).

12. These numbers have been drawn from the database developed by the Organization of American States (OAS) for the preparatory work of the Free Trade Area of the Americas Working Group on Subsidies, Anti-Dumping and Countervailing Duties. See *Working Group on Competition Policy: Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere* (visited Aug. 17, 1998) <http://www.alca-ftaa.oas.org/doc_cover/cov_ade.htm> (making these figures available in English).

TABLE 1 ARGENTINA: ANTI-DUMPING ACTIONS (MAY 1992-MAY 1996)¹³

Target Country	Actions	Target Country	Actions
Brazil	33	Belgium	4
China	16	South Africa	4
United States	10	Spain	4
Germany	9	Taiwan	4
Korea	7	Japan	3
Netherlands	6	Other	28
Total		128	

The Brazilian import policy promoted by the *Real* Plan since July 1994 provides a complementary illustration of the peculiar situations engendered by economic reform. During the period 1988-1993, the government implemented a trade reform that radically changed the conditions of competition in the country.¹⁴ After six decades of economic growth based on import substitution policies, domestic industries were exposed—for the first time—to the competition of imported goods. The new tariff structure was supposed to grant a steady and homogenous level of effective protection to all industries. Accordingly, by July 1993, the average rate of effective protection was 14.5%, and only a few sectors were outside the range of 10% to 20%. The outstanding exception was, again, the auto industry, which had a 130% protection rate.¹⁵

However, after July 1994, import rules became volatile in order to accommodate the amount of foreign trade to the short-

13. Source: Organization of American States.

14. See Pedro da Motta Veiga, *Brazil's Strategy for Trade Liberalization and Economic Integration in the Western Hemisphere*, in *INTEGRATING THE HEMISPHERE: PERSPECTIVES FROM LATIN AMERICA AND THE CARIBBEAN* 152, 199 (Ana Julia Jatar & Sidney Weintraub eds., 1997) (analyzing the recent economic and trade reforms implemented in Brazil); Albert Fishlow, *Is the Real Plan for Real?*, in *BRAZIL UNDER CARDOSO* 43, 46-50 (Susan Kaufman Purcell & Riordan Roett eds., 1997).

15. See Honório Kume, *A Política de Importação no Plano Real e a Estrutura de Proteção Efetiva*, in *INSTITUTO DE PESQUISA ECONÔMICA APLICADA* 23, 23 (1996).

run needs of the macroeconomic stabilization plan. In a first stage that lasted until December 1994, the government's objective was to impose a quick decline of domestic prices through currency appreciation and additional tariff reductions for goods that had significant impact on the inflation indexes. Food products and basic inputs were the preferred targets, and the immediate consequence was to amplify the range of effective protection, since lower tariffs on inputs imply greater protection for final goods.

In 1995, the major macroeconomic problem was not price discipline anymore, but rather the trade deficit. Import restrictions were back, with the consequences reported at tables 2 to 4. Between July 1994 and September 1996, of the 13,428 tariff lines that compose the Brazilian Harmonized System, 11,183 items have been changed.¹⁶ As table 3 shows, capital goods and intermediate inputs were among the most affected industries, wherein import rules have switched more than five times! Considering the forward linkages of these industries, such changes signified unstable relative prices for the whole economy.¹⁷ Table 4 gives examples of ad hoc swings that included assorted goods such as cars, telephone sets, detergents, pesticides, synthetic filaments, and packing machines.

As table 4 shows, the import policy for autos has been highly unstable since 1994. The government made a brief attempt at reducing nominal protection to 20% in September 1994. Five months later it raised the tariff to 70%, and, in December 1995, established a new set of incentives that went beyond those granted by the Argentine automotive regime. The Brazilian Decree No. 1763 combined all types of import substituting mechanisms: import quotas, minimum levels of domestic inputs, export performance targets, tax rebates, and the like.¹⁸

16. See Renato Baumann et al., *As Tarifas de Importação no Plano Real* (1997) (unpublished manuscript, on file with the *Brooklyn Journal of International Law*).

17. It should be noted that, in most cases, the first tariff change was due to the establishment of MERCOSUR CET in January 1995. See da Motta Veiga, *supra* note 14, at 200. Subsequent changes have been made through continual re-statements of the list of exceptions to the common tariff. *Id.*

18. Decree No. 1763, of Dec. 26, 1995 (setting an import levy of 70% and other trade restrictions on autos, trucks, motorcycles and bicycles as of January 1, 1996). See Kume, *supra* note 15.

TABLE 2 BRAZIL: CHANGES OF IMPORT TARIFFS (JULY 1994-SEPTEMBER 1996)¹⁹

Least No. of Changes	Tariff Lines	Percentage
1	11,183	83.3
2	3,830	28.5
3	939	7.0
5	148	1.1
Harmonized System	13,428	100.0

TABLE 3 BRAZIL: EXAMPLES OF INDUSTRIES THAT HAD MORE THAN FIVE TARIFF CHANGES DURING 1994-1996²⁰

HS Chapter	Industry	Number of Products	Number of Changes
15	Fats and oils	1	6
29	Organic chemicals	1	7
34	Cleaning agents	12	
54	Synthetic filaments	7	6
76	Aluminum	2	6
83	Articles of base metal	1	6
84	Mechanical appliances	1	6
85	Electrical equipment	11	5
87	Vehicles	61	5

19. See Baumann et al., *supra* note 16.20. *Id.*

TABLE 4 BRAZIL: EXAMPLES OF TARIFF SWINGS²¹

Product / SH Code	Tariff history (Date/Duty rate)							
	07/94	09/94	12/94	05/95	11/95	02/96	04/96	08/96
Pesticides								
29.26.90.02	15	14	2	4	8	10	2	12
Detergents	07/94	01/95	05/95	11/95	02/96	04/96	08/96	
34.01.19.03	10	11	4	6	8	2	18	
Synthetic filaments	07/94	09/94	11/94	04/95	05/95	02/96	04/96	08/96
54.02.49.02	20	16	2	0	6	10	6	16
Synthetic filaments	07/94	09/94	11/94	04/95	05/95	02/96	04/96	08/96
54.02.49.04	20	16	2	0	6	10	6	16
Packing machines	07/94	11/94	01/95	06/95	07/95	01/96		
84.22.40.99	20	0	19	0	19	18		
Telephone sets	07/94	01/95	03/95	05/95	01/96	04/96		
85.17.10.99	30	19	70	63	56	30		
Passenger cars	07/94	09/94	01/95	02/95	01/96	04/96		
87.03	35	20	32	70	62	70		

The automotive industry is an international oligopoly that has a long tradition of influencing trade negotiations and national policies. The 1965 auto-pact between Canada and the United States, the export promotion policies implemented by the Brazilian government in the seventies, the 1981 U.S.-Japan voluntary export (VER) agreement, and the tariff swings listed in table 4 are just a few examples of that tradition. Due to the industry's size and production linkages, the investment decisions made by the assembly firms often generate macroeconomic consequences that affect not only employment and GDP growth rates, but also the balance of payments conditions and the national rhythm of technical progress. Since these economic figures can be easily transformed into political power, the

21. *Id.*

auto industry has been able to extract privileges from governments worldwide for many decades.

Besides the market distortions already illustrated by the preceding examples, the automotive regime raises an additional challenge to the enforcement of competition rules in MERCOSUR. Imagine that the Brazilian antitrust authorities have found convincing evidence of price-fixing among the industry's leading firms. The most immediate action for repressing such behavior would be to stimulate import competition, a solution that the government could not allow at this moment. An eventual surge of car imports would contradict not only the provisions of Decree No. 1763, but, more importantly, the current macroeconomic priorities of controlling the trade deficit and ensuring the credibility of the *Real Plan*.

Under this awkward circumstance, the best strategy for the antitrust authorities would be the promotion of market transparency, as a first step toward enduring competition rules in the long run. This can be attained by a system of economic indicators that would keep the public informed about the current conditions of competition in the country. The system should include all the relevant industries and describe their evolution in terms of size, structure, efficiency patterns, entry barriers, and market power of incumbent firms. These indicators would provide answers for the three basic questions that can be raised about the current conditions of competition, namely: Do they impose enough discipline on the established firms, thereby protecting the public interest, or leave open space for unfair practices? Do they allow domestic producers to follow the international rhythm of technical progress? Are the regulated industries meeting the international levels of productivity?²²

Among the OECD (Organization for Economic Cooperation and Development) countries, publicity has proven to be the prime enforcement mechanism of antitrust law, and the most compelling case has been the Swedish experience since 1946. In that year, a new law was enacted with surprising provi-

22. See, e.g., José Tavares de Araujo, Jr., *Contestability and Economic Integration in the Western Hemisphere*, (OAS Trade unit stud., 1995) (discussing the use of economic indicators as competition policy instruments); José Tavares de Araujo, Jr., *The Use of Economic Indicators as Competition Policy Instruments* (OAS Trade unit stud., 1996).

sions: the government was responsible for investigating restrictive practices and for announcing the findings, but had no castigating authority. As Bourdet commented: "[N]o fines could be imposed on firms involved in restrictive practices with harmful effects and no legislative provision existed that gave competition authorities the power to force firms to terminate restrictive practices agreements. Making information about these firms and their behavior public was considered sufficient to convince them to respect the legislation and to adopt the competitive straitjacket."²³ Subsequently, that law was amended in 1953, 1956, and 1982, and certain enforcing rules were gradually introduced. As the antitrust authorities remained peaceful, however, very few cases have been taken to court. According to Bourdet, this reflects the government's view "that a more conciliatory policy of negotiating with firms who have violated the restrictive practices legislation will bring more positive effects for society than would court proceedings."²⁴

In sum, the foregoing evidence shows that the main problem faced by antitrust agencies in MERCOSUR, as well as in Latin America, is not to discipline the private sector but to cope with inconsistent governmental actions. The only feasible instrument for this endeavor is *competition advocacy*, which promotes transparency and, consequently, the political conditions for abolishing the inconsistent actions.²⁵ Competition

23. Yves Bourdet, *Policy Toward Market Power and Restrictive Practices*, in *INTERNATIONALIZATION, MARKET POWER AND CONSUMER WELFARE* 299, 301 (Yves Bourdet ed., 1992).

24. *Id.* at 314.

25. Competition advocacy commonly refers to the role of the antitrust authorities in removing trade distorting barriers in the economy beyond the traditional prosecution of anticompetitive practices. For the most part, this component focuses on identifying either public policies promoted by other authorities within the government or rent-seeking activities by interest groups aimed at obtaining protectionist gains to the detriment of consumer welfare and economic efficiency pursued by trade liberalization and competition policies. It has been increasingly recognized among experts and enforcers that most of the expected benefits from trade liberalization and regulatory reforms have been subverted during the transition period from the government distributive model to a market-oriented one. In this environment, free trade and deregulation have not been able to properly foster competition despite the passing of competition laws. See generally A.E. Rodriguez & Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy*, 23 *BROOK. J. INT'L L.* 365, 367 (1997) (analyzing the arguments supporting competition advocacy efforts); A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 *HOUS. J. INT'L L.* 311, 313

advocacy also plays a similar role at the regional level, as the next section reports.

III. TOWARD COMPETITION POLICY IN MERCOSUR: THE PROTOCOL FOR THE DEFENSE OF COMPETITION

With the progressive elimination of tariffs and non-tariff barriers, MERCOSUR countries have certainly improved market access and promoted trade and investment among its members. However, as regional markets expand, so do anticompetitive and rent-seeking practices, as domestic firms tend to cooperate to keep out new competitors. Besides, international firms looking for monopolistic profits and easy capture of export markets prefer those countries where competition laws do not exist or are weakly enforced. Finally, governments can also contribute to these trends, as Part II described.

To approach these issues, MERCOSUR countries passed, at a meeting of the Common Market Council, held in Fortaleza, Brazil in December 1996, the Decision 17/96 containing the Protocol for the Defense Competition in MERCOSUR (The Protocol).²⁶ This document, part of a comprehensive agenda for common trade policies beyond the external tariff scheme, is pending upon congressional approval by each member country to be enforceable as national law. It was drafted by the MERCOSUR's Trade Commission over the past two years, based on the mandates set forth in the Decision 21/94 which issued guidelines for harmonizing competition law in the subregion.

The Protocol's goals are threefold. First, it provides mechanisms to control firms' anticompetitive practices with a MERCOSUR dimension. Second, it calls for convergent domestic laws in order to ensure similar conditions of competition and independence among firms regarding the formation of prices and other market variables. Third, it provides an agenda for surveilling public policies that distort competition condi-

(1996); R. Shyam Khemani, *The Role and Importance of Competition Advocacy in Promoting Competition*, Paper Presented at the Emerging Market Economy Forum: Workshop on Competition Policy and Enforcement (Oct. 28-30, 1996); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *BROOK. J. INT'L L.* 403, 450-51 (1997) (proposing a gradualist strategy as the best alternative for transition economies).

26. See Protocol for the Defense of Competition, *supra* note 4.

tions and affect trade among the member countries. Thus, the MERCOSUR competition protocol should be an instrument for abolishing obstacles to the enlargement of the regional market. From this viewpoint, The Protocol cannot be seen just as a set of rules to be applied to anticompetitive practices with extra-territorial implications. Rather, it is more far-reaching. It deals with both government and firms' interference with the competition process. Competition benefits, whether related to efficiency, consumer welfare or deconcentration of economic power, are not expressly considered in The Protocol. They are expected, however, as a result of a larger market with more participants.

Like other MERCOSUR provisions, The Protocol is not oriented toward supranational mechanisms. Rather, it is based on cooperation within the region and enforced at a national level. However, MERCOSUR institutions are expected to develop and enforce competition rules on cases of extraterritorial effects. In this regard, The Protocol's approach shares many features of the Australia-New Zealand antitrust accord. MERCOSUR institutions have a role in guiding The Protocol's implementation by the member countries, as will be further examined, and the provisions may serve either as instruments for political mediation or for the enforcement of common rules. Since there is little experience in MERCOSUR on the use of competition law, The Protocol identifies the issues of concern and provides instruments for solving them.

A. *Anticompetitive Practices of MERCOSUR Dimension*

Restrictive agreements are the most visible response to the pressures that the newcomers bring after the elimination of trade barriers. The Protocol seeks to prevent any concerted practice between competing firms or individual abuse of dominant position aimed at limiting competition in the MERCOSUR market. Its provisions apply to acts performed by any person, natural or legal, private or public, including State enterprises and natural monopolies, so long as such practices have extraterritorial effects.²⁷ The list includes price-fixing, restraints, reductions or destructions of input and output, market division, restriction of market access, bid-rigging,

27. *Id.* art. 4.

exclusionary practices, tying arrangements, refusal to deal, resale price maintenance, market division, predatory practices, price discrimination, exclusive dealings, and abuse of dominant position.²⁸

The Protocol is enforced by the Trade Commission of MERCOSUR and the Committee for the Defense of Competition.²⁹ The Trade Commission has adjudicative functions, while the Committee for the Defense of Competition is responsible for the investigation and evaluation of cases. Modeled after the Brazilian law, the proceedings and adjudication of cases are conducted in three stages. Proceedings are initiated before the competition authority of each country at the interested party's request.³⁰ Briefly, the competition agency, after a preliminary determination on whether the practice has MERCOSUR implications, may submit the case before the Committee for a second determination. Both evaluations must follow a *rule of reason* analysis in which a definition of the relevant market, and evidence of the conduct and the economic effects must be provided. Based on this evaluation, the Committee must decide whether the practice violates The Protocol and recommend whether sanctions or other measures should be imposed. The Committee ruling is submitted to the Trade Commission for final adjudication by means of a Directive.³¹ As part of these procedures, The Protocol establishes provisions for preventive measures and undertakings of cessation. This mechanism allows the defendant to cease the investigated practice under compliance of certain obligations agreed upon with the Committee. The monitoring of these measures and the enforcement of the sanctions rests with the national competition authorities.³²

Some problems may be anticipated with this system. As previously mentioned, the substantive and procedural provisions of The Protocol apply only to practices with MERCOSUR implications. Given the fact that the national agencies, the

28. *Id.* art. 6.

29. Both bodies are composed of representatives from each member country. However, in the case of the Trade Committee, countries' representatives must come from the respective competition agencies. *Id.* arts. 8-9.

30. *Id.* at ch. V.

31. *Id.*

32. *Id.* at ch. VI.

Committee and the Trade Commission are independent in their judgements at each stage and that one can overrule the other at the following stage, the process of defining the MERCOSUR dimension of each case may be cumbersome under this system. At each stage, the agency may apply a different criterion to define the relevant market. For instance, the national agencies may well use a restrictive criterion for market definition and close the investigation. The opposite may occur if the applied criteria are more permissive. The same problems can be anticipated regarding the evaluation of the evidence and the economic effects of the practice. There is a large controversy about the limitations of applying economic analysis to anticompetitive practices. Nonetheless, assuming that each criterion is adequately defined by the national agencies, it does not ensure that other definitions and approaches may not be yielded by the Committee. Likewise, although it is expected that the Committee's rulings are adopted by the Trade Commission, the latter has the power to overrule the former based on its own criteria.

Furthermore, given the little experience developed by each country regarding these practices, both the preliminary and the Committee analyses may lead to inconsistent results. This may well open doors for discretion and political influence at any stage if the bodies base their decisions on considerations other than technical ones, particularly in the analysis of the practices' effects on the market. Thus, it remains to be seen how well the inter-governmental coordination mechanisms of The Protocol work, and how sound and politically neutral are the criteria applied to the practices investigated. These issues lead to a consideration of a more preventive approach toward the practices of an extraterritorial dimension, since many of these practices are possible only when there is an imbalance regarding their treatment at each national level. To address this crucial area, The Protocol contains provisions for the harmonization of domestic competition policy and law.

B. Harmonization of Domestic Competition Law

Within any regional agreement, governments may still protect domestic firms after dismantling border controls, either by failing to provide (or provide inadequately) proper competition regulations and institutions or simply by deliberate non-

enforcement of them. These attitudes produce a new type of market "advantage" over countries with stricter competition rules. Two typical procedures performed by firms outside a country which distort competition conditions in the domestic market may illustrate the need for harmonization: price discrimination and collusion.

International price discrimination is the result of setting prices in the export market below those of the national market. Firms usually do this with the aim of penetrating new markets, eliminating competition and, once there, raising prices in monopolistic circumstances. Such practices are feasible when the exporting firm enjoys a dominant position in its domestic market. This condition is reached either by structural barriers that prevent market access to firms from other countries, or by anticompetitive practices that prevail in the firms' market. In both circumstances, the exporting firm has the ability to impose prices and other commercial conditions into its market, which are sufficient to enable it to set lower prices in the foreign market, or to enter into concerted action with the dominant firms in the foreign market.³³

Practices involving collusion are the result of agreement between competitors in the domestic market (export or import cartels) or between competitors of the domestic country and the foreign country (international cartels) with the purpose of increasing market power by dividing markets or fixing output and prices. This type of practice is difficult to counteract, basically because it is achieved by taking advantage of a position of

33. International price discrimination is a practice rarely combatted by means of competition laws. Both the antitrust analysis and the enforcement mechanisms available have not led countries' authorities to come up with sound criteria to judge these cases. Rather, the treatment of this practice has been addressed by trade remedy laws, specifically by anti-dumping laws. The use, goals and benefits of anti-dumping laws compared to competition laws are the subject of a well-known debate on whether anti-dumping laws should be replaced by competition laws. Within MERCOSUR, this discussion has just started. Although The Protocol does not replace the anti-dumping mechanism, it does provide tools to approach the problem from a competition policy point of view. See Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27, 27-36 (1996); Jorge Miranda, *Should Antidumping Laws be Dumped?*, 28 LAW & POL'Y INT'L BUS. 255, 282 (1996) (discussing the tools needed to approach the debate from a competition policy point of view); Clarisse Morgan, *Competition Policy and Anti-Dumping: Is It Time for a Reality Check?*, 30 J. WORLD TRADE 61, 62-63 (1996).

impunity or immunity with respect to competition laws. Assuming the existence of competition laws in the countries involved, because such practices are detected within the foreign country, it will be difficult to enforce them because the competition agency has to verify the existence of monopolistic practices or market barriers in other jurisdictions.

When monopolistic practices are not verified in the country where the distortion was created, firms may act freely. For example, if discriminatory prices are detected in the importing country, competition laws are irrelevant. First, due to the jurisdiction problem, and second because such prices have no anticompetitive impact on the domestic market of the exporting country. Indeed, the peculiarity of this kind of discrimination is to distort only the conditions of production in the importing country, but not the trading partner's market, where the competition law could be applied. The case of collusion agreements is the same, and difficulties are greater if the practices in question are implemented by firms protected by rules of exception, which exclude them from the sphere of competition law, i.e., state monopolies, export cartels or enterprises in sectors or activities which have been exempted.³⁴

The provisions of The Protocol dealing with practices in extraterritorial effects touch upon these issues. They seek to solve problems whose causes may well be attributed to a lack of competition enforcement in the countries where the investigated firms operate. As usual, it is more costly to remedy facts afterwards than to prevent them. Relying exclusively on The Protocol provisions may be risky. It would be more effective to apply common standards where the practice originated and leave only complex cases to the MERCOSUR institutions. By addressing anticompetitive practices with standards directed at the behavior of firms on their turf, governments eliminate a typical root of potential market fragmentation.

The only successful experience reported on agreements whose application does not depend upon supranational organs

34. See Bernard Hoekman, Trade and Competition Policy in Regional Agreements, Paper Presented at the Conference of Private Practices and Trade Policy: The Future of International Rules on Antidumping and Competition (Nov. 1997). See also GABRIELLE MARCEAU, ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE-TRADE AREAS (1994) (presenting a general discussion of competition policy issues in integration schemes).

has been that of the Australia-New Zealand Closer Economic Relations Trade Agreement of 1983 (ANCERTA), which established a mandate for the harmonization of restrictive commercial practices.³⁵ This mandate resulted in New Zealand's adoption (in 1986) of a new competition law assimilated to the terms of Australia's laws. In 1988, both countries adopted a protocol, following which the application of antidumping measures was eliminated, and agreement was reached regarding the application of competition laws to conduct affecting trade between the countries. Furthermore, the powers of inquiry of the agencies were extended to jurisdiction in the other country by requiring companies subject to inquiry to provide information. The case of Australia and New Zealand exhibits many helpful analogies in treating the subject of integration agreements, as in the case of MERCOSUR.³⁶

To this end, The Protocol calls upon the member countries "to adopt within the period of two years, common rules for the control of acts and contracts, of any kind, which may limit or in any way cause prejudice to free trade, or result in the domination of the relevant regional market of goods and services, including which result in economic concentration, with a view to preventing their possible anticompetitive effects in the framework of MERCOSUR."³⁷ Furthermore, it also calls upon the countries to "undertake, within a two year period, to draft joint standards and mechanisms which shall govern State aid susceptible to limit, restrict, falsify or distort competition and to affect trade between the States Parties."³⁸ These provisions set up the basis for a comprehensive competition policy harmonization to be completed by the end of 1998. The process, as clearly stated, goes beyond the treatment of anticompetitive practices to include structure concerns and competition advocacy. For MERCOSUR countries, this means a long road of work.

At present, competition is approached very differently by MERCOSUR countries. For instance, Uruguay and Paraguay

35. Closer Economic Relations-Trade Agreement, Mar. 28, 1983, Austl.-N.Z., 22 I.L.M. 945 (entered into force Jan. 1, 1983) [hereinafter ANCERTA].

36. See Rex J. Ahdar, *The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade*, 12 NW. J. INT'L L. & BUS. 317, 317-22 (1991) (detailing ANCERTA's competition policy harmonization component and developments).

37. Protocol for the Defense of Competition, *supra* note 4, art. 7.

38. *Id.* art. 32.

do not have competition laws in place, leaving this process to be governed by the market following trade liberalization and deregulation. In Argentina and Brazil, although competition laws exist, their components, enforcement mechanisms and policy goals differ greatly.³⁹ In Argentina, the competition regime focuses only on preventing anticompetitive conduct.⁴⁰ At present, the Argentine Congress is working on a bill to improve the enforcement of the current law, clarify enforcement standards, introduce the evaluation of economic concentrations, and make the Competition Commission independent from the Ministry of Economy.⁴¹ In Brazil, the amendments introduced to the law in 1994 made competition policy a critical complement of its trade and investment policies.⁴² They raised CADE (Brazilian Competition Agency) to a status independent of the Ministry of Justice, of which it had previously been a subordinate part. CADE was given competition advocacy powers to ensure that conditions encouraging competition would not be affected by other provisions connected with privatization and regulatory reform of natural monopolies. Regulations were introduced to control economic concentrations, anticompetitive practices were more broadly defined, and CADE was given more precise standards for analyzing and evaluating such practices.⁴³ This has made Brazil's policy contrast with the rest of MERCOSUR, being the only one showing initial signs of

39. See Malcolm Rowat et al., *Competition Policy and MERCOSUR*, World Bank Technical Paper No. 385 (1997) (investigating MERCOSUR countries' domestic regulations on trade, investment and competition).

40. See Protection of Competition Law No. 22,262, July 7, 1980 [350] B.O. Argentina passed the region's first competition law in 1919, being amended in 1947 and 1980. See also Guillermo Cabanellas & Wolf Etzrodt, *The New Argentine Antitrust Law: Competition as an Economic Policy Instrument*, 17 J. WORLD TRADE 34, 34-35 (1983) (outlining related literature on the Argentine law). See also C1 WORLD LAW OF COMPETITION § 2.01 (Julian O. von Kalinowski ed., 1986) (offering a version of the law in English).

41. See Rowat et al., *supra* note 39.

42. Law for the Prevention of Practices Against the Economic Order, Decreto No. 8.884, of June 11, 1994, 1 D.O.U. of June 13, 1994. Prior to this law, Brazil enacted its first law on competition in 1962, being amended in 1990, 1991 and 1994. See Dallal Stevens, *Framing Competition Law within an Emerging Economy: The Case of Brazil*, 75 ANTITRUST BULL. 929 (1995); Rowat et al., *supra* note 39. See also CADE Homepage (visited June 25, 1998) <http://www.mj.gov.br/cade/ing_defa.htm> (detailing related information on Brazil's competition law); 1 COMMERCIAL & INVESTMENT: LATIN AMERICA Doc. 2.7-1 (Andrea Bonime-Blanc ed., 1996) (offering a version of this law in English).

43. See Rowat et al., *supra* note 39.

the coherent approach conceived by The Protocol.

At a MERCOSUR level, each country's approach also remains to be seen. It is possible that countries apply identical standards for both domestic and external trade restraints or differently for domestic and external trade, restricting the protection of competition in favor of domestic consumers and permitting anticompetitive practices aimed at boosting the export capacity of domestic firms. In addition to the substantive differences in approach to the fostering of competition, countries may differ in their enforcement methods. It could be possible that some countries, though their laws may penalize the same practices, differ in how to define them and measure their effects on competition. Similarly, in some countries the laws may not be enforced or the agencies may not be sufficiently trusted. In some countries, industrial policies may be used to foster competition. In some countries, the focus is more on market structures than on the behavior of firms. In some countries sizable sectors may be exempt from the competition regime, while in others specific anticompetitive practices may be subject to administrative authorizations.

These differences may be more likely to be encountered when certain practices are deemed to spur trade and lead to more efficient production, as is the case of mergers and other economic concentrations, mentioned as well in The Protocol. The quest for monopolistic profits based on each country's type of action or omission in regard to competition triggers a number of practices that affect market integration. Since fostering competition conditions in integrated economies depends not only upon the observance of antitrust rules, but also upon the continual surveillance of trade and investment barriers, a competition advocacy component is included in The Protocol.

C. Regional Competition Advocacy

The use of common competition rules to correct the imbalances of the integration process can lead to different styles of law enforcement. Two factors, advanced—among others—by Rodriguez and Williams, highlight the risks of an exclusive focus on prosecuting anticompetitive practices at any cost. First, the evidence linking trade growth to anticompetitive practices is yet to be gathered. Second, there is also lack of data on the welfare costs from extraterritorial anticompetitive

practices compared with the cost of prosecuting and sanctioning them.⁴⁴ It is true that price discrimination and cartels are harmful practices to the integration process and they deserve scrutiny. However, consideration must be given to the costs and limited technical capabilities of both the MERCOSUR institutions and the national agencies in handling these cases.

A more promising alternative is to promote regional competition advocacy, at least during the consolidation period of integration, for the reasons discussed in Part II. As we saw, in a context of unfinished reforms, transparency is the main instrument for controlling both anticompetitive practices and inconsistent government policies. To this extent, a technical committee on public policies that distort competitiveness has been operating since 1995.⁴⁵ Its goal is to identify government measures affecting competition and decide whether they are compatible with the operation of the customs union. The scope of measures examined include exceptions granted under the MERCOSUR regime, taxes, government procurement, and other discriminatory policies.

This committee has advanced little in its agenda, as there are many conflicting topics involved. However, there are two areas related to firms' performance not covered by any MERCOSUR instrument which deserve attention. The former is the harmonization of regulatory frameworks to natural monopolies run either by State enterprises or by privatized firms. The latter are the treatment of dumping actions and the progressive elimination of the dual standard of analysis for export prices and domestic prices for one favoring the application of a harmonized competition regime. The Protocol is particularly keen in regard to State subsidies that affect competition conditions.⁴⁶ If the Committee is successful in identifying and eliminating the distorting fiscal incentives existing in MERCOSUR countries, it could turn this committee into a center forum to advance further initiatives in those untouched areas.

The harmonization process of such diverse areas of compe-

44. A.E. RODRIGUEZ & MARK D. WILLIAMS, DO WE NEED COMPETITION POLICY IN AN INTEGRATED WORLD ECONOMY? (Center for Trade & Commercial Diplomacy Working Paper No. 5, Mar. 1997).

45. MERCOSUR/CMC/DEC No. 20/94 on *Políticas Públicas que Distorsionan la Competitividad*. See INTER-AMERICAN DEVELOPMENT BANK, 1 MERCOSUR REP. 26 (1997).

46. Protocol for the Defense of Competition, *supra* note 4, art. 32.

tion requires the accomplishment of a number of prior sub-processes such as, for instance, those listed in article 30 of The Protocol. The program of cooperation therein described will allow countries to identify grounds of commonality and divergence regarding the goals and scope of competition and its implications for MERCOSUR integration. It will also lead to the identification of exceptions which might allow those anticompetitive practices that affect the market of another country, i.e., state monopolies and import and export cartels. These efforts may engender a coherent set of regulations on conduct and structure, as well as common procedural rules and enforcement standards to be applied by independent agencies. The final outcome will be a common approach to the treatment of anticompetitive practices, i.e., horizontal and vertical practices and abuse of dominant position, especially those of a discriminatory nature as well as methodologies for merger evaluation.

Although not explicit in The Protocol, the above cooperation program includes four clear cut stages of implementation at the national level. A crucial peculiarity of this process is that each stage can only be developed after the attainment of the preceding one. The first stage is the enactment of a national law containing the provisions required by The Protocol. The second is the creation of an autonomous and properly staffed antitrust agency. The third is the establishment of transparent operational routines by the antitrust agency, such as the publication of annual reports, guidelines to orient the private sector, consistent enforcement criteria, etc. The fourth is the consolidation of competition advocacy as the fundamental domestic task of the antitrust agency.

IV. CONCLUSION

Until a few years ago antitrust was just a domestic issue in some advanced economies. Nowadays it has a new title—competition policy—and has become a noteworthy topic on the international agenda. This change was provoked by several factors, such as the simultaneous trends toward globalization and regional integration, the rebirth of capitalism in Eastern Europe, the Latin American economic reforms, the creation of the World Trade Organization (WTO), and the new analytical instruments for dealing with regulatory reform in open econo-

mies.

It is therefore a new subject everywhere. At the WTO, the debate about the effectiveness of a multilateral agreement on competition rules is yet to begin. As Hoekman observed, the possible outcomes may vary from doing nothing to a fully harmonized international law, and a consensus view is far from emerging.⁴⁷ Within the scope of the Free Trade Area of the Americas (FTAA), a working group on competition policy was established in May 1996. Its mandate includes, among other initiatives, the exchange of views on the operation of competition policy regimes in the region, the identification of cooperation mechanisms among governments, and the elaboration of specific recommendations on how to proceed in this matter.⁴⁸

In this context, if the institutional innovations discussed in this paper are accomplished, the MERCOSUR Protocol will turn into a basic reference on the harmonization of competition policy among trading partners. Otherwise, it probably will add complexity to an already intricate theme.

47. Bernard Hoekman, *Harmonising Competition Policy in the WTO System*, 1 WORLD ECON. AFF. 39, 41 (1997).

48. See *Working Group on Competition Policies OAS/IDBECLAC Tripartite Committee Homepage* (visited Aug. 17, 1998) <<http://www.alca-ftaa.oas.org>> (citing information on the development of the preparatory work for the FTAA, particularly in the area of competition policy).