Toward a Common Competition Policy in Mercosur

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In December 1996, Mercosur countries signed the Fortaleza Protocol, which established an ambitious set of guidelines toward a common competition policy in the region. The protocol implies that all member countries must have an autonomous competition agency; that the national law will cover the whole economy; that the competition authority will be strong enough to challenge other public policies whenever necessary, and that the member countries 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 agency.

The protocol is enforced by the Mercosur Trade Commission (TC) and the Committee for the Defense of Competition (CDC).1 The TC performs adjudicative functions, whereas the CDC is responsible for the investigation and evaluation of cases, which are handled in three stages. Proceedings are initiated before the competition authority of each country at an interested party's request. After a preliminary determination of whether the practice has Mercosur implications, the competition agency may submit the case to the CDC 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. Then, the CDC must decide whether the practice violates the Protocol and recommend that sanctions and other measures be imposed. The CDC ruling is submitted to the TC for final adjudication by means of a directive. 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 certain obligations agreed upon with the CDC. The monitoring of these measures and the enforcement of the sanctions are the responsibilities of the national competition authorities.

Argentina has had an antitrust law since 1919 and Brazil since 1962, but competition policy became a relevant issue in these countries only in the nineties, in the context of the trade reforms and privatization programs implemented in the region since the late eighties. In 1994, the Law no. 8884 redesigned the Brazilian policy instruments and strengthened the powers of CADE (Conselho Administrativo de Defesa Economica) as the

main antitrust authority, paving the way for the regulatory reforms carried out in the subsequent years in the areas of energy, oil and telecommunications. The Argentine law was amended in 1946 and 1980, but the real reform was to be made only in September 1999 through the Law no. 25156, which created the Competition Tribunal with the necessary instruments to play the role of regulator of last resort in the economy. With an enlarged scope of application, this law introduced important new provisions, such as merger control and the autonomy of the antitrust authority.

Although Paraguay and Uruguay do not have antitrust laws, since the mid nineties their governments have been engaged in the debate about competition rules in two integration projects, the Free Trade Area of the Americas (FTAA) and Mercosur. After a preliminary phase that lasted from March 1996 to June 1998, the FTAA Working Group was transformed into a negotiating group whose main assignment is to prepare the competition chapter of the hemispheric agreement to be signed in 2005. Two explicit mandates of this group are to *"advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti-competitive business practices;"* and *"develop mechanisms to promote cooperation and exchange of information between competition authorities."* (San Jose Declaration, March 1998; see FTAA Official Website)

Therefore, the FTAA negotiations will reinforce the commitments made by Paraguay and Uruguay within Mercosur in regard to the adoption of a competition law. As they are yet to take this measure, the Fortaleza protocol is not operational until now. But there are two additional factors hampering the implementation of the protocol. According to article 7, the parties should have adopted common rules for controlling mergers and acquisitions by December 1998. According to article 9, the CDC was supposed to submit the procedural rules of the protocol to the Trade Commission. None of these commitments has been attained so far.

One important goal of the protocol is to pave the way for abolishing antidumping measures among Mercosur countries. Since the signing of the Asuncion Treaty in 1991, Argentina has initiated 38 antidumping actions against Brazil, two against Paraguay and one against Uruguay; while Brazil has opened two investigations against Argentina and two against Uruguay. As table 1 shows, Mercosur and NAFTA are the only regional agreements in the Western Hemisphere wherein the member countries apply this instrument on a regular basis. During the period 1987-2000, while Mercosur had 45 cases and NAFTA had 216, the Andean Community and CARICOM had no cases, and Central America had three cases.

Enforcing competition policy is a necessary, but not sufficient step toward the elimination of antidumping. In theory, these policies have an overlapping target, which is to curb predatory pricing but, in practice, they address different issues. While the former is concerned with market power, the latter is normally used as a trade remedy for industries unable to face import competition. Thus, to abolish antidumping inside a trade agreement, the member countries need not only competition policy, but also common disciplines for promoting the international competitiveness of their domestic industries. This is another unfinished task inside Mercosur,

as article 32 of the Fortaleza protocol mandated: “The States Parties undertake, within a two year period following entry into force of the present Protocol, and for purpose of their incorporation in this instrument, to draft joint standards and mechanisms which shall govern State aid which is susceptible to limit, restrict, falsify or distort competition and to affect trade between the State Parties.”

Table 1

Antidumping Measures Affecting FTAA Countries, 1987-2000

Part 1

Origin:	Arg	Bra	Can	Chile	Col.	C.R.	Ecu	Gua	Mex
Target:									
Argentina		2	2	1					1
Bolivia									
Brazil	38		13	2					19
Canada		1							4
Chile	3	3							1
Colombia	2								3
Costa Rica									
Ecuador									
Guatemala						1			
Honduras									
Mexico	3	4	3		2	2	1	1	
Nicaragua						1			
Paraguay	2								
Peru									1
T & Tobago					1				
USA	10	26	65	1	8	1			68
Uruguay	1	2							
Venezuela	2	2	1	1		1			6
FTAA	61	40	84	5	11	6	1	1	103
RoW	104	100	218	7	24	0	0	0	130
Total	**165**	**140**	**302**	**12**	**35**	**6**	**1**	**1**	**233**

Part 2

Origin:	Nic	Pan	Peru	T&T	USA	Ven	FTAA	RoW	Total
Target:									
Argentina			1		14	1	22	7	**29**
Bolivia			1				1	0	**1**
Brazil			2		30		104	36	**140**
Canada			1		42		48	10	**58**
Chile			3		5	1	16	0	**16**
Colombia		1	1		4		11	3	**14**
Costa Rica	1			1			2	0	**2**
Ecuador					4		4	0	**4**
Guatemala							1	0	**1**
Honduras	1						1	0	**1**
Mexico		1	2		34	1	54	14	**68**
Nicaragua							1	0	**1**
Paraguay							2	0	**2**
Peru						1	2	0	**2**
T & Tobago					2		3	1	**4**
USA						3	182	78	**260**
Uruguay							3	0	**3**
Venezuela				3	12		28	4	**32**
FTAA	2	2	11	4	147	7	485	153	**638**
RoW	0	0	16	3	635	22	1259	1572	**2831**
Total	**2**	**2**	**27**	**7**	**782**	**29**	**1744**	**1725**	**3469**

Source: Antidumping in the Americas.

When the protocol was signed Brazil was the only country that had the proper instruments to enforce the regional disciplines. Now, after the reform of the Argentine system, new opportunities have been created for an effective -- though interim and partial -- implementation of the protocol's objectives. First, instead of the cumbersome decision making process therein established, whereby a resolution made by the CDC can easily

be overruled by the TC and transformed into a trade dispute, Argentine and Brazilian competition authorities could sign a bilateral agreement based on the more lean procedures of positive comity, following other successful experiences such as those of Australia and New Zealand, and between the European Union and the United States.

These agreements made popular the concept of positive comity, which does not have a formal definition, but implies that each country will consider the other's national interest when enforcing its own competition laws. The European Commission's report on the application of the EU-US agreement describes some practical meanings of positive comity: *"In all cases of mutual interest it has become the norm to establish contacts at the outset in order to exchange views and, when appropriate, to coordinate enforcement activities. The two sides, where appropriate, seek to coordinate their respective approaches on the definition of relevant markets, on possible remedies in order to ensure that they do not conflict, as well as on points of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Cooperation under this heading has involved the synchronization of investigations and searches. This is designed to make fact-finding action more effective and helps prevent companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted."* (European Commission, 1998 Report on Competition, p.339)

Besides strengthening the competition authorities, an agreement of this type would bring about new elements into the Mercosur current agenda, by moving its focus from import/export figures and related mercantilist topics toward more fundamental subjects such as productive efficiency, consumer welfare and market distortions. Second, both countries could unilaterally include the interests of Paraguay and Uruguay when handling cases through the bilateral agreement. This procedure would generate a continuous record of the damages suffered by those countries for not having domestic competition laws, thus providing an additional stimulus for a more rapid completion of the Fortaleza protocol.

This innovative approach toward positive comity would create a dual pattern of cooperation inside Mercosur for an interim period. On the one hand, Argentina and Brazil could start immediately joint efforts for dealing with cross-border competition cases; and the practical knowledge engendered by this experience would point out the best solutions for an eventual reform of the Fortaleza protocol after the introduction of competition laws in Paraguay and Uruguay. On the other hand, these two countries would be receiving a "tailor made" technical assistance for the drafting of their domestic laws, through the direct access to the jurisprudence produced by the agreement between Argentina and Brazil. At both levels this implies a complex and time consuming learning process, but its long-term results are obviously worthwhile.

1. Both bodies are composed of representatives from each member country. However, in the case of the CDC, countries' representatives must come from the respective competition agencies.