ASPECTS OF COMPETITION POLICY IN MERCOSUR [1]

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The signature of the Mercosur Competition Policy Protocol at the 11th Mercosur Committee Meeting in December of 1996 was a step forward in setting up the Customs Union. In fact, harmonization of competition rules has proven to be an important instrument of integration. The so-called Fortaleza Protocol was the result of a series of discussions, which started with the debate on the harmonization of the competition laws, provided for in Decision 21 of 1994.

The objective of this paper is to discuss its limitations as a useful instrument for the development of competition policy in the region. Section 1 describes a few relevant features of the document. Section 2 points out the major limitations. A final section contains suggestions for a possible revision of the Protocol.

1. Major Characteristics of the Fortaleza Protocol

The Protocol still requires ractification by Uruguay and Argentina and appropriate regulation, as provisioned in Article 9 of the document[3]. A few elements of the Fortaleza Protocol deserve to be mentioned:

- adoption of a rule-of-reason definition of anticompetitive practices (Chapter II);
- the creation of specific procedures to investigate, adjudicate and sanction anticompetitive practices (Chapters V, VI and VII);
- incorporation of a timetable the implementation of merger control (Chapter III);
- promotion of cooperation among national competition authorities (Chapter VIII).

Table 1 compares the Fortaleza Protocol with other arrangements. As in the great majority of the agreements, cooperation plays an important role. Different from a free trade area like Nafta, Mercosur has common rules in competition. But like Nafta, and in contrast with more integrated regions like the European Union, Mercosur does not have a

[1] This article has been funded by the Resarch Center of Getúlio Vargas Foundation (Núcleo de Pesquisas e Publicações-FGV)
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[3] A copy of the text of the Protocol has been published in CADE (1997) and is available at www.mj.gov\cade. General documentation about Mercosur can be found at www.mre.gov.br and Informemercosul.com.br. and Romano (1999).

supranational authority (see Table 1). Thus, having common rules implemented by inter-governmental bodies is one of the major characteristics of Mercosur and, as discudssed later, one of its major limitations.

Table 1
Selective List of Bilateral and Regional Agreements related to Competition Policy

Name of Agreement	Year (a)	Type	Cooperation	Common Rules (b)	Common Authority
MERCOSUR Protocol on Protection of Competition	1996	Regional	Yes	Yes	No
Agreement between the US and Canadian governments on the application of rules on Restrictive Business Practices	1995	Bilateral	Yes	No	No
Revised recommendations of the OECD´s Member Countries Cooperation Council on restrictive business practices affecting international trade	1995	Regional	Yes	No	No
Association Agreement between the European Union and other southern Mediterranean countries	1995 1996 (c)	Bilateral	No	Yes	No
Cooperation and Coordination Agreement signed by Australian Trade Practices Committee and the New Zealand Trade Committee	1994	Bilateral	Yes	No	No
European Agreement on Economic Policy	1994	Regional	Yes	Yes	No
Energy Distribution Treaty	1994	Regional	Yes	No	No
North American Free Trade Agreement	1992	Regional	Yes	No	No
Agreement signed by the United States and the European Community Committee on the enforcement of competition laws	1991	Bilateral	Yes	No	No
Cartagena Council Agreement, decision 285: Rules on how to prevent or correct Competition Distortions restricting competition in free market trading	1991	Regional	Yes	Yes	Yes
Memorandum of Understanding on the Harmonization of Trade Laws signed by Australia and New Zealand	1990	Bilateral	Yes	No	No
Agreements signed between the European Union and eastern and central European countries	1991 1996 (d)	Bilateral	Yes	Yes	No
Action to build structural impediments signed by the US and Japanese governments	1990	Bilateral	Yes	No	No
Agreement signed by the governments of the Republic of Germany and France for Cooperation concerning restrictive market practices	1984	Bilateral	Yes	No	No
Agreement signed by US and Australian governments on antitrust-related matters	1982	Bilateral	Yes	No	No
OECD guidelines for Multinational Enterprises	1976	Regional	Yes	No	No
Agreement between the Federal Republic of Germany and the US government for Mutual Cooperation concerning Restrictive Business Practices	1976	Bilateral	Yes	No	No
Treaty Establishing the European Community	1957	Regional	Yes	Yes	Yes

Source: UNCTAD, based on various sources.
(a) The year the agreement was signed.
(b) The number of the Common Rules differs considerably from agreement to agreement.
(c) Israel, Morocco, Palestinian Authority (1996) and Tunisia.
(d) Six agreements like the June 1996 agreement had been signed

2. Limitations of the Fortaleza Protocol

There is a long way before an efficient competition policy can be implemented in the Mercosur member countries. Like other countries in Latin America, the Mercosur member countries face a few challenges in this regard.

The first of these challenges is lack of a competition culture. Both the public and the private sector are not used to the inherently competitive market game. There are still traces of interventionism in government regulations, and corporate leaderships are still not sufficiently aware of competition policy.

The second problem stems partly from the first. Both the public and private sectors are not equipped to enforce legal decisions. Legal departments and executive officers of companies operating in the Mercosur area are not always familiar with basic aspects of competition laws either in developed or in their own countries. Public agencies have a chronic shortage of human and material resources.

One of the most serious problems is the sluggishness of the decision-making process. Relatively simple administrative cases may take years to be resolved. This overburdens companies, creates legal insecurity and leads to a lack of bureaucratic transparency. It is essential to adjust the pace of competition authority action to the speed of the market.

In fact, concern with the efficiency of market operation is heightened as small and medium-sized economies open up their markets and undergo in-depth production restructuring. An understanding of this phenomenon and greater flexibility in enforcing national laws are essential to enable competition authorities to speed up rather delay the wave economic reform that is spreading through the Mercosur member countries.

Unless due care is taken, the implementation of the Protocol could add to the already sluggish national authorities´ decision-making process. In fact, the steps of this decision-making process are numerous as shown in Table 2 and Table 3.

Table 2 has a description of the procedural flow established in the Protocol[4]. The flow of information and decisions is crucial in relationships involving:

- National agencies and the Intergovernmental Competition Policy Committee (CIDC);

- CIDC and the hierarchical framework of Mercosur, particularly of the Trade Committee (CCM).

[4] See Chapter V "Procedure for Enforcing " of Fortaleza Protocol". For a discussion of the risk of long time delays in the application of the Fortaleza Protocol, see Silva Pereira (1998).

There is no doubt that if CIDC fails to issue clear instructions, and these are not understood and assimilated by the national agencies, there will likely be a lack of uniformity and delay in determining violations. Equally worrysome is the length of time the Trade Commission may take to ractify decisions which are sent by CIDC.

Table 2

Procedure provided for in the Fortaleza Protocol

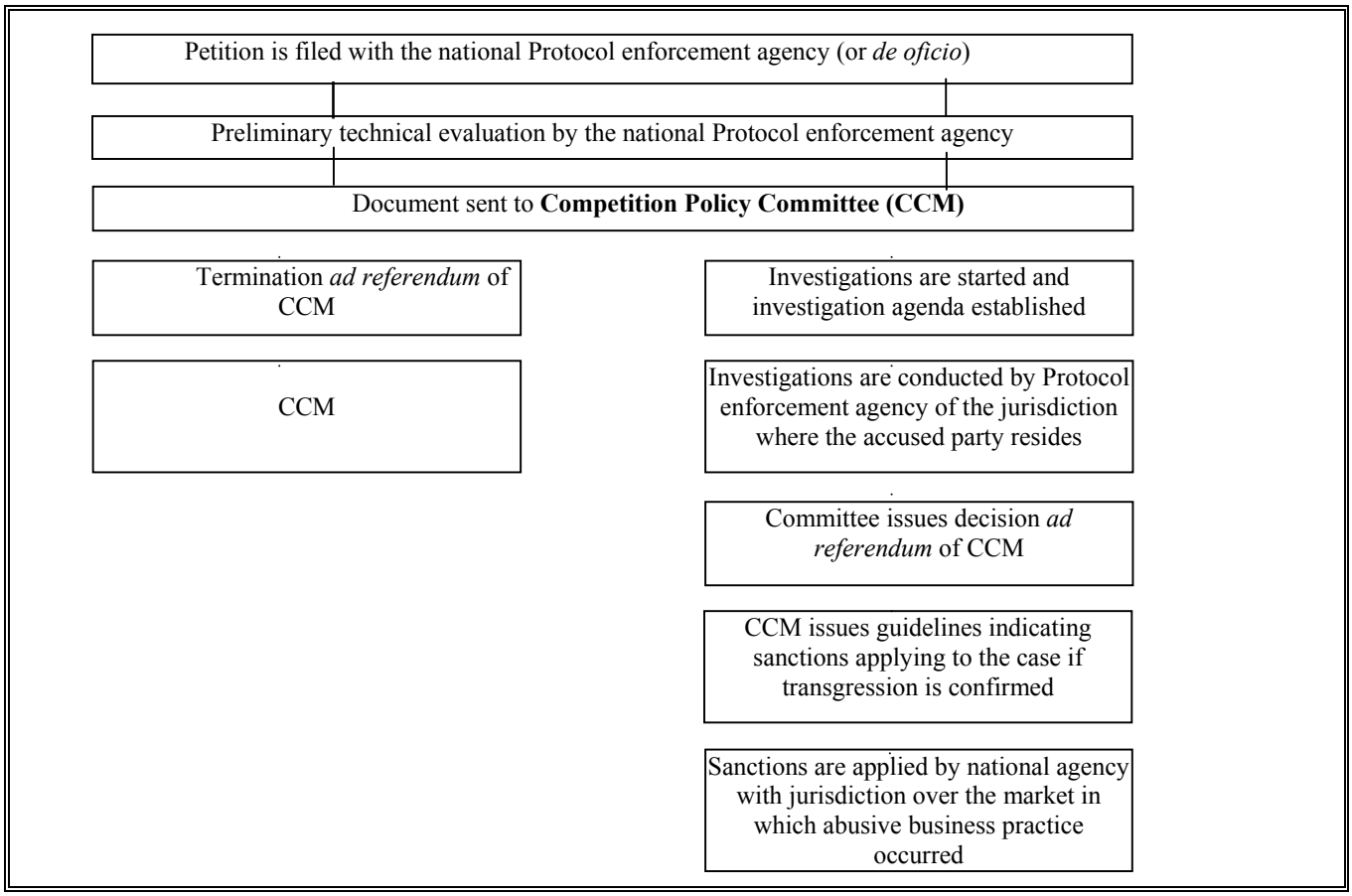
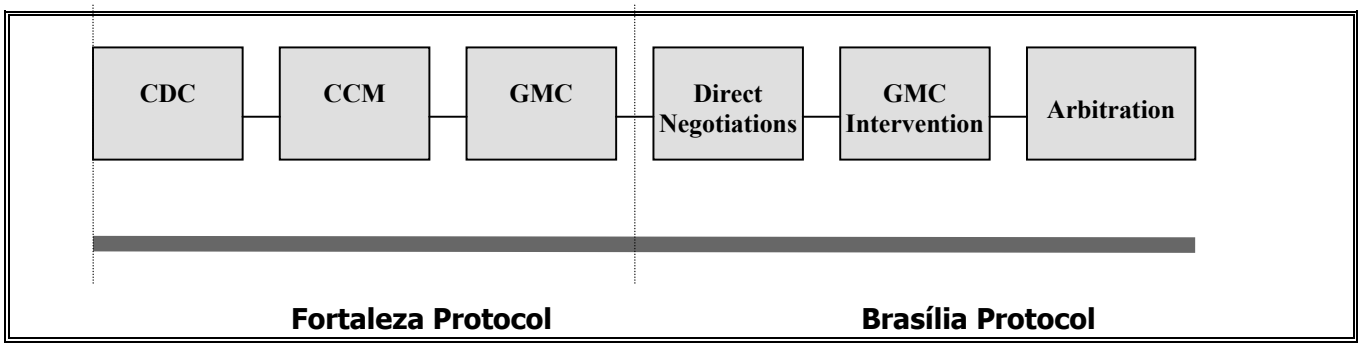


Table 3 indicates the different instances in which possible disputes can be resolved. If adequate routines are not created, resolutions on competition-related issues could be extremely lengthy. Chances of success depend greatly on the national agencies having the necessary resources to guarantee fast administrative decisions. It is worth noting that the arbitrage boards set forth in the Brasília Protocol could prove a helpful dispute-settlement tool.

Table 3

Procedural Stages for a Competition Case in Mercosur



Thirdly, there remain several assimetries in the legal framework for competition in the Mercosur countries. Indeed, Paraguay and Uruguay have not enacted competition laws yet. Both Brazil and Argentina are promoting important changes in their regulations. Brazil has created in 2000 a working group to propose a major chnge in Law 8884 of 1994. Argentina approved a new law in 1999 but has not created the new Competition Tribunal which is supposed to be the central body for the implementation of the legislation.

This is why cooperation and technical assistance play a particularly important role. It is not merely a question of setting down the rules on paper, but rather of implementing competition policy in practice, with the help of agencies that play their roles efficiently in the Customs Union.

This is a characteristic of competition policy that is unique in relation to most of the other topics featured in the sub-regional integration agenda. Unlike the negotiations involved in establishing the Common External Tariff (TEC), there is no need to define commitments with specific timetables of tariff reduction. Rather, the success of integration in the area of competition requires that the parties reach a common understanding about the major concepts and criteria which will determine the jurisprudence in the field. This goal can only

be achieved through enriched case law and continous interaction among Mercosur competition authorities.

Fourthly, there is a problem with the very nature of the decision mechanism. Given the fact that there is no supranational authority in the Customs Union, the competition bodies have an intergovernmental nature and decide on a consensus basis. This causes serious problems:

- competition matters which require technical criteria may be decided based on a political and diplomatic criteria.

- decisions taken by independent national authorities, like CADE in Brazil, may be changed by a political body of Mercosur.

Fifthly, the previous question makes all more important the clear delimitation of the national jurisdictions as oppposed to the Mercosur jurisdiction. The Protocol does not contain an objective definition for this issue which depends on na appropriate regulation still under discussion among the four countries.

The task of correctly defining criteria to delimit the scope of authority of the national authorities as opposed to that of CIDC is not na easy one. Any imprecision in this regard could generate uncertainty and conflicting views on whether a given case should be sent via a national agency or via the institutional channels established in the Fortaleza Protocol.

It goes without saying that in some litigation's one jurisdiction could be used against another as a means of appealing a presumably unfavorable judgment. Problems of this kind could naturally give rise to competence conflicts and generate legal uncertainty.

3. Points for a Revision of the Fortaleza Protocol

The limitations pointed out in the previous section call for a revision of the Fortaleza protocol. A more realistic approach would take into account the following points:

i) the gradual expansion of competition policy in the Mercosur member countries should begin with the strengthening of the national agencies in the cases of Argentina and Brazil and their very creation in the cases of Uruguay and Paraguay. The overlapping of their duties with those of CIDC should be

avoided. Thus, it is essential to establish clear criteria to define jurisdictions and avoid undesirable rivalry among the agencies at the Mercosur level[5].

ii) high priority should be given to the institutional development of national agencies, which means member countries should give them adequate resources and they should exchange technical cooperation experiences among themselves; emphasis should be given to the reduction of time delays which are particularly onerous to the private sector.

iii) During the initial stages one should not have common regional rules. The latter should only be in place after:

iiia) Mercosur becomes a common market with supranational authority;

iiib) the national competition policies and laws are enacted and harmonized;

iiic) the delimitation of the national jurisdictions with respect to the regional jurisdiction is clearly defined.

In practical terms, the above suggestions mean that until Mercosur becomes a common market, its competition agreement should look more like the competition chapter of Nafta and less like the European Union.

In the past, foreign investments were attracted to the area mainly due to domestic market advantages associated with protection. However, globalization changed this and all the Mercosur economies underwent a broad financial and trade liberalization process. Today, the strengthening of market competition, transparency and stable rules are particularly relevant in stimulating global investors. Efficient and independent competition authorities are crucial in this new context. The Fortaleza Protocol in its present form fails to achieve such institutional development.

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[5] Although neither of these problems was fully avoided, the experience of the European Union is useful in establishing similar mechanisms for the Mercosur member countries.

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