Brooklyn Journal of International Law

Volume 24 | Issue 2 Article 4

1-1-1998

Competition Policy in Brazil and MERCOSUR: Aspects of the Recent Experience

Gesner Oliveira

Follow this and additional works at: https://brooklynworks.brooklaw.edu/bjil

Recommended Citation

Gesner Oliveira, *Competition Policy in Brazil and MERCOSUR: Aspects of the Recent Experience*, 24 Brook. J. Int'l L. 465 (1998).
Available at: https://brooklynworks.brooklaw.edu/bjil/vol24/iss2/4

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

SYMPOSIUM COMMENTARY

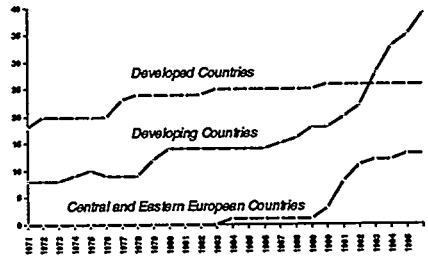
COMPETITION POLICY IN BRAZIL AND MERCOSUR: ASPECTS OF THE RECENT EXPERIENCE†

*Gesner Oliveira**

I. INTRODUCTION

The last decade has been characterized by the dissemination of competition laws throughout various jurisdictions, particularly in developing countries. According to the 1997 Unctad World Investment Report,[1] more than seventy nations now have competition laws, in contrast with less than forty in the 1980s.

TABLE 1 NUMBER OF COUNTRIES WITH COMPETITION LAWS



SOURCE: World Investment Report 1997, U.N. Conference on Trade and Development 189 (1997).

† This paper was distributed at the Brazilian Antitrust Roundtable Symposium held in Miami, U.S.A.

* Gesner Oliveira is President of CADE (Brazilian Competition Agency) and Professor of Economics at Getúlio Vargas Foundation. The author expresses his appreciation to Marcelo Nishimoto, Evelyn Celso, Cesar Mattos, Thomaz Jensen, and colleagues at CADE for comments and discussion. All the opinions expressed in this paper are the author's entire responsibility and do not reflect the official positions of CADE.

1. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1997: TRANSNATIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY 290, U.N. Sales No. E.97.11.D.10 (1997).

Table 1 shows that such development has been particularly intense in Eastern Europe. Table 2 illustrates that a new wave of competition laws is taking place in the 1990s, involving a larger number of countries than at the turn of the century and during the immediate postwar period.

TABLE 2 NATIONAL COMPETITION LAWS

PERIOD	COUNTRIES
1890-World War II	United States, Canada, and Australia.
After World War II	Germany, European Union, United Kingdom, Japan, Sweden, France, Brazil (1962), Argentina, Spain, Chile, Colombia, Thailand, India, South Africa, and Pakistan.
1980 - 1990	Kenya, Sri Lanka and Korea.
1990 - Present	Russian Federation, Peru, Venezuela, Mexico, Jamaica, Czech Republic, Slovak Republic, Ivory Coast, Bulgaria, Kazakstan, Poland, and initiatives in many other countries.

SOURCE: Roger Alan Boner & Reinald Krueger, *The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities*, 23 (World Bank Technical Paper No. 160, 1991).

Tables 1 and 2 show that competition policy becomes more important with globalization, and not the contrary, as is sometimes argued. Notwithstanding the radically different historical contexts, competition policy tends to gain increasing importance in developing countries.

The objective of this paper is to provide an overview of competition policy in Brazil and MERCOSUR. Section II proposes an ideal timetable for the implementation of competition policy in a developing country.

Section III puts more than three decades of the Brazilian experience in historical perspective, and discusses the present agenda. Section IV provides a brief description of the discussions about competition policy in MERCOSUR with emphasis on the Fortaleza Protocol. Section V points out the priorities for Brazil and MERCOSUR over the next few years.

II. A TIMETABLE FOR IMPLEMENTATION OF COMPETITION POLICY

The implementation of competition policy requires time, cultural change, and investment in adequate institutions. Therefore, it is not surprising that competition laws and enforcement vary widely across countries.

Despite the historical nature of competition policy, it is useful for analytical purposes to identify the sequence of evolutionary stages that could serve as a reference for comparisons among different countries.

There are two extreme positions to be avoided when implementing competition policy in emerging economies. The first position to avoid is to implement the policy so slowly that the necessary changes do not occur. Indeed, lack of competition can make other reforms such as privatization and deregulation less effective, aside from creating difficulties for subregional integration.

The second position to avoid is to try to implement the policy too quickly and without the necessary attention to the peculiarities of the country, and most importantly, to the limited budgetary resources. Overactive and underfunded competition agencies might end up creating additional transaction costs to the private sector, rather than helping the market.

The above considerations demonstrate the importance of defining priorities and setting a plan for institutional building. Table 3 contains a useful timetable to serve as a reference for governments.

TABLE 3 TIMETABLE FOR IMPLEMENTATION OF COMPETITION POLICY

STAGE / LEVEL	*I*	*II*	*III*	*Institutional Maturity*
NATIONAL	*1. Competition Advocacy* *2. Repression of Horizontal Agreements* *3. Technical Assistance*	*I* + *4. Merger Control* + *5. Vertical Agreements*	*II* + *6. Regulation* + *7. International Cooperation Agreements*	*III* + *8. Second-Generation International Agreements* + *9. Pro-Active Competition Advocacy*
REGIONAL	*Harmonization Agenda*	*Transformation of Antidumping into Competition Policy*		
MULTILATERAL	*Core Principles*			

The proposed sequencing is based on a simple idea inspired by Khemani and Dutz.[2] The agency should start with the actions that will most likely benefit the market and gradually introduce measures that require more a sophisticated cost/benefit analysis.

A. *The Four Stages of Institutional Development*

It is possible to identify nine lines of action distributed in four stages of implementation of competition policy.

Stage I:

At the beginning, the competition agency should focus on three lines of action:

i) competition advocacy;

ii) horizontal agreements with emphasis on price cartels; and

iii) technical assistance from other agencies and multilateral organizations.

Stage II:

In addition to the lines of action in Stage I, the following points should be introduced:

iv) merger review system; and

v) control over vertical arrangements.

Both require careful examination, because they usually involve costs and benefits. The impact upon social welfare is not easily calculated.

---

2. R. Shyman Khemani & Mark Dutz, *The Instruments of Competition Policy and Their Relevance for Economic Development, in* REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 16, 31 (Claudio Frishtak ed., 1995); R. Shyman Khemani, *Competition Policy and Economic Development, in* POLICY OPTIONS 23, 26-27 (1997).

Stage III

In addition to the previous points, two lines of action should be introduced, both requiring a great effort in terms of inter-institutional coordination.

vi) cooperation with the regulatory agencies; and

vii) cooperation with competition agencies of other countries.

The difference between points vii) and iii) is that at later stages of institutional development, there should be a greater concern with the harmonization of practices and the conceptual framework on a more bilateral basis, as opposed to the mere technical assistance of Stage I.

Stage IV

Institutional maturity is achieved when, in addition to the previous lines of action:

viii) the agency is able to coordinate with agencies of other national jurisdictions in order to enforce the extraterritoriality clause; and

ix) the culture of competition is sufficiently disseminated so that it is possible to implement a pro-active competition advocacy.

The difference between i) and ix) is that, at the earlier stages, competition advocacy should focus on less ambitious tasks, such as the mere explanation to the private community of the elementary characteristics of competition law and the need to change its attitudes toward antitrust matters. This is particularly important for regions which have had a long history of state intervention such as Eastern Europe and Latin America.

In contrast, pro-active competition advocacy means a more pervasive role of the competition agency in giving opinions about competitive impacts of various types of legislation. Analogously, with the environmental issues in more mature jurisdictions, one would expect competition matters to be taken into consideration in an increasing number of areas.

The stages suggested in Table 3 are organized according to the degree of difficulty that authorities face in undertaking cost/benefit analysis of the impact of competition measures. Merger review comes after conduct control because the welfare effect of a merger might be less clear than that of a price cartel, the latter being unequivocally welfare reducing.

However, it might well be the case that legally sound repression of price cartels may be more difficult than the implementation of a merger review system. In fact, it is generally easy to assess the microeconomic impact of a cartel, but it is hard to fulfill the requirements for an acceptable standard of proof for the courts.

B. The Regional and Multilateral Levels

1. Competition Policy and the Regional Blocks

The agenda of the regional blocks has usually dealt with two issues. First, the harmonization of the national competition laws, which includes the creation of a new legal framework in certain countries. Such is the case of some of the Eastern European nations.

Second, the member states have to negotiate the transformation of the anti-dumping rules into competition ones. This is not a trivial question, either theoretically or politically, but it is one that has to be addressed in order to stimulate trade within the bloc.

2. Competition Policy and the WTO

Such transformation does not seem to be realistic at the present world level. Any kind of international code or legislation in competition seems to be premature, given the wide diversity of experiences and stages of development of the members of the WTO.

The definition of general guidelines with regard to the prerequisites that a national law has to provide legal certainty to private agents seems to be the relevant agenda at the multilateral level. It would be useful to establish what the WTO considers to be the core principles of competition policy.

C. *Globalization and Competition Sequencing*

Note that countries do not necessarily follow the sequence suggested in Section II.A. Indeed, due to the many different historical circumstances it would be difficult, if not impossible, to find a single country that applied Table 3. And yet, the latter continues to serve as a useful reference for competition authorities.

Analogous to the industrialization process, the more recent the national experience with competition policy, the faster the pace of implementation of the sequence of stages indicated in Table 3 and/or the more frequent the overlapping among those phases, making the sequence converge towards a simultaneous implementation.

III. ASPECTS OF THE BRAZILIAN EXPERIENCE

The discussion of Section II is useful to examine the Brazilian experience. Despite some difficulties, Brazil has had an impressive development in competition policy in comparison with other emerging economies.

In terms of the sequence proposed in Table 3, Brazil has completed most of the lines of action of Stages I and II and is now entering Stage III. However, Section 3B reveals the need to consolidate some relevant points of the earlier stages. Given the rapid integration with the global economy, as pointed out in Section 2C, the acceleration will coincide with the undertaking of the new agenda of Stage III, as discussed in Section 3C. Before turning to those discussions, it is useful to provide an overview of the Brazilian legislation in competition policy.

A. *An Overview of the Brazilian System*

Considering the high degree of state intervention during the greater part of the import-substitution industrialization of the twentieth century, the Brazilian legislation in competition is precocious. CADE was created back in 1962 and has already acquired some tradition.

Tables 4, 5 and 6 contain the relevant information. Table 4 shows the two distinct trends in the legislation dealing with market regulation in Brazil, as well as in many other developing countries.

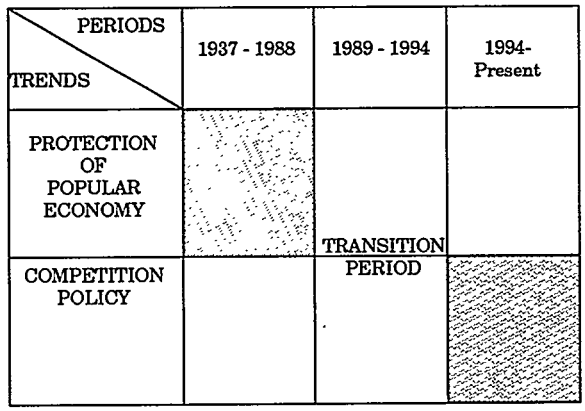
TABLE 4 RULING THE MARKET IN BRAZIL: TWO MAJOR TRENDS

LEGISLATION & DATE	REFERENCE	AGENCY	TRENDS		
			PROTECTION OF POPULAR ECONOMY	TRANSITION	COMPETITION POLICY
DL No. 869 Nov. 18, 1938	C.F. 1937, art. 141		■		
DL No. 7666 "Law Malaia" June 22, 1945		Administrative Council for Economic Defense (CADE)			■
Lex No. 1521 Dec. 26, 1951			■		
Lex No. 1522 Dec. 26, 1951		Federal Commission of Supply and Prices (COFAP)	■		
Lex No. 4137 Sept. 10, 1962	C.F. 1946, art. 148	Administrative Council for Economic Defense (CADE)			■
Lex No. 4 Sept. 26, 1962	C.F. 1946, art. 146	National Superintendency of Supply (SUNAB)	■		
DL No. 52025 May 20, 1963	Regulates Law No. 4137				■
Decreto No. 63196 Aug. 20, 1968	C.F. 1967, art. 83, II Revoked on Apr. 25, 1991	Interministerial Council of Prices (CIP)	■		
DL No. 92323 Jan. 20, 1968	Revokes DL No. 52025 Regulates Law No. 4137				■
DL No. 99244 May 10, 1990		National Secretariat of Economic Law (SNDE)		■	
Lex No. 8137 Dec. 27, 1990	Return to the configuration of acts against economic order as crimes		■		
Lex No. 8158 (MP No. 204/90) Jan. 9, 1991		Secretariat of Economic Law (SDE)		■	
Lex No. 8884 Jun.11, 1994	C.F. 1988, art. 170 and 173	Transforms CADE in autarchy			■
Lex No. 9021 Mar. 30, 1995	Implementation of the autarchy created by Law No. 8884/94				■
Lex No. 9069 Jun. 29, 1995	Alters Law No. 8884/94				■
Lex No. 9470 Jul. 10, 1997	Increases paragraph to the art. 4th. of Law No. 8884/94				■

The first is characterized by significant direct intervention in the market for the purpose of protecting the so-called "popular economy." As shown in Table 4, this type of legislation dates back to the 1930s. It is a corollary of the state intervention in other areas of the economy.

Indeed, when import tariffs were high, subsidies prevailed in many sectors, and government regulated the most important macro prices, it was natural that prices had to be controlled. This trend was predominant until the late 1980s, as indicated in Table 5.

TABLE 5 MAIN PERIODS OF MARKET REGULATION IN BRAZIL



Three important changes occurred thereafter:

i) a significant trade liberalization program bringing import tariffs down from an average of more than 50% to approximately 13% and eliminating several non-tariff barriers;

ii) privatization and deregulation of a number of important sectors of the economy; and

iii) lastly, a stabilization plan in the period 1993-94 that succeeded in coping with the four-digit inflation process which had undermined the macro performance of the country since the late 1970s.

After the transitional period indicated in Table 5, those changes made the "protection of the popular economy" anachronistic and the second trend of legislation became predominant (see Table 5).

Table 6 compares the three most important pieces of legislation in competition policy since 1962. In June of 1994 the Law 8884 was passed, introducing a few changes more in line with the international trends in antitrust regulation:

i) CADE was given more autonomy from the central administration, and its members gained a fixed two-year term renewable once; and

ii) the merger review system was perfected in a number of ways and was put in practice for the first time.

TABLE 6 BRAZILIAN COMPETITION LAWS SINCE 1962

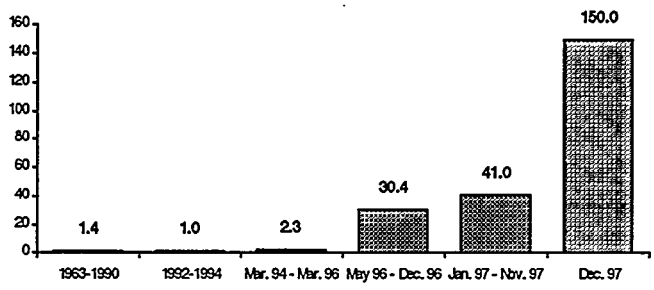
LAW / Characteristics	No. 4137 (1962)	No. 8158 (1991)	No. 8884 (1994)
Competition Bodies	CADE	SNDE CADE	CADE SDE SEAE
Scope	Conduct	Conduct	Conduct Structure
Degree of Autonomy	–	–	CADE becomes an independent agency; CADE members have a two-year mandate

B. The Need to Consolidate Stages I and II

In contrast to the majority of the emerging economies, Brazil already has a reasonable number of administrative decisions, especially in the recent period.

Table 7 shows the evolution of the number of decisions per month. In 1997 the average number of decisions per month was roughly seventeen times that of the previous commission in 1994-96. More than half of all CADE decisions were taken in the last twenty months.

TABLE 7 NUMBER OF CADE DECISIONS PER MONTH

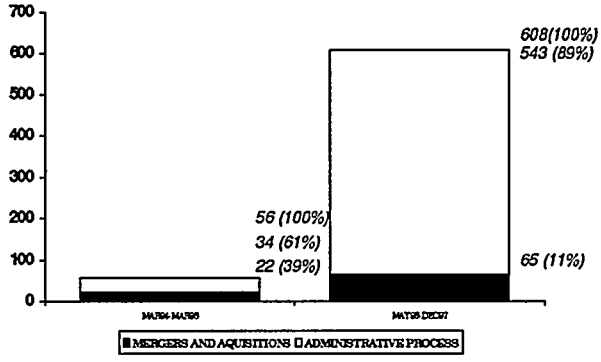


SOURCE: CADE

However, those statistics should not lead to an underestimation of the importance of the early experience of CADE. Indeed, one can find a rich doctrinal debate, as well as a few useful precedents for most classic types of horizontal and vertical agreements. It is also noteworthy that a professional community dedicated to antitrust developed in a few cities of the country.

Table 8 provides information about the composition of the decisions breaking it down to conduct and merger cases. Numerically, there is now a predominance of conduct cases vis-à-vis merger review cases; the latter represented 39% of the total in the first two years of implementation under the new law, as opposed to 11% in the last twenty months. This excessive emphasis on merger cases involving detriment of conduct seems to have occurred in other jurisdictions and may be attributed to various factors discussed elsewhere.

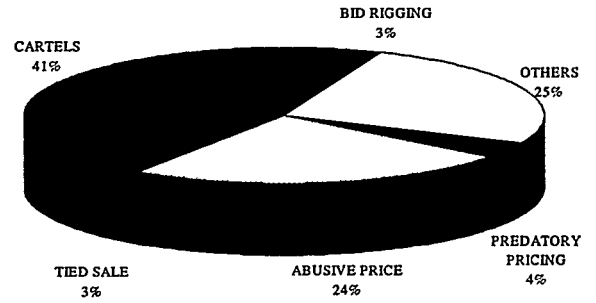
TABLE 8 COMPOSITION OF CADE DECISIONS: CONDUCT VERSUS STRUCTURE DURING 1994-1997



SOURCE: CADE

Table 9 shows that the composition of the conduct cases reveals what could be considered an old-fashioned feature of the Brazilian system. The high percentage of "abusive price" cases suggests the frequency with which authorities in the past tried to use the competition law to repress what was perceived as an abuse, but very often was a macro result of the inflationary process.

TABLE 9 TYPES OF CONDUCT CASES



SOURCE: CADE

The vast majority of the conduct cases in the recent period have been terminated without the imposition of any penalties. In most cases the evidence was not sufficient to continue the prosecution, and elementary aspects of the due process of law were not respected. Two points derive from this:

i) in countries with a history of strong state intervention this may be frequent, as well as desirable. In fact, the termination of a number of old cases is positive to the extent that previous arbitrary state actions are no longer causing uncertainty. This is particularly true in regard to numerous cases involving privatized companies which were continuously under investigation until last December;[3] and

ii) it is urgent to build an investigative capacity for which material, and especially human resources are badly needed.

With regard to mergers some results are noteworthy:

- compared to other developing countries, the number of decisions (87) as well as the content of the rulings already reveal some accumulated experience;

- as Table 10 shows, the rate of disapproval in 1994-97 is relatively low and not much different from more mature jurisdictions (6%);

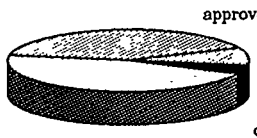
- as Table 11 shows, most of the transactions are undertaken by foreign companies; and

- most of the acquisitions involve Brazilian companies, as illustrated by Table 12.

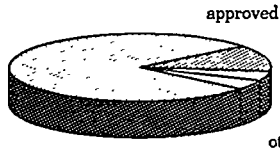
3. Table 19, *infra* contains a list of the relevant cases.

TABLE 10 MERGERS AND ACQUISITIONS BY TYPE OF DECISION

June 1994 - March 1996



May 1996 - December 1997



SOURCE: CADE

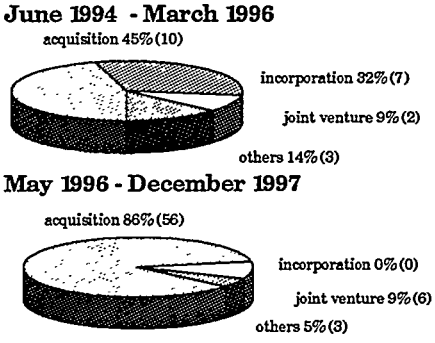
TABLE 11 MERGERS AND ACQUISITIONS BY ORIGIN OF CAPITAL

June 1994 - March 1996

May 1996 - December 1997

SOURCE: CADE

TABLE 12 MERGERS AND ACQUISITIONS BY TYPE OF OPERATION



SOURCE: CADE

One of the major difficulties with merger control in Brazil is the fact that most of the operations are notified *a posteriori*, a possibility permitted by the Brazilian law. In more than 95% of the cases, CADE examines the merger only after the fact, which makes it much more costly for the authority to challenge the transaction. Although a change in the law on this particular point will be necessary in the future, a more serious problem is the relatively long period of time that has been required on average to analyze a merger.

In order to speed up the decision process, a change in regulation was introduced in 1996 through Resolution 5. Tables 13, 14 and 16 compare the systems before and after Resolution 5. The basic idea was to create a fast-track procedure for cases, which can be considered simple and are most likely to be approved.

One of the peculiarities of the Brazilian system as shown in Table 6 is that two different secretariats—SDE (Secretary for Economic Regulation) and SEAE (Secretaria de Accompanhamento Economico [Economic Monitoring Office]—give opinions before the CADE decision is taken. Thus, increasing efficiency requires better coordination among CADE and the two other institutions.

TABLE 13 MERGER REVIEW BEFORE RESOLUTION NO. 5

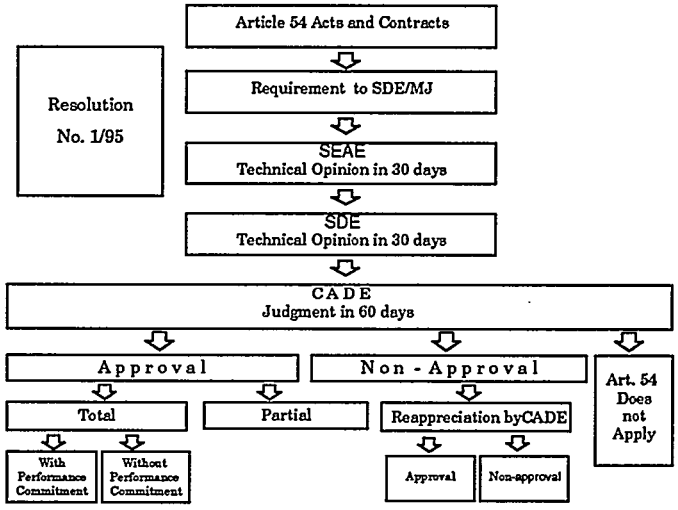


TABLE 14 MERGER REVIEW AFTER RESOLUTION NO. 5

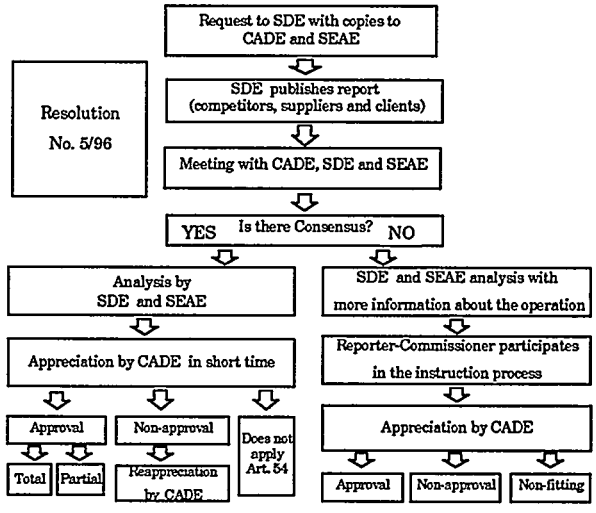
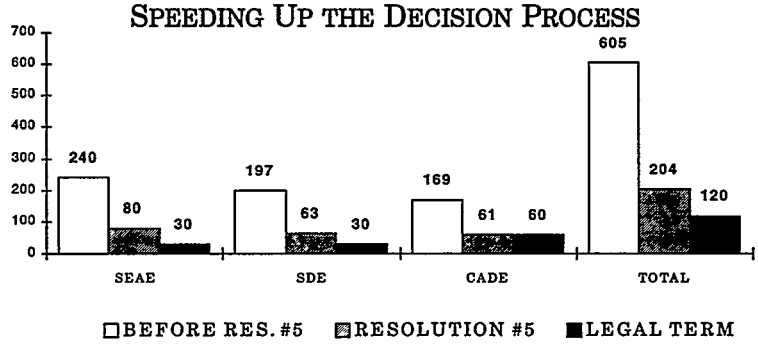


TABLE 15 RESOLUTION NO. 1 VERSUS RESOLUTION NO. 5: SPEEDING UP THE DECISION PROCESS



SOURCE: CADE

TABLE 16 BASIC DIFFERENCE BETWEEN RESOLUTION NOS. 1 AND 5

Resolution No. 1
Isolated Sequential Analysis

Resolution No. 5
Integrated Rapid Analysis

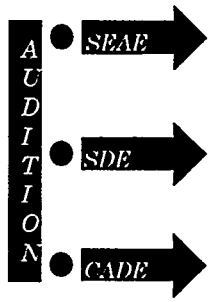


Table 15 presents the results obtained. The average time required to examine operation declined from 605 days to 204 days. Despite the significant improvement, a seven-month period is definitely unsatisfactory given the pace of the economic decision process. Measures to cope with this problem are discussed in the final section.

C. *Entering Stage III*

In addition to consolidating the lines of action of Stages I and II, Brazilian authorities have to prepare for the new challenges of a new model of development different from the old import substitution model and integrated in a global economy.

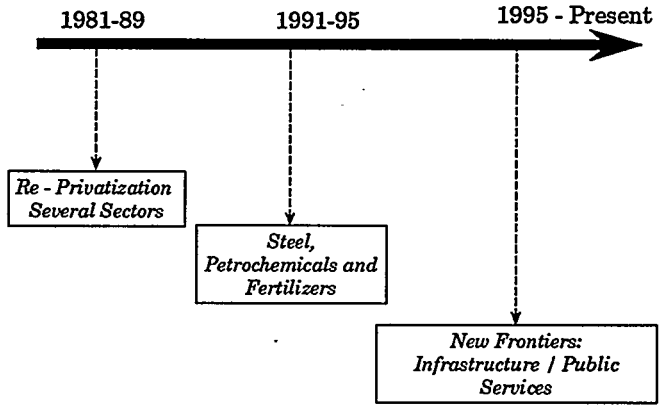
Two lines of action are particularly important in this new context, as pointed out in Table 3:

- privatization and the coordination between competition and regulatory authorities; and
- cooperation with the other national jurisdictions.

1. Competition Policy, Privatization and Re-Regulation

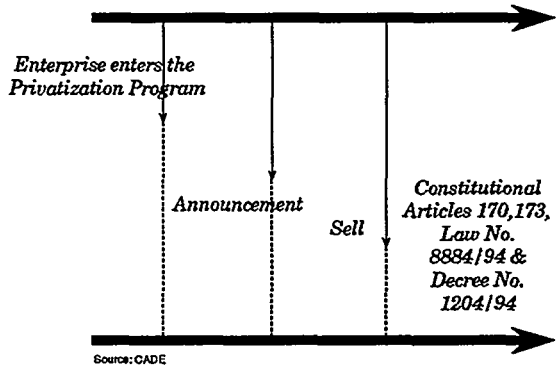
Table 17 illustrates the major phases of the Brazilian privatization program. Although it began in the 1980s, the program only became important after 1991, when major state companies were transferred to the private sector.

TABLE 17 STAGES OF THE BRAZILIAN PRIVATIZATION PROGRAM



CADE analyzed some of these operations in light of Law 8884. Table 18 describes the major steps of the privatization of a firm. As with the private sector operations, the exam is typically made *a posteriori*. It is only after the firm is already privatized that the competition aspects of the transaction are scrutinized.

TABLE 18 COMPETITION ANALYSIS OF PRIVATIZATION OPERATIONS



Such a system could be improved with greater cooperation between competition and privatization authorities in the design of the steps previous to the final sale to the private sector. This has been achieved in the recent period through an operational agreement between BNDES and CADE.

Table 19 illustrates the list of privatization operations examined by CADE. As mentioned before, a number of cases have been terminated in the recent period diminishing uncertainty of private investors.

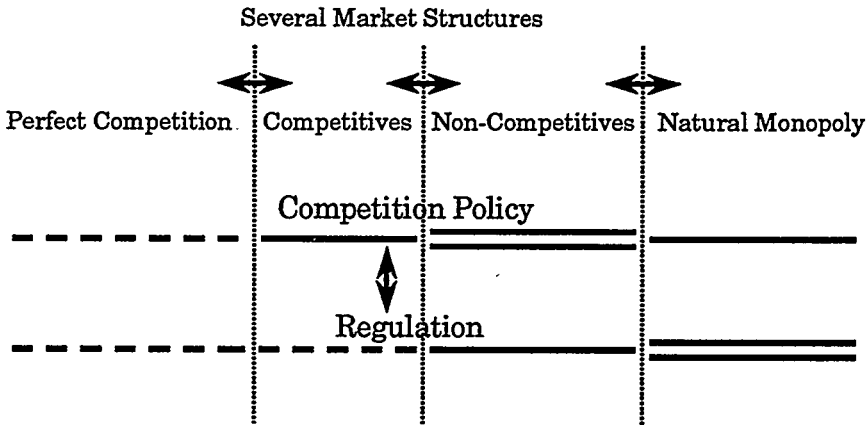
TABLE 19 PRIVATIZATION OPERATIONS SUBMITTED TO CADE

COMPANY	NUMBER	STAGE
Caraíba Metais Caraíba	AC 29/95	returned to SDE
Fosfértil e Ultrafértil	AC 02/94	approved under conditions
Petroflex	020260/94-11	terminated
Cia. Nacional de Álcalis	020256/94-44	terminated
Usiminas	015932/94-59	returned to SDE
Copesul	020252/94-93	under analysis
Poliolefinas	020253/94-56	terminated
CBE	020254/94-19	terminated
CSN	020255/94-81	terminated
Polisul	020259/94-32	terminated
Nitriflex	020257/94-15	terminated
Acesita	020258/94-84	terminated
PPH	020261/94-84	terminated
Ferrovia Centro-Atlântica	AC 95/96	under analysis
Malha Sudeste	AC 108/96	under analysis
Ferrovia Sul-Atlântica	AC 115/97	under analysis
Companhia Vale do Rio Doce	AC 155/97	under analysis

Since 1995, the privatization program has included sectors that have been heavily regulated in the past under the assumption that they were natural monopolies. With a new law for public concessions since 1995 and the amendments to the Constitution, it has been possible to create a new regulatory framework for these sectors.

The challenge for the near future is to facilitate cooperation between CADE and the newly-formed regulatory agencies. A harmonious interaction will be crucial to avoid uncertainty for the private investors and assure pro-competitive regulation. Table 20 suggests the ideal division of labor between regulatory and competition authorities. Some of the specific legislation has incorporated this complementary role between the agencies, such as in telecommunications.

TABLE 20 FRONTIERS BETWEEN COMPETITION AND REGULATION



2. International Cooperation

There are obvious advantages to cooperating with other national agencies. Gains in terms of knowledge and experience can be enormous.

However, there are two additional factors to consider in order to understand why international cooperation must be-

come a priority at this point in time:

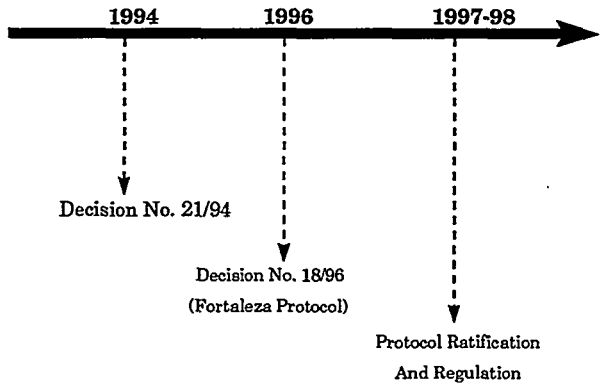
> i) In contrast to the jurisprudence of the 1960s and 1970s, there are more and more cases that not only present the same characteristics in the Brazilian market, but in other markets as well; they constitute in reality a cross-border merger or a generalized conduct. Therefore, the potential for inconsistent decisions among different national agencies is high, requiring an increasing degree of coordination. The search for consistency among various national jurisdictions is even more important due to the lack of an international code as discussed before; and
>
> ii) the frequency of cross-border transactions poses the problem of transaction costs that firms incur when they have to comply with so many applications and bureaucratic timetables. Efforts to harmonize particular requirements (e.g., for merger review) could be useful even without a more profound convergence in the legislation.

IV. ASPECTS OF THE MERCOSUR EXPERIENCE

The Fortaleza Protocol signed in December of 1996 bears great similarity with the Brazilian law and represented an important step in the formation of the Customs Union.

The Fortaleza Protocol resulted from a discussion process started with the harmonization agenda comprised in Decision 21/94, as indicated in Table 21.

TABLE 21 COMPETITION POLICY IN MERCOSUR



As usually happens in documents of such nature, the Protocol may be improved in the future, mainly from its application and, in some cases, upon the proper regulation provided for in article 9. Enforcement will commence when it is regulated and ratified by the national legislatures.

The document seems adequate in three areas:

- adoption of the rule of reason avoiding the rigid criteria of *per se* illicit;

- incorporation, in article 7, of a timetable for the implementation of a merger review system within the regional bloc; and

- cooperation mechanisms among the national competition agencies.

A. Challenges Ahead

However, there is still a long way to go in order to achieve an effective competition policy in MERCOSUR. As in other Latin American countries, the MERCOSUR members face two main challenges that transcend the mere harmonization of the legal texts.

First, as in the case of Brazil, there is not a widespread culture of competition in the other MERCOSUR members. There is in fact less tradition in terms of antitrust legislation and jurisprudence.

The second challenge partially arises from the first. The public and private sectors are not equipped to assure compliance with the legal determinations. The legal and executive departments of the MERCOSUR companies do not know basic aspects of the competition legislation of the mature countries and of their own domestic markets. The public agencies lack sufficient human and material resources.

Such obstacles pose difficulties for the Protocol implementation. One of the most severe problems is the slow pace of the decision-making process. Relatively simple administrative claims take years to be settled, encumbering the companies and generating legal insecurity and bureaucratic opacity. It is urgent to incorporate the rhythm of the competition agencies to

the dynamism of the economic life; it is urgent to substitute the *economic time* for the "bureaucratic time."

In addition to such challenges it is necessary to implement the competition legislation in a very different historical context from that which inspired the first legal texts of the United States and Canada and, after the Second World War, of the European countries. Indeed, the concern with the functioning of the markets occurs during a time of deep productive restructuring of small and medium-sized economies in a process of trade liberalization. The understanding of such phenomena, as well as the flexible application of the national legislation are essential in order to make competition authorities accelerate, and not delay, the economic changes MERCOSUR economies are undergoing.

If the above description seems close to the realities of Brazil and Argentina, which already have applying legislation and national agencies, the challenges are even bigger in Uruguay and Paraguay, which do not have competition laws.

B. The Importance of Technical Cooperation

The importance of technical cooperation has already been emphasized. It deals not only with the establishment of written rules, but also with the feasibility of its practical implementation.

This point constitutes one of the peculiarities of competition policy in comparison with the great majority of issues that form the sub-regional agenda. In contrast with the arrangement that led to the Common Foreign Tariff, the case is not to define commitment intervals from objective parameters, or to establish standardization of procedures or measures, as could be the case in several other MERCOSUR Technical Groups.

The integration success in the area of competition requires not only similar rules, but convergence in its understanding. Such goals may only be achieved with the development of the jurisprudence and the permanent interaction among the competition agencies of the region.

In that sense, the cooperation that is being developed between CADE and the National Commission of Competition Protection of Argentina is crucial. Those two agencies agreed on a common work plan, involving the exchange of staff, organization of seminars and workshops and, most important, the

discussion of common cases and the participation of observers in the sessions of both institutions.

Equally important are the initiatives, in the scope of the private sector, of approximation among antitrust professionals of Brazil and Argentina and other countries, which could result in the formation of a supra-natural association similar to the Brazilian Institute of the Competition and Consumption Relations (IBRAC) of Brazil.

C. *A Few Guidelines for the Protocol Regulation*

Several questions will have to be settled in order to consolidate competition policy in MERCOSUR, many of which shall be approached in the context of regulation of the Fortaleza Protocol. The following points are worth mentioning:

D. *Jurisdiction Delimitation*

The task to unequivocally establish jurisdictional definition criteria to the national organisms, vis-à-vis the Intergovernmental Commission of Competition Policy (CIDC) is not trivial. It is noted that any uncertainty in this area may generate uncertainty with dissenting views on whether a process should be forwarded by means of the national agency, or by the institutional channels provided for in the Fortaleza Protocol.

In certain litigations, a jurisdiction could be used in opposition to another, as a way to appeal a decision presumably unfavorable. Problems of such nature could naturally result in conflicts between MERCOSUR and national agencies generating legal uncertainty.

In order to avoid them, it is required:

- to establish clear methodological criteria for jurisdictional definition; and

- to build competition policy upon the cooperation among national agencies, thereby avoiding undesirable rivalry among the latter and the MERCOSUR decision bodies.

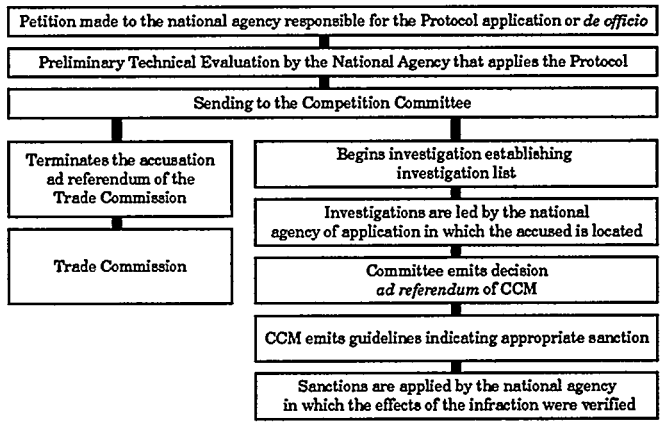
E. "Economic Time" Versus "Bureaucratic Time"

The protocol implementation could aggravate the problems already existing in the national agencies, should due care not be taken.

Table 22 contains a description of the procedures of the Protocol. The information and decisions flow seem to be essential in the relations among:

- the national agencies and CIDC; and
- CIDC and the hierarchical structure of MERCOSUR, particularly the Trade Commission.

TABLE 22 THE FORTALEZA PROTOCOL



Indeed, if the CIDC instructions are not issued with clarity and understood and assimilated in the national jurisdictions, there is a high risk of lack of uniformity and delay. An excessive delay in the ratification of decisions *ad referendum* of CIDC by the Trade Commission would be equally worrisome.

TABLE 23 POSSIBLE DECISION INSTANCES OF THE FORALEZA PROTOCOL

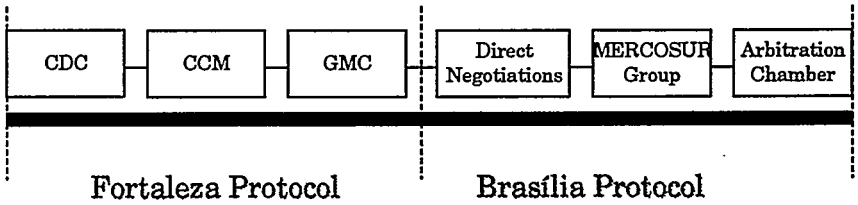


Table 23 shows the successive stages for dispute resolution. If proper routines are not created, it is reasonable to suppose that the resolution of competition questions may become slow.

The efficiency of the system will depend crucially on the capacity of the national bodies to be provided with the resources required to accelerate the administrative proceedings. Note that the arbitration chambers mechanism anticipated in the Brasília Protocol may constitute a useful mechanism for conflict solution.

F. Consensus Criterion Versus Judging Nature

There is a natural tension between the judging nature of CIDC and the adoption of the consensus criterion. The latter, however, constitutes the basic decision mechanism in the scope of the Customs Union.

G. Limit to the Degree of Autonomy

The inter-governmental nature of CDIC and its subordinated position in the MERCOSUR power structure prevents higher autonomy in the decision stage.

V. PERSPECTIVES OF COMPETITION POLICY IN BRAZIL: TOWARDS INSTITUTIONAL MATURITY

The previous sections suggest a few priorities for the competition authorities of Brazil and MERCOSUR.

With regard to Brazil, the agenda should include three major points:

1. Consolidation of Stages I and II:

- improvement of the investigative capacity in conduct;
- improvement of merger control; and
- continuation of the work of competition advocacy with emphasis on the Judiciary.

2. Entering Stage III

- operational agreements with the regulatory agencies; and
- systematic cooperation with other national jurisdictions.

3. Institutional Building of CADE

- modernization of the internal rules; and
- staff training.

With regard to MERCOSUR, in the past, the attraction of foreign investments derived mainly from the possibility of advantages in the domestic market associated with protection. However, the process of globalization changed this picture and all MERCOSUR economies were subject to comprehensive processes of financial and trade liberalization.

The difficulties pointed out in Section IV are natural in the consolidation process of a Customs Union, and do not justify skepticism about the Fortaleza Protocol. Four guidelines seem to be required to face them:

- the gradual construction of the competition policy in MERCOSUR must occur from the strengthening of the national agencies. Any parallelism between the CIDC activities and those of the national agencies must be avoided;
- maximum priority must be attributed to the institutional building of the latter ones upon proper provision of resources by the member States and exchange of experiences through technical cooperation;
- it is important to accelerate the decision process through non-bureaucratic procedures; and
- it is crucial to create a tradition of technical excellence of CIDC, attributing to it, in practice, a higher degree of relative autonomy. The latter is not necessarily conquered by law. It requires the building up of a reputation of technical

excellence.

In the global economy, regions attract foreign investment through legal certainty. Special privileges are less important than a stable environment and respect for the due process of law.

Brazil and MERCOSUR have taken important steps in that direction. Their success continues to depend on a complex historical process, in which technical cooperation and jurisprudence formation constitute essential ingredients.