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COMPETITION POLICY IN MERCOSUL

Introduction

Nowadays in such a globalized world it is very clear that all countries are concerned with trying to access new markets. Therefore, starting few years ago, some countries began to realize that the integration process could be the key to their efforts. Following this tendency, in 1991, Brazil, Argentina, Uruguay and Paraguay decided to create a Common Market between themselves, better known as the Common Market of the South (acronym MERCOSUL in Portuguese or MERCOSUR in Spanish).

Moreover, it is undeniable that a number of developments have taken place in recent years in the international economy which have fundamentally changed the conditions for competition. This imposes new requirements and demands on policy-makers developing an effective competition policy for the efficient use of resources in an international context. The globalization of economic activity and relations, rapid technological developments, and progressive elimination of trade restraints are some of the most important factors to be mentioned. As a consequence, economies have become more open and interconnected, and competition is increasingly transcending national boundaries and penetrating deeply into national markets. The process of trade liberalization has to some extent shifted the emphasis from eliminating trade restraints to getting rid of competition restraints as obstacles to international investment and trade flows. This has led to an increased awareness of inter-linkages between trade and competition policies and their consequences for the international trade system.

Considering the above mentioned aspects above mentioned, this paper intends to give the reader an overall view – and I stress, a legal but not economic analysis – of what MERCOSUL itself and each member state have been doing in terms of competition policy in order to guarantee as much as a possible a faire market for trade.

This paper is divided in three parts. The first part is introductory and it is related to the following questions: Where did MERCOSUL come from? and What is MERCOSUL? As a consequence, it includes a discussion of the historical background and the main aspects of the Treaty of Asuncion and the Protocol of Ouro Preto. In this chapter, MERCOSUL's structural framework will be taken into consideration as well.

The second part of the paper will focus on the importance of competition policy to MERCOSUL and several aspects will be analyzed such as how each member state treats the subject and what concretely exists so far. Moreover, initiatives of MERCOSUL will be pointed out considering that the legal framework is still under discussion between the member states with respect to the rules of the integration process. The third part, as a conclusion, will try to answer only one question: Where is MERCOSUL going?

I) Where did MERCOSUL come from and what does it represent in an international scenario?

1.1. Latin American integration: historical background

In 1955, the Economic Commission for Latin America (acronym "CEPAL" in Portuguese) had already pointed out the importance of a Latin American integration process, with the scope to increase trade between countries of that region. Therefore, a project came out in April, 1959 evaluating the real possibilities to create a Free Trade Area or a Customs Union based on the model of the European Coal and Steel Community (1954) and European Economic Community (ECC).

Influenced by these European models, most of Latin American countries began t their first steps towards regional integration. As a result, in 1960 the Treaty of Montevideo (TM 60) was signed in order to create the Latin American Free Trade Association (acronym ALALC in Portuguese) which would be accomplished by means of periodical and selective negotiations between its member states. The countries' choice to negotiate at the discretion of each member state made the "ALALC" trade opening program develop in a quite reasonable way during its first years. However, several internal problems, such as high inflation, huge external debt and political misunderstandings, contributed to limit the success of that first concrete attempt at Latin America integration. Thus, despite the fact that ALALC stimulated mutual trading between the member states, the distance between its first goals and the results actually obtained were great.

Once convinced that the “ALALC” had collapsed in view of the decrease of mutual concessions and internal trade, the member states decided to reformulate the Treaty of Montevideo by promoting several meetings.

A few years later, on August 12th, 1980 the second Treaty of Montevideo (TM 80) was signed creating the Latin American Integration Association (acronym ALADI in Portuguese) to replace the “ALALC”, by using other means to attempt the integration between the following eleven countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

It should be pointed out that, instead of the Free Trade Area, an Economic Preference Zone was established to create a favorable atmosphere for the growth of bilateral initiatives as a prelude to the institution of plurilateral relationships in Latin America.

If one compares “ALADI” to its predecessor it is true that the latter attempt was more successful than the former one and permitted the negotiation of several agreements and joint actions among the countries in the region. In fact, “ALADI” works as an umbrella under whose auspices many agreements are made. However, the creation of a Common Market was still “ALADI’s” main long-term goal.

For the creation of the Southern Common Market (acronym MERCOSUL in Portuguese and MERCOSUL in Spanish), it should be emphasized that it was preceded by the approximation between two countries, Argentina and Brazil. In 1985, both countries started their first officinal improvement of relation through the so called Declaration of Iguacu signed by the Brazilian President at that time, Jose Sarney and his Argentine counter part, Raul Alfonsin. This following with the signing in 1986 of twelve commercial protocols under the “ALADI” system.

To supplement and improve on their 1986 and subsequent ALADI agreements, both countries signed in 1988 a Treaty for Integration and Cooperation and Development that set the stage for a future common market between Argentina and Brazil within ten years, seeking the gradual elimination of all tariff barriers and the harmonization of their macroeconomic policies, as well. The Treaty emphasized that it would be possible for other countries to also join. Later on, Paraguay and Uruguay decided to join Argentina and Brazil in their effort at economic integration and on March, 24, 1991 they signed the Treaty of Asuncion with the goal of establishing a common market (free movement of goods, services and factors of production); the elimination of customs duties and non-tariff restrictions; and the establishment of a common external tariff and the adoption of a common trade policy, the harmonization of their macroeconomic policies. Chile and Bolivia became associate members on October 1st, 1996 and March 1st, 1997, respectively. In other words, the Treaty of Asuncion, despite what many people say, didn’t create MERCOSUL but set forth the main basis under which it should be created, because an integration process takes a while as a consequence of its many different phases. Fundamentally, an integration process can be divided in five categories. The first is a free trade area, where tariffs and quantitative restrictions are eliminated on goods traded among the member states. Each participating country, however, retains its own individual external tariff structure against nonmember states. The second form of economic integration consists of a custom union: a free trade area coupled with a Common External Tariff that is applied by all the members states to imports from outside the union. The third form of integration, a common market, includes all the features of a customs union and adds the free movement of factors of production (i.e., labor and capital) between the member states. An economic union, the fourth form of integration, combines a common market with some degree of harmonization of each member state's macroeconomic policies. It can be argued that for a common market to be truly successful it must be a economic union. Finally, total economic integration, the fifth form, involves the unification of monetary, fiscal, and social policies and the establishment of a supranational authority whose decisions are binding on all member states. In effect, total economic integration is synonymous with the creation of a Federal entity such as Brazil, Canada and the United States of America.[1]

Therefore, the Treaty of Asuncion should not be see as the final document creating MERCOSUL but as an important instrument of international character that intends to make the implementation of a common market possible. Basically, the Treaty is an economic integration agreement with regional goals, because it remains open to the accession of other "ALADI" members. It is important to add that the decision between Argentina and Brazil to join their efforts demonstrates the maturity of both countries since they traditionally were very well known as big economic rivals.

At the present time, MERCOSUL can be considered a very imperfect customs union whereby the member states have eliminated all tariff and non-tariff barriers to reciprocal trade and adopted a common external tariff for third party countries. This is because the member states negotiated what has come to be callled an "Adoption Regime" by which some products traded among the four countries will, for a while, continue to pay duties. Lists of Exceptions to the common external tariff for a group of specific products also

[1] Thomas A. O'Keefe, Latin America Trade Agreements, Irvington-on-Hudson, N.Y.: Transnational Publishers, 1997, pp. 23-27

exist for non-MERCOSUL countries that will, for a while, pay different duties depending on the specific MERCOSUL country that imports them.

The Protocol of Ouro Preto was signed in December 1994 and focuses on the institutional structure of MERCOSUL. The importance of that document is undeniable for to two reasons: it fixed the new institutional framework of MERCOSUL and confirmed it as a juridical entity under international law. For that reason MERCOSUL can, since that moment perform all necessary acts in order to accomplish its objectives. Specifically, it can contract, buy or sell chattel and real state, appear in court, own funds and make transfers and negotiate agreements with other countries or group of countries like the European Union.[2]

Another aspect that makes MERCOSUL still very peculiar as an economic bloc is the fact that, as consequence of the Protocol of Ouro Preto, all decisions must be taken by consensus in the presence of all member states. As a result, if one MERCOSUL country hasn’t got a supranational institution and if one party disagrees with another, they won’t be able to take any decisions at all.

Such a reality has been seen by many as a significant defect that works againsts improving the bloc, because it really slows down the integration process, when the member states, with their different realities, can not agree about important points such as competition policy, consumer protection, macroeconomic policies, and so on.

1.2 Objectives of MERCOSUL.

The Treaty of Asuncion in its first article describes the main goals of MERCOSUL, as the following:

" Article 1 – The member states agree to form a Common Market of the South which must be established by December 31st, 1994 and will be called the Common Market of the South."

Such a market requires:

Free transit of manufactured goods, services and factors of production between the member states with, inter alia, the elimination of customs duties and the lifting of nontariff restrictions or any other measures with similar effects on the transit of goods.

Fixing of a common external tariff and adopting a common trade policy with regard to nonmember states or group of states and the coordination of positions in regional and international commercial and economic meetings;

Coordination of macroeconomic and sectoral policies of member states relating to foreign trade, agricultural, industry, taxes, monetary system, exchange rates and capital, services, customs, transport and communications and any others they may agree on, in order to ensure free competition between member states; and,

The commitment by the member states to make the necessary adjustments to their laws in pertinent areas to allow for the strengthening of their integration process."

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[2] O'Keefe, Latin America Trade Agreements, Appendix 10, p. A10-8

The Treaty of Asuncion is fundamentally based on the doctrine of the reciprocal rights and obligations of the member states. As said before, MERCOSUL initially sought the creation of a free trade zone, then a customs union and, lastly, a common market, where in addition to customs unification, the movement of manpower and capital across the member nation's international frontiers will be possible, and there is an obligation of equal rights and duties being granted to all the signatory countries.[3]

1.3. Institutional framework

The Treaty of Asuncion set forth the initial rudimentary institutional framework of MERCOSUL. However, the Protocol of Ouro Preto decided to keep the same original institutions and also added a few others. The main institutions and, as is going to be demonstrated are implementing MERCOSUL's principles and purposes.

The premier MERCOSUL institution is the Common Market Council that is responsible for the projects direction. It also creates the policies that are needed for the implementation of the principles and purposes of the common market and acts on policy proposals sent to it by the Common Market Group. Furthermore, it has supervisory authority over other institutions and is the real representative of MERCOSUL empowered to negotiate and execute agreements with other international and domestic organizations. The Council's policies are known as Decisions and they are "obligatory on

[3] Website: www.mre.gov.br/mercosul, p. 1

the member states".[4] The Council is comprised of the Foreign Relations and Economic Ministers from each of the four member states and it has no permanent staff.[5]

Another institution is the Common Market Group which is MERCOSUL's executive body and it is made up of representatives from the central bank and the economic and foreign ministries of each member state, plus four alternate members from each country. Fundamentally, its responsibilities include drafting policy proposals to be decided by the Council and implementing Council decisions. The Group also analyzes and makes recommendations on proposals submitted to it for comment by other MERCOSUL institutions. It also has significant administrative responsibilities, such as the approval of the MERCOSUL budget, the approval of the Secretariat's annual expenditures, and organization of the Council's Meetings. The Group issues its policies in the form of "Resolutions" which are binding on the member states, as well.[6]

The MERCOSUL Trade Commission, the body entrusted with assisting the Common Market Group, is also charged with monitoring the application of and implementing the common commercial policy as agreed to the member states, making decisions regarding the administration and application of the common external tariff, proposing changes to it and keeping the Group informed on the evolution and application of the common commercial policies. Furthermore, The MERCOSUL Trade Commission (MTC) has the

[4] Malcolm Rowat, Michele Lubrano, and Rafael Porrata, Jr., Competition Policy and Mercosur , World Bank Technical Paper No. 385 (Washington, DC: The International Bank for Reconstruction and Development, 1997), p. 14

[5] Articles 3 and 4 consist of the following: Article 3. The Common Market Council is MERCOSUL's highest body and it is entrusted with the political management of the integration process and the taking of decisions in order to ensure compliance with the objectives established by the Treaty of Asuncion and in order to achieve the final establishment of a common market." "Article 4.The Common Market Council is made up of the Ministers of Foreign Relations and the Ministers of Economy, or their equivalents, of the State Parties." (O'Keefe, Latin America Trade Agreements, Appendix 10, p. A10-2)

[6] Rowat, Competition Policy, p. 14

power to resolve, in accordance with the procedure set forth in the Protocol of Brasilia on Dispute Resolution, complaints by individuals concerning the application by member states of legal or administrative actions which violate the “law” of the MERCOSUL community. The MTC has created 11 Working Groups to examine and make proposals regarding different specific areas related to the common external tariff and the common commercial policy. Moreover, the MTC issues either “Directives” or “Proposals” with the former being “ binding on the member states” and is composed of four nominal members and four alternate ones per state party and its activities are coordinated by the respective Ministries of Foreign Relations.[7]

To understand a little bit more about MERCOSUL’s institutional composition it is important to read Article 2 of the Protocol of Ouro Preto that clearly states the following:

“ Article 2 – The Common Market Council, the Common Market Group, and the MERCOSUL Trade Commission are institutions with decision-making capacities and are of intergovernmental nature.”

The article is particularly significant for MERCOSUL’s institutional structure because it emphasizes that all decisions taken by those institutions are of an intergovernmental nature. That is a consequence of MERCOSUL’s institutions of not having supranational powers. Therefore, the decisions must be ratified and adopted by each member state before they enter into full force and effect in the domestic legal framework of that particular country. [8]

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[7] Ibid., pp. 14-15

[8] (Article 17 of the Ouro Preto Protocol that consists of the following: “Article 17. The decisions of the institutional bodies of the MERCOSUL shall be taken by consensus and in the presence of all State Parties.” (O’Keefe, Trade Agreements, Appendix 10, p. A10-9)

To complement Article 2, there are two other ones that are equally significant: Article 40 and 42 which provide, respectively:

"Article 40 – With the goal of ensuring simultaneous legal effect of the norms emanating from MERCOSUL in the state parties as contemplated in Article 2 of this Protocol, the following procedure should be followed:

i) Once the norm has been approved, the State Parties will adopt all the necessary measures for its incorporation into the national legal order and will notify the MERCOSUL Administrative Secretariat of this situation;

ii) When all the State Parties have informed the MERCOSUL Administrative Secretariat of this incorporation into their respective internal legal order, the MERCOSUL Administrative Secretariat will then inform each State Party of this fact;

iii) The norms will enter into legal effect simultaneously in the State Parties thirty (30) days after the date of communication made by the MERCOSUL Administrative Secretariat, pursuant to the terms of the previous subparagraph. With this objective, the State Parties will publicize the entry into force of the referred norms within the aforementioned time limit, through their respective official newspapers."

" Article 42 – The norms emanating from MERCOSUL's institutional bodies as contemplated by Article 2 of this Protocol will be binding in nature and, when necessary, should be incorporated into the nominal legal orders pursuant the procedures called for by each country's laws."

Other MERCOSUL institutional bodies include the so-called Joint Parliamentary Group that is the institution representing the legislatures of the member states. It is made up of an equal number of parliamentarians representing the state parties. Unlike the Common Market Council Group, or MTC, it has no decision-making powers and has only advisory functions.

Another institution is the Socio-Economic Advisory Forum is the body that represents the different economic and social sectors in civil society, (including producers, consumers, workers and merchants) and is made up of an equal number of representatives from each state party. It plays an advisory role and this advice takes the form of non-binding "Recommendations" to the Group.

Finally, the Secretariat is the only institution within MERCOSUL to have a permanent staff. It is permanently headquartered in Montevideo (Uruguay) and, at the present, its staff consists of approximately 30 professionals. It has only administrative duties.

II) The scope of competition policy

No one will argue that the cornerstone for an efficient market is the existence of competition. It is competition that motivates the markets, the entrepreneurs to work better and look for a way to keep the consumers satisfied with their goods, or, in one word, to make them look for more efficiency. Once the market has a lot of players only those who can find a way to be more efficient will survive. In reality it is a kind of economic Darwinism. In such an atmosphere, consumers play a relevant role as well because they become more demanding and companies need to adopt and improve themselves if they want to sell their products. Moreover, the globalization era makes very clear that boundaries basically don't exist at all and the consequence is that countries as a whole must also look for efficiency, once competition among them become more pronounced.

It is undeniable that a number of developments have taken place in recent years in the international economy which have changed fundamentally the conditions for competition. This imposes new requirements and demands on policy-makers developing an effective competition policy for the efficient use of resources in an international context. The globalization of economic activity and relations, rapid technological developments, and progressive elimination of trade restraints are some of the most important factors to be mentioned. As a consequence, economies have become more open and interconnected, and competition is increasingly transcending national boundaries and penetrating deeply into national markets. The process of trade liberalization has to some extent shifted the emphasis from trade restraints to competition restraints as obstacles to international investment and trade flows. This has led to an increased awareness of inter-linkages between trade and competition policies and their consequences for the international trading system.[9]

As was said earlier, this paper will focus on competition policy within the MERCOSUL countries although, first, it is important to understand what is meant by competition policy.

[9] Competition and Trade Policies; Coherence or conflict? Edited by Einar Hope and Per Maeleng – Routledge Studies in the Modern World Economy, New Ferrer Lane, London) p. 1, 11

The broad objective of competition policy is to help ensure that market economies deliver high and rising standards of living. More specifically, competition policy primarily seeks to prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers most want at the lowest possible prices. In some jurisdictions, competition policy has important secondary objectives such as contributing to market integration or preserving the freedom to compete. Hence, competition policy has two main branches: The first consists of advocacy whereby competition agencies encourage other branches of the government to adjust their policies so as to interfere as is little as absolutely necessary with market competition – for example, in the development of regulations. The second branch of competition law is enforcement. As law enforcers, competition agencies investigate and prosecute or prohibit agreements which either exclude competitors or substitute collusion for competition. They also prohibit monopolization or abuses of dominant market position whereby enterprises unilaterally restrict actual or potential competitors. Finally, most competition agencies prospectively review mergers to ensure these are not used as a means to eliminate or restrict competition. Virtually, all forms of competition law enforcement requires access to a great deal of highly specific, often confidential information concerning the workings of current markets and individual firms. It also requires making sensitive judgements and tradeoffs concerning the economic effects of various types of conduct and mergers.

Competition law is, in general, national law, but it has never been purely domestic. There are four related reasons why competition law enforcement is taking on more an more of an international dimension and rising to greater prominence in international for:

- First, since 1950, few countries had competition laws, and those that did generally took a very tolerant approach to cartels and other anticompetitive conduct; only gradually did competition law regimes become more widespread and more serious instruments of public policy;
- Second, until quite recently, all countries with competition law other than the United States took a narrow view of the applicability of their laws to foreign firms' conduct in their markets. In order to protect their citizens, a growing number of countries are extending the jurisdictional scope of their laws;
- Third, globalization means that a higher percentage of competition cases have significant international components;
- Fourth, to the extend that trade and investment liberalization reduces entry barriers, it might give firms greater incentives, but perhaps less ability, to engage in anticompetitive conduct and mergers. [10]

Precisely in the case of MERCOSUL, the importance of an intra-regional competition policy is undeniable since most regional integration processes seek to improve regional economic efficiency and some degree of fairness in trade between member countries. This requires some degree of regional policy harmonization, especially behaviour originating in one country has an impact on the welfare of another member country. A further argument in favor of intra-regional competition policy harmonization is the need to take into account the consumer welfare in partner countries. In sum, some degree of competition policy harmonization is needed to promote the elimination of barriers to the effective enlargement of markets, and also to boost the efficiency gains associated with market enlargement and to assure the equitable distribution of the benefits of regional integration. For that reason the preamble of the Treaty of Asuncion emphasizes the importance of free competition as an essential aspect to help the markets' increase in view of the growth of each member state. The proper way to achieve the goals set forth in the Treaty of Asuncion is to create a common market with free circulation of goods and factors of production between the state members and especially, to coordinate their macroeconomic policies . The central idea of the state parties was to assure fair trade among them and to preserve and protect the competition process in the region.

On December 14th , 1994, the MERCOSUL Common Market Council, in its Decision 21/94, approved a document entitled "Basic Elements of the Defense of Competition in MERCOSUL". This document was intended to harmonize the member states' national laws in the area of competition and to create a scope for coordinated action by the member states so as to prevent anticompetitive practices. That decision was superceded by the approval of a protocol (Decision No. 18/96) for the Defense of Competition Within MERCOSUL on December 17th, 1996 by the MERCOSUL Common Market Council.

III) Historical background of competition policy within MERCOSUL member states: Argentina, Brazil, Paraguay and Uruguay.

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[10] Joanna R Shelton, Competition Policy: What Chance for International Rules? OECD Journal of Competition Law and Policy Vol 1. No 2 p.1 and 2

As was said before, there is no doubt that the onset of globalization has expanded trade and investment flows, increased competition interactions, and also generated an explosion of international mergers, joint ventures and other types of economic strategic alliances. The natural result has been efforts by countries' to adopt their economies – their markets – to that change, that has been coupled with an increasing concern, mainly from the developing countries about the necessity of fair trade practices. As a consequence, in order to guarantee trade growth between countries and economic blocs, it is also crucial for them to up-date or create new rules to face the new economic reality and ensure a fair trade on both internal and international fronts. Accordingly, the core of competition policy is fundamentally to preserve and protect the process of competition. In order to clarify the legal roots of competition policy in MERCOSUL, this paper will now point out the main aspects of each member states' internal competition law – when if even has one – and show what each country has been up to in that field, so far.

3.1. Competition policy within MERCOSUL member states: Argentina, Brazil, Paraguay and Uruguay.

3.1.2. ARGENTINA

Argentina – not very differently from the other MERCOSUL faced in the past several kinds of political disturb once in the past which contributed to create a very protectionist mentality within the country. As a natural consequence of this, the economic policy that was adopted consisted of high tariffs, quantitative restrictions and surcharges on foreign imports. The import substitution program was at the center of economic policy This idea prevailed until the late 1980's when the Argentine government owned or controlled many different enterprises. These companies represented a large portion of the Argentine economy and operated in a fashion similar to that of the national government: they were overstaffed, noncompetitive, inefficient and decisions therein were generally made for political and not managerial reasons.

The situation in Argentina changed drastically in 1989 as a result of the Menem administration. Many reforms were made in different areas such as economic, legal and administrative, this last one in order to restructure the national government. The reforms resulted in a radical modification of the size of bureaucracy, and also rationalized the scope of regulation and administration and have made the national government more efficient. They have also significantly reduced government spending and increased its ability to raise revenue.

Following the American and British tendency to shrink the size of their governments, Argentina under the Menem administration also committed itself to a privatization program with a view of contributing to introducing more significant competitive forces. As it is known, competition requires multiple players and one way to increase the number of players is to unbundle services among many different players wherever possible.

The Menem administration also modified the Argentinean trade policy so that most quantitative and other kind of import restrictions have been eliminated and a reduction on tariffs has occurred as well.

It should be pointed out that most export subsides have been eliminated and trade related taxes and fees have been rationalized. Price control laws have been eliminated, Argentina has joined MERCOSUL, adopted its common external tariff, and is enthusiastically supporting its regional integration efforts. Restrictions and limitations on foreign investment have essentially been eliminated and Argentina has entered into a number of bilateral investment agreements with a number of countries, including the United States.

In short, the Argentine economy has undergone a remarkable change since the late 1980's allowing the country to take part in globalization process and also improving its concerns about the competition process. So, in January 1995, Argentina put into effect the common external tariff (CET) approved by the MERCOSUL member states, inaugurating the customs union (however imperfect). As a result, in the past few years trade has increased production in many sectors and caused the expansion of the domestic economy. Moreover, the global and regional trade arrangements in which Argentina participates have remarkably contributed to Argentine economic prosperity.

To date, despite Argentina's economic recession its possibility to sign so many different trade agreements – specially with Brazil – have prevented the country to avoid an even worse economic and social situation.

3.1.3 Competition Policy in Argentina

As a matter of legal hierarchy, competition policy within Argentinean law is subject first to the provisions of Articles 42 and 43 of the amended Constitution. Below the

Constitution, the current regulatory framework is composed of Law No. 22,262 of 1980 for the Defense of Competition and Executive Decree No 2,284 of 1991 on Deregulation of Domestic Commerce in Goods and Services. Law No. 22,262 of 1980 is a Federal statute which only affects conduct that occurs within more than one province or which affects the general economic interest of the country. Its first Article outlines the scope of the law's application:

"Article 1 – Acts and behaviors related to the production of trade of goods and services limiting, restricting or distorting competition or constituting abuse of a dominant position in a market, in a manner which may result in a damage to the general economic interest, are prohibited and will be penalized pursuant to the rules of this law."

Furthermore, the goals of the competition policy law is to ensure the proper functioning of the markets, guarantee free competition, and punish behavior that limits, restricts or distorts competition or takes improper advantage of a market position to the detriment of the public interest. Basically, law 22,262 of 1980 has three main goals: a) to define, in a precise way, what constitutes unfair market behavior; b) establishes an administrative procedure in order to guide the investigation of such anticompetitive conducts; and c) creates a legal instrument to secure fair competition.

3.1.3.1. The Forbidden Acts under the Argentinean Law No 22,262 of 1980

As mentioned above, the current law forbids abuse of a dominant position in the Argentinean market. A person has a dominant position in the market when it is the only supplier or producer of a product or service in the national market or when it does not face substantial competition by other producers or suppliers. It is important to say that merely having a dominant position in a market is not considered a violation under the current competition law. Only the abuse of such a dominant position constitutes a violation.

However, the current statute – in contrast to the Brazilian one - doesn't have any provisions requiring prior governmental examination and regulation of business mergers or combinations of any type in order to determine whether these combinations result in acts forbidden under the law. Some observers says that the lack of this provision in the current law hampers its enforcement, since it is much easier to prevent an anticompetitive business combination before it occurs than to undo a completed transaction.

It is worth emphasizing another aspect related to the enforcement of the Argentinean competition law. Since Argentina started taking part in the globalization process, a range of economic measures have been taken to increase trade among other countries and protect the domestic market, also. Once the market became more opened or, internationalized, competition naturally increased. The idea of comparative advantages helped, but the markets also became more exposed to predatory practices, especially from more efficient companies seeking to dominate the market. So, the government, more than ever, became aware of the importance of having good laws and also competent enforcement bodies.

In order to guarantee the legal provisions of the Argentinean Competition Code, in 1980 was created the National Commission for the Defense of Competition ("Comision

Nacional de Defesa de la Competencia" acronym CNDC in Spanish) was also created. Its main duty is to investigate the Argentinean market and take the most appropriate procedures to stop conducts that can damage free competition in the market. [11]

Despite the duties established by law No 22,262, only in 1997 did the National Commission for the Defense of Competition (acronym "CNDC" in Spanish) actually start playing a more significant role in the enforcement arena. Before that time, high inflation in Argentina had allowed businessmen to raise the prices of goods or services - specially these last ones because they were not competing with international prices – based on mere expectation of the inflation rate. In response, the Argentinean government decided to use price controls and that attitude has encouraged businessmen to become extremely corporativist. In such an atmosphere, the enforcement body didn't have a lot to do in terms of enforcing the antitrust law because prices were set by the government.

Since the economic scenario has changed, Argentinean authorities has started to reevaluate the role of the "CNDC". Moreover, the changes begun such as the privatization of state-owned companies and the unbundling of many other ones, it also became necessary to create a way to control the efficiency of the privatized enterprises and to avoid them from misusing their power in the market. As a result, the government has created many regulatory agencies in order to ensure competition in areas such as electricity and natural gas.

3.1.3.2. The anticompetitive conducts

[11] "Article 6 – The National Commission for the Defense of Competition is created under the Secretariat of State of Commerce and International Economic Negotiations." OAS, Inventory, p. 8)

As a provision of the Argentinean law the following acts or behaviors shall be punished with the penalties indicated in article 42, provided they fit into article 1. They are the following:

a) Setting, determining or making prices in a market, directly or indirectly, via concerted actions; b) Limiting or controlling through concerted actions, the technical developments for the production of good or services, as well as their production, distribution or marketing; c) Establishing, through concerted actions, the marketing sales conditions, minimum quantities, discounts and other aspects related to selling and marketing; d) Subordinating the signing of contracts to the acceptance of supplementary services or aspects or operations, which because of their nature and according to commercial practices are not related to the object of these contracts; e) Concluding agreements or undertaking concerted actions, distributing or accepting among competitors, zones, markets, client bases or source supplies; f) Preventing or impeding the access to markets by one or more competitors through agreements or other concerted actions; g) Refusing to fulfill specific orders, for the purchase or sale of goods and services made under the standard conditions in effect in the market in question, as part of a concerted action and with no reasons grounded in commercial practices; h) Imposing, trough concerted action, products in any stage of elaboration, or production, or the means devoted to extract, produce, or transport such products; i) Destroy, as part of a concerted action, products in any stage of elaboration, or production, or the means devoted to extract, produce, or transport such products; j) Abandoning harvests, crops, plantations or cattle or agricultural products, or discontinuing or preventing the operation of industrial plants or the production of mining fields, as part of a concerted action; k) Communicating to competing enterprises, as part of the concerted action, prices or other marketing, or purchase of sale conditions under which these enterprises will have to operate. (Article 41) [12]

3.2 BRAZIL

Prior to the current reform movement, the Brazilian development model was considerably removed away from competition and free access to the market. Brazilian Import Substitution Industrialization (a policy designed to protect domestic industries by imposing high duties on the importation of certain goods) started giving its first signs of exhaustion in the late 1980s. As happened in Argentina, the state's excessive involvement in the economy during the last three decades contributed – in a negative sense – on avoidance of competition among domestic companies and with foreign ones.

As has been mentioned before, competition was hindered by anachronistic economic policies that eroded the national culture of competition.

Things begun to change in the early 1990s under the auspices of the Fernando Collor de Mello administration based on his ideas of opening up economy to international trade and investment, privatizing state-owned companies and deregulating a few sectors, of the economy. The outcome was the reduction of import tariffs – flooding the country with cheaper imported goods – and the elimination of quantitative restrictions. Collor was eventually impeached and his vice president, Itamar Franco took office. The turning point in the stabilization process has come with the successful launching of the Real Plan - with Fernando Henrique Cardoso as Minister of Finance at that time - in July

[12] (Ibid., p.3)

1994. It has focused on three basic goals: a) keeping inflation under control; b) obtaining a steady and substantial reduction of social disparities; and, c) achieving a long-term sustainable growth of the GDP, investment, employment and productivity. The structural change of the Brazilian economy has had a remarkable contribution to helping cut away its traditional xenophobic mentality, and, therefore, has reinforced the "new" idea of a competitive and efficient market. As a result, the new policy has stressed the Brazilian producer's potential to compete and has exposed them to the competitive pressures of foreign imports.

3.2.2 Competition Policy in Brazil

The Brazilian Constitution, promulgated in 1988, has dedicated only few articles to competition policy, such as Articles 170, 173 and 174. The Constitutional provisions of the Brazilian competition law can be summarized as the following:

a) Law No. 8,884 of June 11, 1994 (originally enacted in 1962 and amended in 1990 and revised in 1994), transforms the Administrative Council of Economic Defense (acronym "CADE" in Portuguese) into an autonomous government agency and provides for prevention and prosecution of infractions against the economic order. After this law was revised in 1994, "CADE" became the forum for analysis and final decision an acts of concentration;

b) Law No. 8,137 of December 27, 1990, defines crimes against the tax and economic order, and against consumption relations;

c) Law No 9,021 of March, 30 1995, provides for the implementation of the autonomy of the Administrative Council of Economic Defense (CADE), established by Law No 8,884 of June 11, 1994.

d) Law No. 7,347 of June 24 1985, amended by a single paragraph in article 88 of Law No 8,884 of June 11, 1994, regulates the civil action for liability for damages caused to free competition or any other diffuse or collective interest. [13]

As it was mentioned above, Law No 8,884 of June 11, 1994 embodies the bulk of Brazil's current law on competition. Its objective is to prevent and prosecute infractions against the economic order as a means of promoting free competition and free enterprise. Therefore, it applies to practices in all or part of the national territory, or that produce or may produce effects in it. (Article 1). Moreover, it applies to all physical or juridical persons under public or private law, as well as any associations of entities or persons, constituted "de facto" and by law, albeit on a temporary basis, with or without judicial personality, even if they exercise an activity under a legal monopoly. (Article 2). The idea here is to include any kind of company, and it doesn't matter their legal status or if they are a private or a state-owned enterprise.

It should be noted that Article 92 says that the provisions of Law 8,884/94 do not apply to dumping and subsidies cases addressed in the Agreements Relating to the Implementation of Article VI of the General Agreement of Tariffs and Trade (GATT), promulgated by Decrees 93941 and 93962 of January 16 and 22, 1987, and the bodies

[13] Ibid., p.1

entrusted with carrying out the law in dumping and subsides cases will be the Ministry of Industry and Commerce and Treasury Ministry.

3.2.2.1. General Prohibitions under the Brazilian Law No 8,884 of June 11, 1994

Brazil's current competition legislation prohibits any practice aimed at restricting, limiting, or otherwise prejudicing free competition, dominating the relevant market of goods or services, arbitrarily increasing profits, or abusively exercising dominant market position.

Fundamentally, all forms of conduct are covered which have as an objective or potential effect attained to: 1) limit, falsify, or prejudice free competition or free enterprise; 2) dominate the relevant market of goods and services; 3) arbitrarily increase profits and/or; 4) abusively exercise dominant position. (Article 20)

Under the auspices of Brazilian competition law, the "rule of reason" is always applied to determine what circumstances make out a prohibited form of conduct. Unlike the law in the United States, there are no per se offenses in Brazil because each case will be analyzed by the enforcement body (i.e., "CADE". Moreover, - and this is a particularity of the current law -, all forms of conduct, to be considered illegal, should have, or have the potential to bring about, the anticompetitive effects described above, independent of fault. For example, the legislation lists some forms of conduct which, if harmful to competition, and which includes entailing market domination, arbitrary increase in profits, or abuse of dominant position, will be prosecuted. These include collusive practices, setting up barriers to the entry of competitors, setting prices and sales conditions, discriminatory, predatory, or conditional agreements and unjustified price increases, or the imposition of excessive prices, such as:

1. setting or adopting prices and conditions on the sale of goods or delivery of services, in agreement with one's competition, in any form;
2. obtaining or influencing the adoption of uniform or coordinated commercial conduct among competitors;
3. dividing up markets for finished or semi-finished goods or services, or the supply of raw materials or intermediate goods;
4. limiting or impeding the access of new firms to the market;
5. creating difficulties to the chartering, operation, or development of a competing company or supplier, purchaser or financier of goods or services;
6. impeding the access of competitors to the source of inputs, raw materials, equipment, or technology, as well as distributions channels;
7. demanding or granting exclusivity for disseminating advertising in the mass media;
8. pre-arranging prices or shifting advantages in public or administrative bids;
9. using deceit to cause the prices of third parties to fluctuate;
10. regulating markets of goods and services, entering into agreements to limit or control technological research and the development and production of goods, or the delivery of services, or to hinder investment in the production of goods or services, or in their distribution;
11. imposing on distributors, retailers, and representatives trading goods and services, prices for sale, discounts, payment conditions, minimum and maximum amounts, profit margins, or any other marketing conditions relating to transactions with third persons;
12. discrimination among purchasers and suppliers of goods or services by differential price setting, or operating conditions of sales or the delivery of services;
13. refusing to sell goods or deliver services under payment conditions that are normal in terms of commercial uses and customs;

14. hindering or interrupting the continuity or development of commercial relations for an indeterminate term because of the other party's refusal to accept unjustifiable or anticompetitive commercial clauses and conditions;
15. destroying, rendering unserviceable, or withholding from the market raw materials, intermediate or finished goods, as well as destroying, rendering unserviceable, or hindering the operation of equipment for producing, distributing, or transporting such materials and goods;
16. withholding from the market or impeding the exploitation of industrial or intellectual property rights, or rights to technology;
17. abandoning, causing the abandonment of, or destroying crops or plantations without showing just cause;
18. selling merchandise below cost without justification;
19. importing any goods below cost in the exporting country which is not a signatory to the GATT antidumping and subsidies codes;
20. interrupting or significantly reducing production, without showing just cause;
21. ceasing the activities of the firm partially or completely without showing just cause;
22. withholding production or consumption goods, except to guarantee coverage of production costs;
23. conditioning sales of any good or purchase of another, or on the use of service, or conditioning the delivery of a service on the use of another or on the purchase of a good (known as "tie-in" agreement);
24. imposing excessive prices, or increasing the price of a good or service without just cause. [14]

Despite the presence of the above listed conduct, Brazilian legislation permits an express exception from prosecution in those cases where they result as a natural process of the market based on the grater efficiency of economic actors. It also allows the Administrative Council for Economic Defense ("CADE") to authorize acts, in whatever

[14] Ibid., pp. 3-4

form they may take, that may limit or harm competition or result in the domination of relevant markets for goods and services.

Moreover, in contrast to the Argentinean Law, Law No. 8,884 provides for controls on all acts or contracts that may limit or in any way harm free competition or result in the dominance of relevant markets of goods or services. These acts include those expressly aimed at preventing any type of economic concentration, be it through mergers or acquisition of firms, chartering of corporations or partnerships to exercise control of a firm, or any type of corporate organization. The Law also provides criteria for analyzing such acts or contracts and the notification requirements which can be a priori or a posteriori, within maximum term of 15 working days after the transaction (Article 54).

Finally, the enforcement bodies of competition legislation Brazil, are three:

1. “CADE”, a collegial body with an adjudicative function and jurisdiction throughout the national territory, established by Law 4,137 of September 10, 1962, and which, as previously mentioned became an autonomous federal government agency linked to the Ministry of Justice, as a result of Law No 8,884 of June 11, 1980.

2. The Secretariat for Economic Law (“SDE”), an organ for the preparation, investigation, and oversight, of enforcement, which is a decentralized body of the Ministry of Justice, and;

3. The Secretariat for Economic Monitoring ("SEAE") linked to the Ministry of Finance and offering "SDE" the technical support for the case analysis. [15]

3.3. URUGUAY

From the 1930s through the mid-1970s, Uruguay followed an import substitution policy coupled with extensive intervention by the Government in the economic affairs of the country. Those policies contributed to a significant inflation rate and the stagnation of the Uruguayan economy beginning in the 1960s. The government imposed pervasive controls over the domestic goods and financial markets in the form of high tariffs, quantitative trade barriers, price controls and subsidies, exchange and interest rate restrictions. The government also controlled important areas of the economy, such as communications, railways, air craft and oil refining and distribution, and developed a "comprehensive" social security system as well. Certainly, those four decades of protectionism conditioned most companies to a non-competitive climate, with the result that even today Uruguayan firms and entrepreneurs are normally described as conservative, risk averse and anti-innovation.

In response to the country's poor economic performance, which was further aggravated by a worldwide recession, Uruguayan government in the mid-1970s launched a series of reforms seeking to the reduce the role of the government in the economy, increase its efficiency, and reduce inflation. In the early 1990s, the government decided to further change the direction of its economic policy and opened the economy to market forces, as well reduce the size and influence of the public sector. The reforms consists of tariff

[15] Ibid.

reductions, changes in the scope of non-tariffs barriers, deregulation, and simplification of administrative procedures. As a result, Uruguay's economy recovered in the years of 1996 and 1997 with the real GDP growth. Moreover, during the first half of 1998 this recovered continued, though at a slower rate. Despite the adverse impact of recent economic developments on Uruguay's major trading partners, mainly Brazil, such developments have not resulted in any significant direct adverse consequence for the country's economy. Nevertheless, the crisis in Asia, Russia and Brazil have had repercussions in Uruguay, in the form of widening spreads of government securities and a slowdown in the rate of growth of the economy. [16]

Inspite of the reforms, the Uruguayan economy is still nowadays, pretty much characterized by a tight oligopolistic structure, barriers to entry, and a lack of competitive mentality in most sectors.

3.3.1. Competition Policy in Uruguay

Uruguay has no explicit legislation or regulations dealing with competition. There are also no government agencies whose responsibilities include the monitoring of competition. Representatives of both the private and public sectors assert that neither the Uruguayan government nor the private sector has any interest in changing this state of affairs.

Given that MERCOSUL proposes an integration model that will eventually completely open the economies of its member states, and given Uruguay's proximity to Argentina and the surge of Brazilian investment in the area, it is probable that Uruguay's

[16] www.uruguayanembassy.org,, The Uruguayan Economy, pp.1-2

oligopolistic economy will soon be forced open from the outside by investments from those two countries. Without an internal competition law, small Uruguayan firms may not be able to compete with larger and better financed firms from the country's MERCOSUL neighbors. The new MERCOSUL Competition Protocol is meant to be an addition, not a substitute, for domestic competition law. Since Uruguay has no domestic competition law, the effect of the new MERCOSUL Competition Protocol on the Uruguayan economy will be very different from that of the other MERCOSUL member states. Thus, the absence of any competition legislation has strong implications for the development of Uruguay's economy. [17]

3.4. PARAGUAY

Paraguay's economy is still in the early phases restructuring and realignment of production, distribution and trade. During the 1980s, growth and living standards declined, in part, as a result of the significant economic contraction experienced by its wealthier and more industrialized trading partners (i.e., Brazil and Argentina). The economic imbalances and volatility occasioned by the policies just noted has generated disincentives for investment and probably has contributed to the lack of competition and competitiveness in the Paraguayan economy. Perhaps even more damaging, the country's long standing military regimes ability and willingness to grant effective monopolies in all key areas of the economy (notably heavy industry, processing of traditional agricultural products and distribution) practically eliminated real competition , in these sectors. The economic reforms initiated by the new democratic regime and Paraguay's

[17] Rowat, Competition Policy, p.85

accession to the MERCOSUL have, however, dramatically changed the setting for future economic development and the prospects for a more competitive environment. Undoubtedly, over-regulation, lack of transparency and doubts about the willingness of bureaucrats and the judiciary to apply the rules and enforce agreements in an unbiased manner are commonly cited as impediments to a more rapid private sector response to the new economic regime.

Even before the entry into force of the Treaty of Asuncion, Paraguay was heavily dependent on trade with his neighbors with imports and exports representing roughly one-third of its GDP. Because of the limited range of its domestic production and Paraguay's small size (its GDP is less than 2% of Brazil's), trade continues to be largely represented by exports of traditional agricultural goods and imports of manufactures and semi-manufactured goods (including consumer goods). [18]

3.4.1 Competition Policy in Paraguay

Paraguay has never enacted antitrust legislation. Since the latter half of 1995 there has been a flurry of economic law modernization initiatives in Paraguay. A team of advisors to the Wasmosy administration, also worked on a number of other economic law reforms, and prepared a draft competition law in early 1996. The preparation of the draft MERCOSUL Protocol on Competition seems to have been the impetus for movement on this front in Paraguay. The draft provides for the establishment of a quasi-independent competition commission, prohibits both horizontal ("per se") and vertical ("rule of

[18] Ibid., pp. 74 e 75

reason") violations, and provides for commission review of mergers of companies that result in domination of 20% or more market share.

The advisors' draft was circulated for discussion purposes within the government in March 1996. Careful review of the draft reveals a number of important issues that Paraguay will have to address in establishing an appropriate legal/regulatory framework for competition policy. Although the draft law has doubtless undergone many changes, no definitive legislation has been introduced in the Paraguayan Congress so far. The draft was clearly modeled in structure and content on the draft MERCOSUL Protocol on Competition (which, in turn, relies heavily on the Brazilian law).

IV) Competition Policy within MERCOSUL

As previously discussed, the purpose of the Treaty of Asuncion was to establish a common market which would include the free movement of goods, services and factors of production; the elimination of customs duties and non-tariff restrictions; the establishment of a common external tariff and the adoption of a common trade policy and, above all, the coordination of macroeconomic and sectoral policies.

Amongst those many topics requiring coordination at the MERCOSUL level is that of competition policy. It should be stressed that even though the focus of the MERCOSUL Protocol on Competition Policy corresponds to a narrow definition (i.e., horizontal or vertical agreements between enterprises, abuse of dominant positions, monopolization, mergers and acquisitions), competition policy is often viewed in a broader context to also include the range of government policies that have some impact in competition, including trade, foreign investment, consumer protection and intellectual property policies.

Following the above mentioned peculiarity of the MERCOSUL draft Protocol, however, this third part will focus on the narrower definition of competition policy.

Despite the continuing lack of a conclusive Protocol at a regional level there have been some developments. By mid-1995 the MERCOSUL Common Market Council had approved the so-called draft Protocol for the Defense of Competition (or Decision 18/96), explicitly referring to anticompetitive behaviour that ought to be forbidden at a national level and also containing provisions regarding various forms of concentration activity that would result in control of more than twenty percent of a relevant market. The last set of provisions are pretty much likely to prove increasingly relevant, especially considering an increase in the rate of mergers and alliances between Brazilian and Argentinean companies. [19]

The draft Protocol was based on Decision 21/94 of the MERCOSUL Common Market Council, issued in 1994 and entitled “Basic Elements for the Defense of Competition in MERCOSUL”. This document was first intended to harmonize the member state’s national laws related to competition and to create a scope for coordinated action by the member states to prevent anticompetitive practices. In fact, the Protocol only restates he language of Decision 21/94, with regard to the prohibition of concerted agreements whose purpose is to impede, restrict or distort competition, or free market access for the production, processing, distribution or marketing of goods and services throughout t the MERCOSUL, for the abuse of dominant market position as well. Therefore, it is useful

[19] World Bank- OECD, Competition Policy in a Global Economy: A Latin American Perspective, p. 16 Buenos Aires, Argentina, 28-30, October 1996

to highlight the most relevant aspects of the Decision 21/94 in order to help the reader to comprehend the draft Protocol. [20]

4.1 Main Aspects of Decision 21/94 and Decision 18/96

The so called “Basic Elements” found in Decision 21/94 was the first attempt of MERCOSUL to coordinate its member states action to prevent anticompetitive practices. Therefore, it focused on two different kinds of anticompetitive practices: a) the concerted ones; and, b) individual ones. Although, before exploring them in more detail, a few aspects should be taken into consideration.

First of all, Decision 21/94 limited itself to offering a few examples of practices that can be considered anticompetitive when they cause damage or impose throughout all or part of the MERCOSUL market. In other words, the suggested practices are not established in a categorical way. Article 3 to Decision 21/94 is very elucidating about such assumptions when it uses the word “such as”. This means that other acts, besides those listed, can also be considered anticompetitive conducts even if not ostensibly listed in the Article. Moreover, Article 4 adopts the same strategy of when it provides that “ the abuse of a dominant position can consist, among others the following actions….”

Later on, the same strategy has been adopted by the Decision 18/96 in its Article 6 when it provides that: “ the following practices, besides others, as far as they configure the hypothesis of Article 4, characterize an anticompetitive restraint to the market” This is a

[20] Ibid.

procedure adopted by some competition policy statutes, in order to have a broad possibility to punish practices that occur but are not categorically described by the law.

Another aspect point out is that both Decisions 21/94 and 18/96 were very clear about the fact that not all kind of anticompetitive practices will be prohibited but only those whose effect is to impede, restrict or distort competition or free access to the market for the production, processing, distribution and marketing of goods and services throughout MERCOSUL. [21] Once MERCOSUL Competition Protocol enters into force, it will take procedure over the domestic regulations of each member states whenever there is a conflict of laws.

Continuing the analysis of Decision 21/94 and 18/96 some words related to the meaning of the system of abuse should be mentioned to help understand MERCOSUL's Competition Protocol.

As was mentioned before, the assumptions of competition policy within MERCOSUL focus on certain types of misbehavior by the economic actors in the regional market which the law considers as damaging to its normal workings. According to the system adopted by the Protocol, not every dominant position will be considered anticompetitive unless the conduct is a result of an abusive dominant position.[22] On the other hand, within MERCOSUL, the meaning of the abuse of dominance is a matter of time, experience, and jurisprudencial interpretation and its definition it is not so easy and requires a lot of specific analysis by the experts.

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[21] The draft Protocol has adopted the same reasoning in its Articles 2 and 4.

[22] The draft Protocol follows the so called "rule of reason", also adopted by the European Union, instead of the "per se" doctrine, followed by United States antitrust law.

It should also be said that both Decision 21/94 and 18/96 have not established a situation when the competition rules won't be enforced as it is provided through the Articles 85 and 86 from the EU (Treaty of Rome, 1957).In the European context it is clear under which circumstances the competition law won't be enforced including a) when the negative conduct doesn't affect the commerce between the member states; b) when the deal between the companies does affect the interstate commerce but in a very slight way that it is not worth applying the law; and, c) when the deal can affect the regional market but because of some economic evaluations, the deal is considered legal.

Finally, the kinds of practices that were established as anticompetitive under the auspices of Decision 21/94 should also be mentioned..

This include all concerted agreements and practices entered into by enterprises whose purpose is or whose effect is to impede, restrict or distort competition or free access to the market if the production, processing, distribution and marketing of goods and services throughout all or part of MERCOSUL . Examples of these practices include:

- direct or indirect price fixing;
- imposing limitations or control in production, distribution, investment or technological innovation;
- division of the market or limitation of access to raw materials;
- concerted actions in public bidding;
- adoption, with respect to third parties, of unfair contractual conditions which place them at a competitive disadvantage;

- conditioning the execution of contracts to other agreements regarding matters which do not relate to their subject matter; and,
- pressuring suppliers or clients not to engage in certain behavior or retaliating against them if they do.

Decision 21/94 also established individual anticompetitive practices (abuse of a dominant position) and examples of these practices are the following:

- imposition of unfair prices or contractual conditions;
- unjustified restrictions in production;
- preventing the distribution or access to technology which result in prejudice to other firms or to consumers;
- imposition of unfair contractual conditions upon third parties which places them at a competitive disadvantage;
- conditioning the execution of contracts to other agreements which do not relate to their subject matter ("tie-in" agreements);
- unjustified refusals to deal;
- conditioning transactions to unfair or unjust commercial uses or practices or to refusals to utilize goods or services produced by third parties; and,
- selling goods at an artificially low price.

Decision 21/94 also establishes that all business mergers or combinations which involve firms having a participation of more than 20 % of the relevant market and which produce anticompetitive effects in all or part of MERCOSUL must be examined by the authorities of the appropriate member state. According to Decision 21/94 also requires that, member states mutually cooperate, either directly or within the MERCOSUL Trade Commerce Commission, in the creation and enforcement of common norms or procedures in the area of competition law. This can include information exchange, consultation, technical cooperation as well as other methods.

Another important aspect related to Decision 21/94 is that is provides that until a final agreement on the matter is reached by the member states, that a member state that considers itself affected by a violation of free competition may present a claim to another state party through the MERCOSUL Trade Commission. The member state where the alleged violation is located shall then, within 30 days, initiate an investigation of the matter in accordance to its national law. If such an investigation doesn't result in proceedings against the alleged offender, or if the affected party believes that, the anticompetitive conduct continues, the complaining state party may resort to the dispute resolution procedures set forth in the Protocols of Brasilia and Ouro Preto. [23]

As already noted, Decision 21/94 was the first attempt by the MERCOSUL to regulate competition policy and it was intended as a general "guide" to the member states in harmonizing their internal competition laws - for those countries which already has one - and to help the Paraguay and Uruguay to create one. A few years later, the draft Protocol came out as a result of the second meeting (May 22-24,1995) of the Technical Committee No. 5 to the MERCOSUL Trade Commission.

The draft Protocol, first, in a verbatim adoption from the "Basic Elements", prohibited all concerted agreements and practices entered into by enterprises and whose purpose or effect is to impede, restrict or distort competition or free access to the market for the production, processing, distribution and marketing of goods and services throughout all part of the MERCOSUL and also adopted the examples of these practices as set forth in the Basic Elements. Secondly, again in a verbatim adoption of the language of the Basic Elements, the Protocol forbade the abuse of a dominant position and adopted the examples of these practices as already set forth in the Basic Elements as well.

Article 5 of the draft Protocol requires that the authorities of the member states examine merger or business combinations which involve firms having a dominant market share of 20% or more of the relevant market and which might result in anticompetitive effects in all or part of the MERCOSUL.[24] However, Article 5 also makes exception when it establishes that business combinations that involve firms having a participation of more than 20% of the relevant market may be authorized to merge if they have as their objective to increase production, improve quality, or foster efficiency or technological or economic development, and that such benefits will be passed on to consumers.

Once one reads the draft Protocol is easy to conclude that it followed very closely the languages of Articles 85 and 86 of the Treaty of Rome [25] which prohibits agreements and concerted practices having as their object or effect the prevention, restriction, or distortion of competition within the common market and abuses of dominant position. In a similar fashion, European Council Regulation 4064/89 requires that certain takeovers

[23] Ibid., pp. 93-94
[24] Decision 21/94 in Article 5 has adopted the so called “effects doctrine” from the American antitrust law whereby the enforcement of the national law can occurs even in agreements celebrated abroad but whose anticompetitive effects will be produced at the national territory. In other words, MERCOSUL has adopted such doctrine to allow the extraterritorial enforcement of its competition law.
[25] Now Articles 81 and 82 of the Amsterdam Treaty, but referred here as Articles 85 and 86.

and mergers (or "concentrations" in the language of the Regulation 17)[26] must be reported to the European Commission before they are affected. The Regulation, basing itself on the authority of Article 86, allows the Commission to forbid those concentrations if they result in an abuse of dominant position which would significantly impede competition in the common market or within a significant part of it. Because practices which affect competition in only one member state are still subject to the national competition law regimes of the member state of the European Union, the European and national law regimes of the systems of the European Union coexist with each other.[27]

In December 1996 the Common Market Council's approved Decision 18/96 covering a final Protocol for the Defense of Competition within MERCOSUL. The Protocol will not become effective until it has been incorporated into each member's legal system (something which has not yet occurred). The Protocol has as main features, the following:

a) The Protocol applies in the circumstances under which the effects of the anticompetitive conduct are produced within MERCOSUL and affect the commerce between the member states. (See Article 2 – effects doctrine);

b) All concerted agreements whose purpose, (independent of guilt) or effect is to impede, restrict or distort competition or free access to the market, or that abuse a dominant position in the relevant market of goods and services within MERCOSUL and that affect trade between the member states violate the Protocol. (See Article 4);

[26] Regulation is the major piece of secondary law under Articles 85 and 86. It establishes the scheme of enforcement for competition law.

[27] MERCOSUL has adopted the same system.

c) According to Article 5 domination of the market that results in greater efficiency for the economic actor is not considered anticompetitive;

d) Article 6 adds another seven practices, to those set forth in Decision 21/94 that produce the effects described in Article 4 and characterize anticompetitive practices.

V) Conclusion

It can be said that Decision 18/96 represents a significant improvement over predecessor MERCOSUL regulation and competition policy and in that way it now delineates a role for MERCOSUL institutions to administer competition acts and agreements that affect more than one member state. Until the member states realize the importance of competition policy as a way to improve the common market, however, each will act in its own idiosyncratic way. All MERCOSUL member states must learn that once they are involved in an economic integration process, sometimes they are going to have to give up some of their sovereignty. Moreover, for the long term prosperity of MERCOSUL, it is vital hat they also start harmonizing their macroeconomic policies and create a supranational authority to work beyond each country's private interests. So, considering MERCOSUL's of economic integration goals, the role of competition policy is very significant and should work as an instrument to help achieve that integration. Furthermore, if MERCOSUL wants to have a relevant role during the negotiations for the creation of the Free Trade Area of the Americas (FTAA) it must consolidate itself as a economic bloc and thereby negotiate with strength.

References

BATISTA, Luiz Olavo. O Mercosul, suas Instituicoes e Ordenameto Juridico. Sao Paulo: LTr, 1998.

FARIA, Werter. Constituicao economica; liberdade de iniciativa e de concorencia. Porto Alegre: Sergio A. Fabris Editor, 1990.

FERREIRA, Aldo Leao. Mercosul.Comentarios sobre o Tribunal de Assuncao e o Protocolo de Ouro Preto. Porto Alegre: Livraria do Advogado, 1994.

FOLSOM, Ralph H. European Law in a Nutshell. West Group, St. Paul, Minn., 1999.

O'KEEFE, Thomas A. Latin America Trade Agreements. Irvington-on-Hudson, N.Y.: Transnational Publishers, 1997.

ROWATT, Malcolm; LUBRANO, Michelle and PORRATA, Rafael Jr. Competition Policy and MERCOSUL. World Bank Technical Paper No 385, Washington-DC, 1997

SILVEIRA, Paulo Antonio Caliendo V. da. Defesa da Concorrencia no Mercosul. Acordos entre empresas, abuso de posicao dominante e concentracoes. Sao Paulo :LTr, 1998.

Competition and Trade Policies: coherence or conflict? Edited by Einar Hope and Per Maeleng. Routledge Studies in the Modern World Economy, London and New York, 1998.

Articles

BARBOSA, Rubens Antonio. O Mercosul no Contexto Regional. Boletim de Integracao Latino-Americana, No 21, 1997.

CARNEIRO, Joao Geraldo Piquet. A Compatibilizacao Institucional e Juridica no Mercosul: A experiencia da CEE. Boletim de Integracao Latino-Americana, No 7, 1992.

PEREIRA. Jose Matias. Regimas de Concorrencia e Politicas de Concorrencia na America Latina: O caso do Mercosul. Boletim de Integracao Latino-Americana, No 16. 1996.