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The Cooperation between the Competition Authorities of the Developing Countries: Why does it not Work? Case Study on Argentina and Brazil*Marco Botta**

The last fifteen years have recorded a proliferation of multi-jurisdictional competition law cases. Moreover, a number of bilateral agreements have been concluded between different National Competition Authorities (NCAs). However, the degree of bilateral cooperation between the NCAs of different developing countries is still quite limited. The article analyzes these issues taking Brazil and Argentina as case study. These countries have enforced a competition law since 1994 and 1999 respectively. However, while Brazil has improved the quality of its enforcement action during the last years, in Argentina little progress has been recorded. The NCAs of the two countries have adopted a number of initiatives at the Mercosur and bilateral level in order to increase the degree of coordination. Nevertheless, to date these initiatives have not been successful. This article argues that the lack of cooperation has been caused by the different stages of development of the competition law in the two countries, and due to the lack of personal contacts between the officers of the NCAs. In its conclusions the article identifies a number of lessons applicable to the NCAs of other developing countries which aim at strengthening their bilateral cooperation.

1. INTRODUCTION

During the last fifteen years, new competition law regimes have ‘bloomed’ around the world.¹ In particular, several emerging economies in Latin and Central America, Eastern Europe, South East Asia and in a number of African States have recently adopted a competition law. The latter was perceived as one of those policies necessary to establish a market oriented economy.² Moreover, a number of countries in different areas of the world are currently in the process of introducing competition legislation. The well known example is the Republic of China, which has adopted its first Anti-Monopoly Law last year, which entered into force on 1st August 2008.³ However,

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¹ Lipsky, ‘The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?’ (2002) 26, Summer-Fall, Fletcher Forum of World Affairs 59-68. Which confirms that ‘more than 100 countries now have competition law’, Whish, *Competition Law*, 5th edition, London, Oxford University Press (2003), p 782.

² Lande, ‘Creating Competition Policy for Transition Economies’ (1997-1998) 23 Brooklyn Journal of International Law 341.

³ Anti-monopoly Law of the People’s Republic of China. Adopted at the 29th meeting of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China on 30th August 2007.

during the last year there have been other cases of introduction or reform of national competition law in smaller developing countries. For instance, in Latin America, Uruguay adopted its first competition law in July 2007.⁴ Likewise, following the example of its neighbour, the Paraguayan Chamber of Representatives passed the text of a competition law in June 2008, which is now pending before the Senate.⁵

Another well known phenomenon is the proliferation of the multi-jurisdictional cases in the area of competition law. The expression multi-jurisdictional cases refers to the competition law cases which have to be dealt at the same time by a number of competition authorities of different countries. For instance, in the area of merger control, multi-jurisdictional mergers are the concentrations which have to be notified to a number of different competition authorities due to the fact that the merging parties own subsidiary in a number of different countries, and thus one concentration has an impact on a number of different geographic markets placed under the jurisdiction of different competition authorities. As a consequence of the globalization of the economy, a growing number of mergers & acquisitions (M&As) needs to be reviewed by a number of different competition authorities, where the concentration satisfies the local threshold of notifications.⁶ Moreover, some studies have shown that as a consequence of the trade liberalization the number of international cartels has increased during the last twenty years. In particular, developing countries are usually more likely to suffer harm from international cartels, due to the weakness of their internal system of protection of competition.⁷ Finally, a number of corporations, which have become dominant in the same product segment in different geographical markets, have committed abuses of dominance on a global level. However, these forms of abuses of dominance are still investigated at a national level.⁸

An English translation of the legislation is available at <www.leggicinesi.it/view_doc.asp?docID=344> (09.08.2008).

⁴ Hargain, 'Nueva Ley de la Competencia en Uruguay', (2007) 23, *Boletín Latinoamericano de Competencia*, 100-109. The *Boletín Latinoamericano de Competencia* is an online publication sponsored by the European Commission about the development of competition law in Latin American countries. It is available at <<http://ec.europa.eu/comm/competition/publications/blc/index.html>> (14.8.2008).

⁵ News circulated on the Yahoo Group Foro Competencia on 7.7.2008, provided by Carlos Cazaña Portella, in house lawyer of Petrobras Paraguay Distribución Limited in Asunción, Paraguay. Foro Competencia is an open forum of Internet discussion among lawyers and economists dealing with competition law in the Latin American countries. For further information see <<http://www.forocompetencia.com/home.html>> (9.8.2008).

⁶ One case study concerning the effects of a multi-jurisdictional transaction in different competition law jurisdictions can be found in Botta, 'Multi-Jurisdictional Mergers and Acquisitions in an Era of Globalization: the Telecom Italia-Telefónica Case' (2008) 1 *Global Antitrust Review* 97-116.

⁷ Jenny, 'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence', (2006) 29(1), *World Competition*, 109-137. Levenstein, Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71 *Antitrust Law Journal* 801-852.

⁸ For instance, it is well known the decision of the European Commission in the Microsoft case, which was upheld last years by the European Court of First Instance. However, it is less known that a similar decision was issued in December 2005 by the South Korea Fair Trade Commission (KFTC). The KFTC also

The clash between the increasing number of competition law jurisdictions and the multi-jurisdictional cases could be solved only through a more effective system of cooperation among the national authorities. If a supranational system of enforcement of competition law is still far from becoming a reality,⁹ effective systems of bilateral cooperation seem at the moment to be the more realistic alternative. In recent years a number of bilateral agreements between different competition authorities have been concluded on the basis of the OECD guidelines of 1995.¹⁰ The principles of positive and negative comity, mutual notification of the beginning of competition law proceedings involving companies based in different countries, consultation and exchange of non-confidential information when both authorities investigate the same anti-competitive conduct or they review the same multi-jurisdictional merger have become the cornerstones of these agreements. So far, the majority of the bilateral agreements have been concluded between the competition authorities of the OECD Member States. In fact, few bilateral agreements exist between the competition authorities of the developed and the developing countries.¹¹ The latter usually include systems of technical assistance, but they seldom include provisions concerning mutual notification and exchange of information. Even more striking is the lack of bilateral agreements concluded between the competition authorities of different developing countries. This is surprising, taking into consideration the economic integration achieved by some emerging economies lasting recent years, following the establishment of regional free trade areas and customs unions.

OBJECTIVES AND STRUCTURE OF THE PAPER

The goal of this paper is to investigate the reasons of the lack of cooperation between the competition authorities of different developing countries. The research will be based on a case study on Brazil and Argentina. These countries have been selected for the case study because they both have had competition law in force for a sufficiently

condemned Microsoft for abuse of dominant position to have bundled Messenger and Media Player to the version of the Windows operating system in South Korea. An English summary of the content of the KFTC's decision in the Microsoft case can be found at <http://ftc.go.kr/data/hwp/microsoft_case.pdf> (9.8.2008).

⁹ Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intention Gone Awry', (1997), 6, *Minnesota Journal of Global Trade*, 1-66.

¹⁰ Organization for the Economic Cooperation and Development, Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade. Adopted by the OECD Council on 27th-28th July 1995. The text of the recommendation is available at <<http://www.oecd.org/dataoecd/60/42/21570317.pdf>> (9.8.2008).

¹¹ This conclusion can be achieved looking at the list of bilateral agreements concluded by the European Commission and by the US Department of Justice (DOJ)/Federal Trade Commission (FTC) with the competition authorities of third countries. The European Commission has cooperation agreements with the US DOJ/FTC, Canada and Japan <<http://ec.europa.eu/comm/competition/international/bilateral/>> (26.08.2008). The US Federal Trade Commission and the US Department of Justice have cooperation agreements with the competition agencies of following countries: Australia, Brazil, Germany, European Communities, Germany, Japan, and Mexico. Further information is available at: <<http://www.ftc.gov/oia/agreements.shtm>> (24.08.2008).

long period of time. In fact, Brazil adopted its current competition legislation in 1994¹² and Argentina in 1999.¹³ Both acts include a system of merger control. Another reason behind this choice is the economic integration that the two countries have undertaken after the signature of the Treaty of Asunción in 1991, which established the Mercosur.¹⁴ This allowed the liberalization of the bilateral trade between the two countries as from 1st January 1995.¹⁵

Mercosur has often been criticized because the process of establishment of common external tariffs and the abolition of intra-block anti-dumping duties has never been completed.¹⁶ Moreover, the process of positive integration of the standards of production and marketing of goods, necessary to avoid the creation of invisible trade barriers, has been slowed down by the requirement that each secondary act of the Mercosur needs implementation at the domestic level by each Member State.¹⁷ Torres talks about *hipertrofia normativa* (legislative hypertrophy) to indicate the number of secondary legislative acts adopted within Mercosur which have never entered into force, due to the lack of implementation at the state level.¹⁸ Nevertheless, economic data shows that Argentina and Brazil today are two connected economies. According to the 2007 Yearbook on Brazil International Trade, Argentina is the second main trading partner of Brazil, after the USA and before China.¹⁹ On the other hand, in 2007 Brazil

¹² Brazilian competition law, Law n.8884/94, adopted on 6th June 1994. A translation in English of the law is available at <http://www.globalcompetitionforum.org/regions/s_america/Brazil/Legisla%E7%E3o%20Antitruste%20em%20ingl%EAs.PDF> (03.04.2007).

¹³ Ley 25.156 de Defensa de la Competencia, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm>> (04.04.2007).

¹⁴ Tratado para la Constitución de un Mercado Común entre la Republica Argentina, la Republica Federativa del Brasil, la Republica del Paraguay y la Republica Oriental del Uruguay. The text of the treaty is available at: <<http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>> (11.08.2008). For a description of the steps which led to the negotiation of the Mercosur agreement see: Meza, Mendoza, Poget., Linares, *Política, Integración y Comercio Internacional en el Cono Sur Latinoamericano*. Facultad de Ciencias Políticas y Sociales, Universidad de Mendoza, 1989.

¹⁵ According to Art.1 of the treaty of Asunción, the liberalization of trade should be completed by 31st December 1994.

¹⁶ Torrent, *15 Años de Mercosur. Comercio, Macroeconomía y Inversiones Extranjeras. Anatomía del Mercosur Real*. Zonalibro, Buenos Aires, 2006, p 39.

¹⁷ According to Art.40 of the Protocol of Ouro Preto, the secondary legislations adopted by the bodies of the Mercosur will enter into force 30 days after that the *Secretaría Administrativa del Mercosur* has received communication by all Member States that the act has been implemented at the internal level. There are no sanctions for Member States which do not implement the Mercosur acts. As a consequence, each Member State obtains a *de facto* double right of veto: it can veto the adoption of the Mercosur act during the negotiations, where the rule of consensus is followed, and afterwards it can avoid implementing the act at the internal level. Protocolo Adicional al Tratado de Asunción sobre la Estructura Institucional del Mercosur. Protocol signed in Ouro Preto in 1994. Art. 40. The text of the Protocol is available at: <<http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>> (12.8.2008).

¹⁸ *Supra*, Torrent, p 37.

¹⁹ Yearbook 2007 on Brazil International Trade, p 146. <<http://www.analisecomercioexterior.com.br/?from=An%E1lise+Editorial&from=An%E1lise+Editorial>> (11.8.2008).

was the main trading partner of Argentina, both in terms of exports and imports.²⁰ Moreover, after the 2001 financial crisis in Argentina, a number of Western corporations which had invested in the country during the privatizations of the public utilities during the 1990s withdrew their investments.²¹ On the other hand, the number of Argentinean companies acquired by Brazilian investors has increased since then.²² Close economic links between the two countries justify the need of coordination in the enforcement of competition law, due to the likeliness of cross-border cases. For instance, it is not surprising that during the last years some of the most controversial of concentrations in Argentina involved the acquisitions of local companies by Brazilian investors which were already present in the Argentinean market. The latter aimed at strengthening their position in the market through the acquisition (e.g. case Quilmes-Brahma and Pérez Companc-Petrobras). Nevertheless, as will become apparent in the following discussion, there is currently no effective cooperation between Brazil and Argentina in the field of competition law.

In relation to the structure of the paper, after an overview of the functioning and the development of the competition law systems of Brazil and Argentina during the last two decades, an analysis of the attempts to improve the forms of cooperation between the Brazilian and the Argentinean competition authorities will be undertaken. In the final part of the paper, some explanations concerning the reasons for the lack of cooperation will be provided in the light of the opinions of the officers and Commissioners of the Brazilian and Argentinean competition authorities that the author recently interviewed in Buenos Aires, Brasilia and São Paulo. Those views will be systematically presented and compared in the paper. The objective of the research is to explain the current problems and the steps which have to be taken to improve cooperation in the future. The lessons drawn from the experience of Brazil and Argentina might be useful for other developing countries which are in the process of introducing competition law rules and which have close economic links with their neighbours.

OVERVIEW OF THE EVOLUTION OF THE BRAZILIAN COMPETITION LAW SYSTEM

Brazil adopted its first competition law in 1962. The law established a *Conselho Administrativo de Defesa Econômica* (CADE, Administrative Council of Economic Law)²³ under the Ministry of Justice, in charge of investigating cases of cartels and abuses of

²⁰ *Ibid*, 15.8% of Argentinean exports had Brazil as destination and 37% of the imports had Brazil as origin.

²¹ Secretariat of the United Nations Conference on Trade and Development (UNCTAD), FDI in Brief: Argentina. Country Data concerning 2002. The document is available at <http://www.unctad.org/sections/dite_fdistat/docs/wid_ib_ar_en.pdf> (11.8.2008).

²² Navarro, 'M&A in Argentina in the Last Decade: Boom, Crisis and Resurgence', (2006), 19(1), International Law Practicum, 74 – 79. La Nación, Liderazgo de firmas de Brasil y México. Article published on 14.8.2008. The text of the article is available at <http://www.lanacion.com.ar/nota.asp?nota_id=1039544> (14.8.2008).

²³ Law 4.137, adopted on 10th September 1962. Art. 8 The text of the law is available at <<http://www.cade.gov.br/legislacao/4137lei.asp>> (02.04.2007).

dominant position. In practice, this institution was not active until the beginning of the 1990s. This was due to the fact that Brazil was characterized by a system of import substitution. Furthermore, the price of the majority of goods was agreed by the local producers with the Commission of Provision and Prices, rather than through free competition among the entrepreneurs.²⁴

Within the broad programme of liberalization of the economy undertaken by Brazil at the beginning of the 1990s, a new competition act, the Law 8884/94, was passed.²⁵ With the new legislation CADE became a federal independent agency (*autarquia federal*),²⁶ composed of a President and six Board Members. CADE Commissioners were appointed for a period of two years, with the possibility of reappointment by the President of the Republic with the approval of the Senate.²⁷ They could only be dismissed by a decision of the Senate if they were convicted by a non appealable criminal judgement.²⁸ Despite the fact that the Law 8884/94 underlined the concept of *autarquia federal*, some features of this legislation undermined the independence of CADE. For instance, the period in office of CADE Commissioners was relatively short, only two years, which encouraged them to look for the necessary political support in order to get another re-appointment. Moreover, CADE was assisted by an Economic Law Office (SDE),²⁹ part of the Ministry of Justice, and by a Secretariat of Economic Surveillance (SEAE), part of the Ministry of Finance.

Another important reform introduced by the Law 8884/94 was provision for a merger control system, absent in the previous legislation.³⁰ According to Art. 54(3), 'any form of economic concentration' had to be notified to the SDE at least fifteen days after the completion of the transaction (post-merger notification). The SDE and SEAE presented their opinion concerning the effect of the transaction to CADE, which was in charge of taking the final decision.³¹

The Law 8884/94 was criticized by a number of authors,³² due to the triangular structure established by the Law 8884/94. The latter could slow down the speed of the proceedings in particular in the area of merger control, and it could undermine the

²⁴ In relation to the role of competition law in Brazil before the reforms of the 1990s see: Monteiro, Considera, Correa, 'The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy', (2001) *International Antitrust Law and Policy* 533-568.

²⁵ *Supra*, Law n.8884/94. For a comment of the Law 8884/94 see, Dallas, 'Competition Law in Brazil' (2005) 16 *European Competition Law Review* 255-261.

²⁶ *Supra*, Law n.8884/94, Art.3.

²⁷ *Supra*, Law n.8884/94, Art. 4(1),(2).

²⁸ *Supra*, Law n.8884/94, Art. 5.

²⁹ *Supra*, Law n.8884/94, Art. 13.

³⁰ For a detailed analysis of the Brazilian system of merger control see: Andrade, *Controle de Concentrações de Empresas. Estudo da Experiência Comunitária e a Aplicação do Artigo 54 da Lei n.8884/94*. Editora Singular, São Paulo, 2002.

³¹ *Supra*, Law n.8884/94, Art. 54(4).

³² Page, 'Antitrust Review of Mergers in Transition Economies: A Comment, with some Lessons from Brazil' (1997-1998) 66 *University of Cincinnati Law Review* 1124.

independence of CADE. Though a detailed analysis of the evolution of the Brazilian competition law system goes beyond the scope of this paper, it is worthwhile mentioning that the two fears indicated above have gradually faded. In a number of sensitive merger cases not only CADE, but also SDE and SEAE, resisted the political pressures which demanded the clearance of concentrations due to reasons of industrial policy.³³ Today, both the officers which work in these institutions³⁴ and the lawyers who work in the field of competition law in São Paulo recognize that CADE/SDE/SEAE are fully independent institutions from the Government.³⁵

During the second half of the 1990s, CADE was criticized due to the long period of time needed to review the notified concentrations, even those ones which did not raise any competition concern. Article 54(6) of the Law 8884/94 provides that the total time of review should not last longer than 120 days from the time of the notification.³⁶ However, the time of review was usually extended due to the fact that each institution asked the parties for additional documents. Such documents were often not essential for the review, they were requested with the objective of extending the time of review as the Brazilian competition authorities usually could not comply with the 120 days time limit.³⁷ Moreover, the thresholds of notification were initially interpreted in a

³³ The two most controversial cases in this regard are the Ambev case of 1999 and the Nestlé-Garoto case of 2004. Ambev was a new company, resulting from the merger of the two main beer producers in Brazil, Brahma and Antarctica. SDE and SEAE expressed their intention to block the merger, while the Government, through a recommendation submitted to CADE by the Ministry of Industry, Trade and Development, pleaded in favour of a clearance of the merger without any remedy imposed. Several politicians argued that Ambev would become a national champion, which would be able to increase its exports towards other Latin American markets. Finally, CADE authorized the concentration, but it imposed a number of structural commitments. A summary of the Ambev case can be found at: OECD Secretariat, Competition Policy and Regulatory Reform in Brazil. A Progress Report, Published on 30.3.2000, pp 16-17. The document can be downloaded at: <<http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7BC7F3270D-81D4-4FBF-BED2-5652F45F330D%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-40E-4B56390F180A%7D>> (10.8.2008). The second case concerned the acquisition by Nestlé of the Brazilian chocolate producer Garoto. Due to the fact that Nestlé was already present in the Brazilian market before the acquisition of Garoto, the horizontal merger would have granted to Nestlé a market share of 63.10% in the Brazilian market for chocolate bars and 88.50% market share for solid chocolate toppings. CADE decided to block the acquisition, in spite of the political pressures received. Several politicians argued that following the acquisition of Garoto, Nestlé would have opened new factories in Brazil and, thus, it would have created new possibilities for employment for Brazilian workers. Following the decision of CADE, the Brazilian Senate refused to re-appoint one of the CADE Commissioners who had voted to block the acquisition. *Supra*, OECD Peer Review of the Brazilian Competition Law 2005, pp 33-34.

³⁴ Meeting of the author with Ana Paula Martinez, head of the competition law division of the SDE, on 2.6.2008 in Brasilia. According to Ms. Martinez, the Minister of Justice has never interfered personally in the work of the SDE, even in the most controversial cases.

³⁵ Meeting of the author with José Ignacio Franceschini, founding partner in the law firm Franceschini & Miranda Advogados, in São Paulo on 13.6.2008.

³⁶ SDE and SEAE have 30 days each one to submit their reports. Afterwards, CADE has 60 days to adopt a final decision.

³⁷ Between 1995 and 1998 the average time to review a notified concentration by CADE/SDE/SEAE was of 605 effective days, against the 120 days provided by the Law 8884/94. Source: Oliveira, 'Competition Policy in Brazil and Mercosur: Aspects of Recent Experience' (1999) 3 Boletín Latinoamericano de Competencia 14.

broad manner, in order to increase the number of transactions subject to review.³⁸ The huge number of notifications overloaded CADE, broadened the time of review and impeded CADE/SDE/SEAE from conducting any investigation on anti-competitive practices. However, recent years have seen a better system of coordination between the SDE and SEAE³⁹ and a more restrictive interpretation of the thresholds of merger notifications⁴⁰ allowing for a reduction of the time of merger review.⁴¹ According to Camila Safatle, senior officer of the merger review unit of the SDE, SEAE and SDE have achieved an effective division of their tasks: SEAE mainly deals with projects of competition advocacy towards other regulatory agencies of the Brazilian public administration and it draws the opinion for CADE concerning the notified concentrations. On the other hand, SDE has focussed its resources on the investigations of anti-competitive conducts.⁴²

In 2000, the Law 10.149 amended the Law 8884/94, by introducing a system of leniency for cartels.⁴³ The simplification of the proceedings of merger review and the introduction of a leniency system allowed the SDE to dedicate more human resources to the detection of cartels. For instance, the number of dawn raids conducted by SDE

³⁸ In 1994 only six concentrations were notified. This number increased to 16 in 1996 and to 226 in 1999. This increase was due to the fact that CADE interpreted that the turnover threshold of 400 million Reals provided by Art. 54 of the Law 8884/94 should be calculated on the basis of the world-wide turnover, rather than on the basis of the Brazilian one. The huge number of notifications overloaded CADE and broadened the time of review.

³⁹ On 18.2.2003, the SEAE/SDE adopted a fast-track procedure for categories of mergers which usually do not represent particular competition concerns (e.g. conglomerate mergers; acquisition of Brazilian companies by foreign investors not present yet in the Brazilian market; joint ventures). Portaria Conjunta SDE/Seae n° 01, 18.2.2003, available at: <<http://www.mj.gov.br/sde/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={0076B8D7-06BB-43C7-9566-B6C1A26EF277}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}>> (9.8.2008). On 4.1.2006 SDE/SEAE adopted a new procedure for merger review which allows for the delivery of a joint opinion to CADE. The opinion is drawn by SEAE and it is reviewed by SDE. When SDE's opinion is convergent with SEAE, its opinion to CADE is limited to a note stating that it agrees with SEAE's opinion. Portaria Conjunta SDE/Seae n° 33, 4.1.2006, available at <<http://www.mj.gov.br/sde/data/Pages/MJ5C394253ITEMID827D7C2F4E7C4BF8ABEF6E45CC39F971PTBRNN.htm>> (9.8.2008).

⁴⁰ On 19th January 2005, in the decision concerning the concentration ADC Telecommunications and Krone International Holding Inc, CADE changed its understanding of the notification thresholds: the turnover could be calculated only in relation to the sales within the Brazilian market. Dutra, CADE Votes to Use National Turnover for Merger Calculation, International Law Office (ILO) Newsletter, 10.3.2005. Available at <<http://www.internationallawoffice.com/>> (9.8.2008).

⁴¹ According to the 2007 CADE *Relatório Anual* (CADE's Annual Report), in 2006 the average time to review the cases was of 51 days for CADE. Only two cases took over 2 years to be decided (page 23). The text of the document can be downloaded in Portuguese at <<http://www.cade.gov.br/publicacoes/relaanual.asp>> (9.8.2008).

⁴² Meeting of the author with Camila Safatle, senior officer in the merger control unit of the SDE, in Brasilia on 2.6.2008.

⁴³ Law n. 10.149, adopted on 21st December 2000, which amended the text of the Law 8884/94. The text of the law is available at <<http://www.cade.gov.br/legislacao/10149lei.asp>> (9.8.2008).

increased from 11 in 2003 to 84 in 2007.⁴⁴ Finally, in September 2007 CADE adopted the Resolution 46/2007 which introduced the possibility to negotiate settlements with the companies involved in a cartel case, in order to decrease the time of investigations concerning a single investigation.⁴⁵

The evolution of the Brazilian system of competition law is still ongoing. The last phase of this process of transition started in September 2005, when the Government submitted the text of new competition legislation to the Brazilian Congress. The latter should replace the Law 8884/94.⁴⁶ The new bill will provide a full institutional reform: CADE will have exclusive jurisdiction in the field of competition law enforcement, while the competition law division of the SDE will be abolished. The new CADE will be composed of three bodies:⁴⁷ the *Tribunal Administrativo de Defesa Econômica* (with adjudication tasks similar to the current CADE), the *Superintendência-Geral* (in charge of conducting the investigations; the current staff of the SDE will probably move to this body) and a *Departamento de Estudos Econômicos* (headed by a chief economist, in charge of providing opinions when requested by one of the Commissioners of the *Tribunal Administrativo* or by the *Superintendente-Geral*). The SEAE will mainly play the role of competition advocacy and it will deliver opinions concerning mergers only if so required by CADE.⁴⁸ Finally, the mandate of CADE Commissioners will be extended to four years.⁴⁹ Furthermore, the merger review will be sped up through a pre-screening system of all the notifications by the *Superintendência-Geral*. The latter will be able to directly approve them without restrictions.⁵⁰ The concentrations that the *Superintendência-Geral* would like to block or to impose remedies will be reviewed by the *Tribunal Administrativo*.⁵¹ Another innovation brought by the draft bill is the abolition of the post-merger notification time-frame, replaced by a pre-merger system.⁵² The objectives of these reforms are to strengthen CADE independence from the executive branch and to speed up the process of merger review. These modifications are relevant,

⁴⁴ SDE's press release of 29.8.2007, SDE Carries out the Largest Dawn Raid in Latin America and Fourteen Executives Were Arrested on Charges of Conspiring to Fix Prices. The press release is available at <<http://www.mj.gov.br/main.asp?View={AE70F431-442E-44D0-9303-65BF6C217A48}>> (9.8.2008).

⁴⁵ CADE, Resolução n.46 of 4.9.2007. The text of the resolution is available in Portuguese at <<http://www.cade.gov.br/legislacao/resolucoes/Resolucao46.pdf>> (9.8.2008).

⁴⁶ Projecto de Lei, Estrutura o Sistema Brasileiro de Defesa da Concorrência e dispõe sobre a prevenção e repressão às infrações contra a ordem econômica e dá outras providências. Presented by the Government to the Brazilian Congress on 12.9.2005. Proposal n.P-5877/2005. The text of the draft bill is available at: <<http://www2.camara.gov.br/proposicoes>> (9.8.2008). An analysis of the draft bill is available in: Garcia, Todorov, 'New Brazilian Draft Competition Law Sent to Congress' (2006) 27(2) *European Competition Law Review* 64-73.

⁴⁷ *Supra*, draft law P-5877/2005, Art. 5.

⁴⁸ *Supra*, draft law P-5877/2005, Art. 19.

⁴⁹ *Supra*, draft law P-5877/2005, Art. 6 (1).

⁵⁰ *Supra*, draft law P-5877/2005, Art. 49 (1).

⁵¹ *Supra*, draft law P-5877/2005, Art. 51 (1).

⁵² *Supra*, draft law P-5877/2005, Art. 89 (2) (3).

but they are not unexpected: they are the result of the process of transition previously described.

OVERVIEW OF THE EVOLUTION OF THE ARGENTINEAN COMPETITION LAW SYSTEM

If the case of Brazil shows the positive evolution of a competition law system in a developing country, the case of Argentina shows what can go wrong in such process of transition. Argentina adopted its first competition law in 1980.⁵³ The law had the same scope of application as the Brazilian law of 1962: both legislations sanctioned anticompetitive agreements and abuse of dominant position, but they did not provide any mechanism of merger control.⁵⁴ Moreover, they both established competition law authorities dependent on the executive branch. In the case of Argentina, the *Comisión Nacional de Defensa de la Competencia* (CNDC, National Commission of Protection of Competition) was established *en el ambito* (within) of the State Secretary for Trade and International Economic Negotiations.⁵⁵ Finally, the CNDC, like CADE before 1994, did not actively enforce Law 22.262/80.

On 25th August 1999, the Argentinean Congress passed the Law 25.156, which replaced the previous bill.⁵⁶ The new legislation introduced two main innovations: a system of merger control and an independent competition law authority, the *Tribunal Nacional de Defensa de la Competencia*⁵⁷ (National Tribunal of Protection of Competition). According to the Law 25.156/99, the Competition Tribunal would be an *organismo autarquico* (autarchic body). Reading the text of the legislation, this autarchy seems *prima facie* substantial. In fact, unlike CADE, the Competition Tribunal does not receive any opinions from any other institution related to the Government: it is the only authority responsible for the enforcement of the Argentinean competition law.⁵⁸ Moreover, the seven Members of the Tribunal are not politically appointed, but they are selected through a public competition.⁵⁹ Finally, the appointed Members remain in office for a

⁵³ Law 22.262, Ley de Defensa de la Competencia, adopted in 1980. The text of the law is available at <<http://www.poderdelconsumidor.com.ar/legislacion/ley22262.htm>> (02.08.2008). For an analysis of the Law 22.262/80 see: Cabanellas de las Cuevas G, *Derecho Antimonopolico y de Defensa de la Competencia*, Editorial Heliasta, Buenos Aires, 1983.

⁵⁴ *Supra*, Law 22.262/80, Art. 1.

⁵⁵ *Supra*, Law 22.262/80, Art. 6.

⁵⁶ Ley 25.156 de Defensa de la Competencia, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm>> (04.08.2008). For a detailed analysis of the Law 25.156/99 see: Cabanellas De Las Cuevas G, *Derecho, Antimonopolico y de Defensa de la Competencia*, Segunda Edición, Editorial Heliasta (Buenos Aires), 2005.

⁵⁷ *Supra*, Law 25.156/99, Art. 17.

⁵⁸ *Supra*, Law 25.156/99, Art. 13.

⁵⁹ The seven Members of the Tribunal are not politically appointed, but they are selected by a panel (*Jurado*) through a public competition (*previo concurso público de antecedentes*). The *Jurado* would be composed of the Attorney General of the State Treasury (*Procurador del Tesoro de la Nación*), the State Secretary for the Internal Trade, the Presidents of the Trade Commissions of both Chambers of the Argentinean Parliament, the

period of six years, rather than the two years of the CADE Board Members. A key factor of the CADE's success was its independence from the Government, an independence which was strengthened over the years. By contrast, in Argentina the *Tribunal Nacional de Defensa de la Competencia* has never been established. Nine years after the approval of the competition law of 1999, the public competition through which the seven Members of the Tribunal should be selected has not taken place yet.⁶⁰ Since 1999 Law 25.156/99 has been administered by the CNDC. The latter has still to report the results of its investigations both in the area of conduct cases and in the field of merger control to the *Secretaría del Comercio Interior* (Secretariat for the Internal Trade).⁶¹ As a result, the final decision concerning the clearance of a notified concentration or the sanction against an anti-competitive conduct is not taken by an independent authority, as in Brazil, but by a branch of the Government. This solution was justified under Art. 58 of the Law 25.156/99, which provides that until the establishment of the Competition Tribunal, the new act will be enforced by the institutions of the Law 22.262/80. The lack of establishment of the Competition Tribunal has opened a legal battle concerning the legitimacy of the CNDC/Secretary for the Internal Trade to enforce the Law 25.156/99. In fact, during the past years a number of federal courts have denied the authority of the Secretariat to adopt administrative decisions under the Law 25.156/99. For instance, in 2004 the Secretariat's decision which authorized the merger between two supermarket chains, Jumbo and Disco, was challenged by a competitor before a federal court in the city of San Rafael, located in the Mendoza province.⁶² Among the grounds presented, the plaintiff argued that the decision was not valid, due to the fact that under Law 25.156/99 the Secretariat does not have any competence.⁶³ Only on 16th April 2008 this legal battle ended through a judgement of the Argentinean Supreme Court, which recognized that according to Art. 58 of the Law 25.156/99 the CNDC/Secretariat are the two institutions in charge of temporarily enforcing the Law until the establishment of the Competition Tribunal.⁶⁴

The current institutional system has also affected the enforcement of merger control. According to Art. 13 of the Law 25.156/99, merger review cannot last longer than 45 days from the time of the notification. When that time limit expires, the concentration

President of the National Court of Civil Appeals and the Presidents of the National Academy of Law and the National Academy of Economics, *supra*, Law 25.156/99, Art. 19.

⁶⁰ Colomo Ibáñez, 'The Revival of Antitrust Law in Argentina: Policy or Politics?' (2006) 27 *European Competition Law Review* 319.

⁶¹ Today it is the called *Secretaría de Comercio Interior*.

⁶² *Diario Judicial*, La Fusión Jumbo-Disco Pasa por el Ministerio. Article published on 17.4.2008. The text of the article is available at <<http://www.diariojudicial.com/nota.asp?IDNoticia=35128#>> (10.8.2008).

⁶³ Den Toom., *Argentina-Competition Law Update*, article published on 17th July 2006 in <www.bomchil.com> (05.08.2008).

⁶⁴ Fallo de la Suprema Corte Argentina, Belmonte, Manuel y Asociación Ruralista General Alvear c/ Estado Nacional Poder Ejecutivo Nacional Ministerio de Economía y Producción Secretaría de Coordinación Técnica Comisión Nacional de Defensa de la Competencia. Judgement of 16.4.2008. The text of the judgement is available at <<http://www.diariojudicial.com/nota.asp?IDNoticia=35128#>> (10.8.2008).

is considered implicitly authorized.⁶⁵ Depending on the complexity of the case, the CNDC may require the parties to submit the information required in three different notifications forms.⁶⁶ The time limit of 45 days can be stopped when the merging parties do not provide all the information required in the notification form⁶⁷. In addition, the CNDC may once ask additional information.⁶⁸ The final result, according to the practitioners of competition law in Buenos Aires, is that the CNDC relies on these expedients in order to postpone for months and months the final opinion addressed to the Secretary.⁶⁹ A brief analysis of the decisions of the CNDC/Secretariat confirms the lawyers' opinion. For instance, the acquisition of Multicanal by Cable Televisión was notified to the CNDC on 4th October 2006, but the opinion of the CNDC was released only on 7th December 2007, more than one year after the date of the notification.⁷⁰ Due to the slowness of the CNDC/Secretariat to clear the notified concentrations, in most of the cases the merging parties implement the concentration before receiving the authorization from the Secretariat.⁷¹ Another consequence of this practice is that the CNDC finds it difficult to impose any structural remedy when the notified concentration has already been implemented. The CNDC would rather opt for behavioural remedies, in spite of the difficulty checking their implementation. As it was shown above the Brazilian competition system was previously affected by the same deficiencies. However, over the years the time of merger review has been shortened and the effective time of review now complies with the 120 days time limit provided by the law. This is not the case in Argentina. The reasons for these delays are the insufficient human resources of the CNDC and the fact that each decision has to be approved by the Secretary for Internal Trade.

⁶⁵ *Supra*, Law 25.156/99, Art. 14.

⁶⁶ The three forms are contained in: Secretario de Defensa de la Competencia y del Consumidor, Resolución 40/01, Guía para la Notificación de Operaciones de Concentración Económica, published on 22.2.2001. A copy of the Resolution 40/01 is available in: Nazar Espeche, *Defensa de la Competencia*, Ediciones Depalma, Buenos Aires, 2001, pp 155-168.

⁶⁷ Presidente de la Nación Argentina, Decreto 89/2001. Apruébase la Reglamentación de la Ley N° 25.156. Adopted in Buenos Aires on 25.1.2001. Art. 14. The text of the Decree is available at: <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm>> (10.8.2008).

⁶⁸ Poder Ejecutivo Nacional, Decreto 396/2001, Modifícase la Ley 25.156, derogando el carácter potencial de la restricción o distorsión de la competencia en los mercados respecto de la autorización de las concentraciones económicas. Adopted in Buenos Aires on 1.4.2001. Art. 4. The text of the Decree is available at <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/66610/norma.htm>> (10.8.2008).

⁶⁹ Views expressed on 11.7.2008 by a number of competition lawyers at a meeting at the Colegio de los Abogados in Buenos Aires. The author participated to the meeting as observer.

⁷⁰ Dictamen of the CNDC n.637, Grupo Clarin S.A., Vistone LLC, Fintech Advisory Inc, Fintech Media LLC, VLG Argentina LLG y Cablevisión SA S/ Notificación Artículo 8 Ley 25.156. Adopted on 7.12.2007. Para. 45. The document is available at: <http://www.mecon.gov.ar/cndc/dictamenes/dictamen_cablevision_multicanal.pdf> (10.8.2008).

⁷¹ Legally speaking the notified concentrations cannot produce any legal effect up to the moment when the concentration is authorized by the Secretariat. However, according to Cabanellas de las Cuevas, 'nothing in the Law 25.156/99 prohibits the merging parties from implementing a concentration through the transfer of the shares after having complied with their duty of notification'. *Supra*, Cabanellas de las Cuevas, 2nd Edition, p 130, volume II.

The failure to establish the Competition Law Tribunal has had an impact not only on speed, but also on the quality of the enforcement. In fact, enforcement was dependant upon which politician was appointed as Secretary for the Internal Trade. Until the financial crisis of 2001, the Secretary approved the majority of CNDC's decisions without interfering in the CNDC's investigations. From 2003 Kirchner's administration, following a more interventionist approach in the economy, has started to influence the activities of the CNDC in order to pursue a number of different economic goals. For instance, the Secretary started to negotiate fixed prices with a number of distributors of consumers' products and with the supermarket chains. The companies which did not follow the negotiated prices were warned that the CNDC would have been encouraged to start investigations against them on the basis of alleged anti-competitive conducts.⁷² On 30th May 2008, a decision of the Secretary for the Internal Trade concerning the existence of an anti-competitive practice consisting in the refusal to supply some distributors of GPL in the Province of Misiones by Shell Gaz and Totalgaz Argentina was annulled by the federal court of the city of Posadas.⁷³ The court held that the decision was arbitrary due to the fact that the CNDC/Secretary based its decision only on the testimony of the complainant, who was not supplied by Shell Gaz and Totalgaz Argentina, rather than on further evidence.

Similarly, this institutional structure also had implications for the content of some merger decisions when the concentration involved political concerns. One of the most controversial cases in this regard is the above mentioned acquisition of Multicanal and Teledigital Cable by Cablevisión. Cablevisión was a subsidiary of the group Clarín, one of the main media groups in Argentina.⁷⁴ Multicanal and Cablevisión are the main cable operators in Argentina, accounting for a joint market share of between 78% and 94% in some provinces outside of the metropolitan area of Buenos Aires.⁷⁵ The analysis of the CNDC has been criticized by a number of competition lawyers,⁷⁶ due to the fact that the CNDC departed from its previous case law, in order to find grounds to justify the approval of the concentration.⁷⁷ In spite of the impact of the acquisition on the level of

⁷² *Supra*, Colomo Ibáñez, p 320.

⁷³ Cámara Federal de la Provincia de Misiones, Expte. N° 9986107 -SHELL GAS S.A. Y TOTALGAZ ARGENTINA S.A. Sf Ley 25.156 Ministerio de Economía y Producción Sec. de Comercio Interior Comisión Nacional de Defensa de la Competencia. Judgement of 30.5.2008.

⁷⁴ *Supra*, CNDC's Dictamen 637/2007, para. 14.

⁷⁵ *Supra*, CNDC's Dictamen 637/2007, table n.18.

⁷⁶ Den Toom, Demarie, 'Approval of the Cablevision - Multicanal - Teledigital Merger. Adequate Understanding of Competitive Dynamics or Wrong Decision?' Article published on 3.1.2008. The article is available at <<http://www.bomchil.com/publicacion.aspx?PublicacionID=205>> (11.8.2008).

⁷⁷ For instance, the CNDC considered the cable TV market approximate to the substitution with the Triple Play services provided by the telecom companies in several countries. As a consequence, it argued that Telecom and Telefónica Argentina, the main telecom operators in Argentina, were ready (though any precise date was planned) to invest in the field of Triple Play. However, the CNDC did not take in consideration the regulatory barriers which impede the providers of fixed telephone services to broadcast any television content in Argentina. Furthermore, the CNDC, for the first time in its case law, accepted all the efficiencies alleged by the parties, without any critical analysis of their effective materialization.

competition in a number of relevant markets, the CNDC advised the Secretary to clear the transaction subject to the behavioural commitments offered by the merging parties on 6th December 2007, the day before the adoption of the CNDC's opinion.⁷⁸ The open question is whether the CNDC will manage to check the compliance of the commitments offered by the parties. This decision seemed more justified by the wish of the CNDC to appease the group Clarín, supporter of the Government, rather than on the basis of a critical competition law analysis. The case Cablevisión-Multicanal is interesting because it shows clearly how the lack of independence of the CNDC from the executive may have consequences on the objective enforcement of the competition law. When such a poor institutional framework is in force, alleged potential entrants in the market and unlikely efficiency gains claimed by the merging parties may be accepted by the competition authority to counterbalance real competition concerns, masking the real political concerns behind the approval of the concentration.

To the untrained eye, the Argentinean law of 25.156799 may look more in line with international standards than the Brazilian Law 8884/94. However, the lack of enforcement of the institutional system provided by the Law 25156/99 led to these unexpected developments. This section had the objective of providing the reader with an overview of the current system of enforcement of competition law in Brazil and Argentina. A more detailed analysis would go beyond the scope of this paper. However, as it will be shown in the following section, the differences in the evolution of these competition law systems has had an impact in the level of cooperation between the competition authorities of these countries.

ATTEMPTS AND FAILURES IN THE COOPERATION BETWEEN THE ARGENTINEAN AND THE BRAZILIAN COMPETITION AUTHORITIES

In 1994, when the process of transition for the establishment of the free trade area within Mercosur was almost completed, it was decided that a number of technical committees should be established in order to negotiate a positive harmonization of the rules which could create invisible barriers to the free trade. In February 1995, the *Comité Técnico n.5* (Technical Committee n.5, CT5), concerning the *Defensa de la Competencia* (Protection of Competition) was established.⁷⁹ This Committee had the task of drawing up a report for the *Comisión de Comercio del Mercosur*⁸⁰ (Mercosur Trade Commission,

⁷⁸ *Supra*, CNDC's Dictamen 637/2007, para 335. The merging parties offered not to discriminate other content providers in their grid of broadcasting and to offer the cable connection services in the cities of the provinces at the same price of Buenos Aires during the next two years.

⁷⁹ Directiva de la Comisión de Comercio del Mercosur n.1/95, Cración Comites Técnicos. Directive adopted on 15.2.1995. Art.1. The text of the Directive is available at <<http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>> (13.8.2008).

⁸⁰ The Comisión de Comercio is one of the institutions introduced by the Protocol of Ouro Preto in 1994 (*supra*). The three most important institutions introduced by this Protocol are: the Consejo del Mercado Común (CMC, the meeting of the Ministries or the Presidents of the four Member States), the Grupo Mercado Común (GMC, the meeting of the senior officers of the national Ministries), the Comisión del Comercio del Mercosur (CCM, meeting of the younger officers of the national Ministries). Every institution decides on the basis of the rule of consensus. For a description of the functioning of the Mercosur

CCM) on the functioning of the competition law in the four Member States. At a later stage it was required to negotiate a *Estatuto de Defensa de la Competencia* (Statute about the Protection of Competition).⁸¹ Moreover, in December 1994 the Presidents of the four Member States fixed the guidelines which would be followed in the project of introduction of competition law at the Mercosur level.⁸² The Annex attached to the Decision 21/94 of the *Consejo del Mercado Común* (Council of the Common Market, CMC) listed a number of agreements and concerted practices and forms of abuse of dominance which should be prohibited by the new rules when they had an impact at the Mercosur level.⁸³ Moreover, it stated that every agreement or concentration among enterprises should be subject to merger control when the transaction implied a control of at least 20% of the relevant market, when defined at the Mercosur level.⁸⁴ These guidelines were very similar to the Brazilian competition law 8884/94 in relation to the list of anti-competitive practices, the mergers notification threshold of 20% market share and the need to notify all the agreements, not only economic concentrations.⁸⁵ This is not surprising, taking in consideration that at that time Brazil had just passed the new competition law in 1994. In Argentina, in spite of a number of proposals pending in the Congress, the old Law 22.262/80 was still in force, despite its lack of enforcement. Finally, as mentioned in the introduction, Paraguay and Uruguay are only now in the process of introducing competition law at the internal level.

Two years after the Decision 21/94, the *Protocolo de Defensa de la Competencia del Mercosur* (Protocol on the Protection of Competition in the Mercosur) was signed in Fortaleza.⁸⁶ The Protocol established a supra-national system of competition law, applicable when anticompetitive behaviour had an impact on intra-block trade.⁸⁷ However, each Member States had exclusive competence in applying its own competition law regime when the anticompetitive behaviour affected only its territory.⁸⁸ Therefore, the

institutions see: Moavro H, Orietta PW, Parera RG, 'Las Instituciones del Mercosur', Working paper 3/1997, Centro Interdisciplinario de Estudios sobre el Desarrollo Latinoamericano (CIEDLA), Buenos Aires.

⁸¹ *Supra*, Directive 1/95, Art. 1.

⁸² Decisión del Consejo Mercado Común n.21, Defensa de la Competencia. Decision adopted in Ouro Preto on 17.12.1994. The text of the decision is available at: <<http://www.mercosur.int/msweb/portal/%20intermediario/es/index.htm>> (13.8.2008).

⁸³ *Supra*, Decision 21/94, Art.3-4.

⁸⁴ *Supra*, Decision 21/94, Art.5.

⁸⁵ *Supra*, Brazilian Law 8884/94, Art. 21, 54.

⁸⁶ Decisión del Consejo del Mercado Común n.18, Protocolo de Defensa de la Competencia del Mercosur, signed in Fortaleza on 17th December 1996. The document is available at <<http://www.mercosur.int/msweb/portal/%20intermediario/es/index.htm>> (13.8.2008). A description of the Fortaleza Protocol is provided in: Oliveira, 'Aspects of Competition Policy in Mercosur' (2000) 11 Boletín Latinoamericano de Competencia 37-41. Andrade, 'Competition Law in Mercosur: Recent Developments' (2003) 17 Boletín Latinoamericano de Competencia 11-14. Bischoff-Everding, 'Is There a Basis for a Cooperation Between the EU and the Mercosur in the Field of Restrictive Business Practices?' (2002) 14 Boletín Latinoamericano de Competencia 113-125.

⁸⁷ *Supra*, Fortaleza Protocol, Art. 2.

⁸⁸ *Supra*, Fortaleza Protocol, Art. 3.

Fortaleza Protocol did not aim at harmonizing the Member States' legislations, but rather to establish a parallel system of competition law rules applicable when the intra-Mercosur trade was affected. This system was quite similar to the relationship between national and Community competition rules. Nevertheless, the underlining difference with the European Community model was that the Fortaleza Protocol was based on an inter-governmental framework.⁸⁹ The two institutions in charge of enforcing the Protocol rules were, in fact, the CCM and the *Comité de Defensa de la Competencia* (Committee of Protection of Competition, CDC), the evolution of the Technical Committee n.5. The latter was composed of the representatives of the national competition authorities or of the Ministries of Economy, when the national competition authority was not yet established.⁹⁰ The proceedings for the infringement of the Protocol were initiated by the competition authority of the country where the anticompetitive behaviour took place. The latter informed the CDC,⁹¹ which adopted the basic rules for the conduct of the investigations (e.g. the definition of the relevant market and the criteria of analysis of the anticompetitive conduct).⁹² However, the investigations were carried out by the competition authority of the country where the company that infringed the Protocol rules was based, not by the Committee itself.⁹³ The competition authority would refer the result of its investigation to the CDC,⁹⁴ which would deliver an opinion to the CCM. The latter was the only institution in charge of imposing fines, through the adoption of a directive which would later be enforced by the national competition authority.⁹⁵ Within this complex mechanism, all the decisions were adopted by consensus.

The substantive rules introduced by the Protocol were similar to those contained in the Decision 21/94, with the only exception that the Protocol did not introduce a system of merger control. In fact, according to Art.7, the Member States should adopt common rules in the field of merger control within two years after the entry into force of the Protocol. The same period of time was chosen to start negotiations concerning the introduction of a system of State aids control.⁹⁶ Nevertheless, twelve years after its signature these negotiations have never started. The Protocol itself has been formally in force since September 2000. In fact, according to Art.33, the Protocol would enter into force thirty days after the deposit of the second ratification. However, at the moment

⁸⁹ In fact, the Fortaleza Protocol did not provide for the establishment of any supranational competition authority in charge of the enforcement of the Protocol. The Protocol would be enforced by the committees composed by the representatives of the national competition authorities and Trade Ministries.

⁹⁰ *Supra*, Fortaleza Protocol, Art.8.

⁹¹ *Supra*, Fortaleza Protocol, Art. 10.

⁹² *Supra*, Fortaleza Protocol, Art. 14.

⁹³ *Supra*, Fortaleza Protocol, Art. 15.

⁹⁴ *Supra*, Fortaleza Protocol, Art. 19.

⁹⁵ *Supra*, Fortaleza Protocol, Art. 20.

⁹⁶ *Supra*, Fortaleza Protocol, Art. 32.

the ratifications of Argentina and Uruguay are still pending.⁹⁷ Although Paraguay has ratified the Protocol, the country still lacks national competition law. Therefore, in the lack of the Argentinean ratification the Protocol, though it is formally in force, de facto does not work. In order for the system of cooperation to function the Protocol needs to be ratified by two Mercosur Member States which have also adopted a national competition law at the internal level.⁹⁸ The Fortaleza Protocol is another example of the *hipertrofia normativa* which characterizes Mercosur, where several acts have been adopted during the years, but few of them have entered into force.

In spite of the lack of ratification by Argentina of the Fortaleza Protocol, the CDC continued to hold periodical meetings during the subsequent years. In 2002, the Committee adopted a Regulation concerning the functioning of the Fortaleza Protocol, where a number of details concerning the proceedings to enforce the Protocol were defined.⁹⁹ Nevertheless, the adoption of this Regulation did not modify the situation of non-enforcement.

After the failure of Fortaleza, a new approach was attempted between the two main trading partners within the Mercosur, Brazil and Argentina. In October 2003, a bilateral agreement of cooperation was signed with the objective ‘... de promover la cooperación entre las autoridades de las Partes en el area de denfesa de la competencia, incluyendo tanto la cooperación en la aplicación de las leyes de defensa de la competencia, como la cooperación técnica’ (‘... to promote the cooperation between the competition authorities of the Parties in the area of competition law, including both the cooperation in the enforcement of the competition laws, as the technical cooperation’).¹⁰⁰ Therefore, the scope of the agreement was relatively broad: it concerned both a system of bilateral cooperation following the example of the OECD guidelines of 1995 and a system of technical assistance. Moreover, the bilateral cooperation also concerned the area of merger control.¹⁰¹ The contracting parties of the agreement were CADE/SDE/SEAE for Brazil and the CNDC/Secretariat for Internal Trade for Argentina.¹⁰² However, the CNDC/Secretariat for Internal Trade would be in charge of enforcing the agreement until the establishment of the Competition Tribunal.¹⁰³ According to the Agreement, each party had 15 days to notify to the

⁹⁷ Lubambo de Melo, ‘Defesa da Concorrência no Mercosul: Entraves e Soluções Normativas’ (2007) 23 Boletín Latinoamericano de Competencia 19-36. See the Annex at p 35.

⁹⁸ *Ibid*, Annex. The Fortaleza Protocol entered into force on 8.9.2000. Brazil ratified the agreement on 19.9.2000, while Paraguay on 21.10.1997.

⁹⁹ Acuerdo sobre el Reglamento del Protocollo de Defensa de la Competencia del Mercosur. The text of the agreement is available at: Vol. 16 Boletín Latinoamericano de Competencia 191-195 (2003).

¹⁰⁰ Acordo de Cooperação entre a República Federativa do Brasil e a República Argentina Relativo á Cooperação entre suas Autoridades de Defesa da Concorrência na Aplicação de suas Leis de Concorrência. Agreement signed on 16.10.2003 in Buenos Aires. Art.1. The text of the agreement is available at: <http://www.cade.gov.br/internacional/Acordo_Cooperacao_Brasil_Argentina.pdf> (13.8.2008).

¹⁰¹ *Ibid*, Art. I (d).

¹⁰² *Ibid*, Art. I (b).

¹⁰³ *Ibid*.

partner authority of the opening of proceedings against anti-competitive practices or the notification of a concentration which was relevant for the competition law of the other country.¹⁰⁴ The agreement allowed the exchange of non confidential information between the parties¹⁰⁵ and the application of the principles of positive and negative comity.¹⁰⁶ Moreover, the officers of the authorities would meet at least twice per year.¹⁰⁷ The activities related to technical cooperation were contained in Article VIII, which provided for the possibility to organize joint conferences and training courses and exchange of officers. The Agreement needed the ratification by both States in order to enter into force.¹⁰⁸ However, so far neither Argentina nor Brazil have accomplished with this duty.¹⁰⁹

The model identified by the agreement of 2003 has been extended later at the Mercosur level, in order to overcome the lack of ratification of the Fortaleza Protocol. In 2004 the CCM adopted the Decision 04/04, concerning a system of cooperation among the competition authorities of the Mercosur countries in the area of anti-competitive practices.¹¹⁰ Similarly, two years later the Decision 15/05 established a system of exchange of information and consultation in the field of merger control.¹¹¹ These two Decisions were supported by the Argentinean delegation in a document concerning the revision of the Fortaleza Protocol. The document was presented in 2006 to the CCM.¹¹² According to the Argentinean delegation, the intergovernmental structure identified by the Fortaleza Protocol was one of the factors which created an obstacle to its ratification, due to the veto right granted to each Member State within the CDC.¹¹³ The Member States were required to implement the Decision 04/04 by 1st October 2004 and the Decision 15/05 by 1st January 2007.¹¹⁴ However, so far only Argentina

¹⁰⁴ *Ibid*, Art. II (4).

¹⁰⁵ *Ibid*, Art. III, X.

¹⁰⁶ *Ibid*, Art. V

¹⁰⁷ *Ibid*, Art. III (2).

¹⁰⁸ *Ibid*, Art. XIII

¹⁰⁹ *Supra*, Lubambo de Melo 2007, Annex

¹¹⁰ Consejo del Mercado Común, Decision n.04/04, Entendimiento sobre Cooperación entre las Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur para la Aplicación de sus Leyes Nacionales de Competencia. Decision adopted in Puerto Iguazú on 7.7.2004. The text of the Decision is available at: <<http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/Decision0404.pdf>> (14.8.2008).

¹¹¹ Consejo del Mercado Común, Decision n. 15/05, Entendimiento sobre Cooperación entre ls Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur para el Control de Concentraciones Económicas de Ambito Regional. Decision adopted in Córdoba on 20.7.2006. The text of the Decision is available at: <http://www.mecon.gov.ar/cndc/control_concentraciones%20_esp.pdf> (14.8.2008).

¹¹² Comisión de Comercio del Mercosur, document n. 34/06. Revisión del Protocolo de Defensa de la Competencia. Propuesta Argentina. The text of the document is available at: <http://www.mercosur.int/msweb//SM/Actas%20TEMPORARIAS/CCM/ATA_08_06/Anexo%20VIII%20%20DI%2034-06%20situaci%F3n%20revisi%F3n%20PDC%20_arg.pdf> (14.8.2008).

¹¹³ *Ibid*, point n.4.

¹¹⁴ *Supra*, Art. 2, Decision 04/04 and 15/05.

and Uruguay have implemented the Decision 04/04, while no country has transposed the Decision of 15/05.¹¹⁵

REASONS BEHIND THE FAILURES - NEED FOR A *DE MINIMIS* AGENDA

The previous part of the paper aimed at providing the readers with an overview concerning the functioning of the competition law system in Brazil and Argentina and the attempts concerning the introduction of a system of cooperation between the competition authorities of these two countries.

A number of articles have already discussed the reasons why the Fortaleza Protocol was not ratified by Argentina and which steps should be taken to overcome the current situation. For instance, Peña pointed out that the Protocol could not be effective without the negotiation of a regime of State aids rules. Art. 32 of the Protocol provided that such negotiations would start two years after its entry into force. However, there was no binding commitment to ensure that such negotiations would be concluded successfully.¹¹⁶ Moreover, common competition rules should be followed by the abolition of intra-block anti-dumping duties, replaced by the rules against predatory pricing contained in the Protocol.¹¹⁷ Finally, Peña showed his dissatisfaction in relation to the institutional system negotiated in Fortaleza, which granted veto power to each Member State. The latter risked nullifying the effective application of the Protocol when national concerns of industrial policy were at stake.¹¹⁸ The criticisms expressed by Peña reflect the official position of Argentina expressed in the proposal for review of the Fortaleza Protocol submitted by the Argentinean delegation to the Committee n.5.¹¹⁹ The latter suggested that the CMC's Decisions 15/05 and 04/04 could be the necessary steps of transitions before the full entry into force of the Protocol.¹²⁰

Brazilian authors have provided alternative explanations to the failure of the Fortaleza Protocol. For instance, Oliveira, former President of CADE in the second half of the 1990s, identified five factors which constituted an obstacle for entry into force of the Protocol:¹²¹ the lack of competition culture among the enterprises operating within Mercosur; the slow decision-making process provided by the Protocol; the strong asymmetries existing in the development of competition law at the national level among the Mercosur Member States; the lack of a supra-national system of merger control; and finally, the existence of inter-governmental institutions in charge of enforcing the

¹¹⁵Argentina implemented the Decision 04/04 at the internal level on 18.8.2004, while Uruguay on 7.10.2005. On the other hand, so far no country has transposed the Decision 15/05. *Supra*, Lubambo de Melo 2007, Annex.

¹¹⁶Peña, 'Una Política de Competencia Económica en el Mercosur' (2001) 12 Boletín Latinoamericano de Competencia 3-26.

¹¹⁷Meeting of the author with Prof. Felix Peña on 1.7.2008 in Buenos Aires.

¹¹⁸*Supra*, Peña.

¹¹⁹*Supra*, CCM 36/06.

¹²⁰*Ibid*.

¹²¹Oliveira, *Concorência. Panorama no Brasil e no Mundo*, Saraiva, São Paulo, 2001, pp 43-49.

Protocol.¹²² In 2001, another Brazilian author, Tavares de Araujo, argued for the establishment of an *agenda minima* in this area. He asserted that the far-reaching supra-national competition rules provided by the Fortaleza Protocol should be replaced by a more modest bilateral cooperation agreement between Argentina and Brazil, following the example of the OECD Guidelines of 1995.¹²³ Finally, more recently Lubambo de Melo has followed a similar approach, proposing the introduction of competition law rules at the Mercosur level within three steps in the short, medium and long term.¹²⁴

In conclusion, there is a shared consensus both in Brazil and in Argentina that the Fortaleza Protocol went too far. The CMC's Decisions 04/04 and 15/05 and the bilateral agreement between Brazil and Argentina constituted an answer to this claim. Nevertheless, this conclusion leads to another question: why have these mechanisms of cooperation proven to be unsuccessful for the moment? Why has the *agenda minima* mentioned by Tavares de Araujo been unsuccessful? Why have neither Argentina nor Brazil ratified the bilateral agreement of 2003, while Argentina only implemented the CMC's Decision 04/04? These questions can be reconstituted into the more general question mentioned in the title of the paper: why does the bilateral cooperation between the competition authorities of the developing countries not work? This paper will try to answer this question by comparing the views expressed by the officers and the Commissioners of the Argentinean and of the Brazilian competition authorities interviewed by the author during the previous months.

In Brasilia, the general feeling is that the main obstacle to the cooperation with Argentina is the lack of independence of the CNDC from the Government. According to Patricia Agra, adviser of CADE President for the OECD and the Mercosur relations, 'each decision (of the Argentinean authorities) seems a governmental rather than a State decision'.¹²⁵ According to Agra, a bilateral cooperation between competition authorities can work only when there is a certain degree of 'confidence', which at the moment is lacking between Brazil and Argentina. The abovementioned authors emphasized that the cooperation between the competition authorities of Brazil and Argentina did not work because the objectives of the Fortaleza Protocol had been too ambitious and thus, an *agenda minima* was required. However, as emphasized in the previous sections, during the last years the difference in the development of the Argentinean and the Brazilian system of competition law has broadened. While the Brazilian competition authorities speeded up the time of merger review in order to focus its human resources on cartel investigations and showed independence from the executive branch in a number of sensitive cases, Argentina followed an opposite road.

¹²²*Ibid.*

¹²³Tavares de Araujo, 'Política de Concorrência no Mercosul: uma Agenda Mínima', in Chudnousky, Fanelli, *El Desafío de Integrarse para Crecer. Balances y Perspectivas del Mercosur en su primera Década*, Siglo Veintiuno de Argentina Editores, Buenos Aires, 2001, pp 145-160.

¹²⁴*Supra*, Lubambo de Melo 2007.

¹²⁵Meeting of the author with Patricia Agra, adviser of CADE President for the OECD and Mercosur relations, in Brasilia on 4.6.2008.

According to Ana Paula Martinez, head of the competition law division of the SDE, a cooperation agreement should serve as ‘recognition of a cooperation which already exists’.¹²⁶ The existence of a cooperation agreement is an additional asset, which may smooth the cooperation thanks to a number of institutional arrangements (e.g. requiring the parties to meet a minimum number of times per year), but it cannot work if the Commissioners and the officers of the two authorities do not know each other and if there is no mutual confidence.¹²⁷ For instance, during the last year the SDE has provided technical assistance to *Fiscalía Nacional Económica* (FNE), the Chilean competition authority, in the field of cartels investigations.¹²⁸ In particular, the SDE organized a number of seminars in Santiago during 2007, in order to explain to the local authority the functioning of the Brazilian system of leniency for cartels. A training session was also organized by the SDE in July 2008 for a number of officers of the FNE. However, only in November 2008 the SDE signed a formal agreement of cooperation with the FNE.¹²⁹

The paradox is that SDE provided technical assistance to the FNE before signing any cooperation agreement with the authorities of Chile. At the same time, Article VIII of the bilateral agreement with the Argentinean authorities states that the Parties should provide technical assistance to each other, but as we know that provision has never been enforced. In conclusion, a bilateral agreement comes as a medium term step, rather than at the beginning of a partnership between two competition authorities. From this point of view, the agreement of 2003 and the CMC Decisions 04/04 and 15/05 seem to have been concluded before the establishment of any informal cooperation between the two authorities. This is why the *agenda minima* mentioned by Tavares Araujo has not been successful.

The Commissioners of the CNDC did not openly admit that the cooperation with Brazil does not work because there is no mutual confidence. They recognize the existence of informal contacts established with Brazilian colleagues during some events within international *fora*, such as the periodical meetings organized by OECD¹³⁰ and the

¹²⁶ Meeting of the author with Ana Paula Martinez, head of the competition law division of the SDE, in Brasilia on 2.6.2008.

¹²⁷ *Ibid*

¹²⁸ SDE’s press release, Governo Brasileiro Capacita Agentes para Combate A Cartéis no Chile. Published on 8.8.2008. The text of the press release is available at: <<http://www.mj.gov.br/sde/main.asp?View=%7BDF282882%2DD0CB%2D4D38%2D98C8%2D0EA6B037E370%7D&Team=¶ms=itemID=%7B16F13690%2DAE3D%2D4F73%2D95F7%2DD084FC969AB4%7D%3B&UIPartUID=%7B2218FAF9%2D5230%2D431C%2DA9E3%2DE780D3E67DFE%7D>> (17.8.2008).

¹²⁹ *Ibid*.

¹³⁰ The OECD Committee for Competition Law and Policy organizes every year a Latin America Competition Forum and a Global Forum on Competition, where the representatives of the competition authorities of the non OECD Member States are invited to join. For further information see: <http://www.oecd.org/document/7/0,3343,en_2649_34535_31586695_1_1_1_37463,00.html> (17.8.2008) <http://www.oecd.org/document/28/0,3343,en_40382599_40393118_40424028_1_1_1_1,00.html> (17.8.2008).

ICN.¹³¹ According to Povolo, one of the current CNDC Commissioners, the relationship with the Brazilian institutions ‘es quasi una relación personal, más que institucional’ (‘it is almost a personal, rather than an institutional relation’).¹³² However, Mauricio Butera, former CNDC Commissioner, recognized that these contacts have never been crucial for solving a case investigated both in Brazil and in Argentina.¹³³ He did not remember any case when he picked up the phone to call an officer of one of the Brazilian competition authorities in order to discuss a case.

The meetings within the international conferences concerning competition law are often the only opportunity for the Commissioners of the authorities of the developing countries to establish contacts with their colleagues from other authorities. A shared opinion both in Brasilia and Buenos Aires was that the work of these international organizations should be evaluated more in terms of the personal contacts that these occasions allow to be established, rather than in terms of the harmonization of the national competition laws and regulations. However, these events may be useful to create mutual confidence only when a sufficient number of officers and Commissioners participate in these events, which is not always the case of Brazil and Argentina. In the case of Brazil, both CADE, SDE and SEAE participate in these *fora*, each one representing Brazil where a topic related to its field of activities is discussed.¹³⁴ For instance, the SDE and SEAE are now members of the ICN working group on cartels investigations.¹³⁵ On the other hand, CADE usually represents the three authorities in the *fora* where issues of general competition policy are discussed.¹³⁶ According to Art. 8 of the Law 8884/94, the external representation of CADE is assured by the President. As a consequence, it is always the President and some of the officers part of his/her Cabinet to participate in the meetings of the CT5 and in the majority of the events organized by the ICN and the OECD. As a consequence, the other Commissioners have fewer occasions to establish contacts with colleagues of foreign competition authorities.¹³⁷ For instance, at a meeting in Brasilia with Mr Furquim, one of the current CADE Commissioners, the latter recognized that ‘as Commissioner, I do not have the same international experience as the President’.¹³⁸ If the CADE *Conselheiro-Relator* in charge of investigating an international cartel which was sanctioned in other jurisdictions wanted to ask for information from the foreign authority, he should ask

¹³¹Meeting of the author with Mauricio Butera, former CNDC Commissioner, in Buenos Aires on 8.5.2008.

¹³²Meeting of the author with Diego Povolo, CNDC Commissioner, in Buenos Aires on 30.4.2008.

¹³³*Supra*, meeting with Butera.

¹³⁴Meeting of the author with Emmanuel Joppert Ragazzo, head of the competition law division of the SEAE, in Brasilia on 6.6.2008.

¹³⁵<http://www.internationalcompetitionnetwork.org/media/library/Cartels/ICN%20SG2%20Contact%20List.pdf> (17.8.2008).

¹³⁶For instance, Elisabeth Farina, CADE President until August 2008, has been part of the ICN Steering Group for the last year. <<http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/steering-group/members>> (17.8.2008).

¹³⁷Meeting of the author with Paulo Azevedo Furquim, CADE Commissioner, in Brasilia 5.6.2008.

¹³⁸*Ibid.*

the Cabinet of the President for getting a contact with an officer of the foreign authority.¹³⁹ However, especially in the area of merger control that is often not the case, due to the time constraints.¹⁴⁰ CADE Commissioners often look at a copy of the decision on the web-site of the foreign authority, but they seldom contact personally the foreign officer who conducted the investigations.¹⁴¹ This is true especially in the area of merger control, due to the time constraints that CADE/SDE/SEAE self-imposed during the last years to respect the time of review provided by the Law 8884/94.¹⁴² In the case of SDE and SEAE, the heads of the competition law units usually establish international contacts during the OECD/ICN events that they attended. In the past, the latter have been exploited to coordinate their enforcement activities with other competition authorities in a number of investigations concerning international cartels.¹⁴³

Similarly, in Argentina it is the President of the CNDC who is to represent the institution within the Committee n.5, while one of the Commissioners has usually followed the work of the OECD and ICN. Moreover, in the case of the CNDC the problem of the lack of international contacts is also increased by the lack of an officer with the competence to keep international relations with other authorities, due to the small size of the authority.¹⁴⁴ On the other hand, in CADE two officers in the Cabinet of the President are responsible for the ICN and for the OECD/Mercosur relations, though they also have to work on the cases of enforcement assigned to the President when he/she performs the task of *Conselheiro-Relator*.¹⁴⁵

The conclusion reached after interviewing the officers and the Commissioners of the Argentinean and of the Brazilian competition authorities is that their bilateral cooperation does not work due to the lack of confidence from the Brazilian side in the objectiveness of the functioning of the Argentinean system. The previous pages showed that such fears are justified. Another reason which creates obstacles to the development of this partnership is the lack of personal contacts between the officers and Commissioners of the two authorities. This problem is not only caused by the lack of mutual confidence, but also by the fact that only a limited number of Commissioners participate in the events organized by international *fora*. The latter are recognized as the best place to establish international contacts, the first step to establishing confidence between different competition authorities and thus, the background condition for the

¹³⁹ *Supra*, meeting with Agra.

¹⁴⁰ *Supra*, meeting with Furquim.

¹⁴¹ Meeting of the author with Murilo Otávio Lubambo de Melo, officer in the Cabinet of Commissioner Furlan, in Brasilia on 4.6.2008.

¹⁴² Meeting of the author with Camila Safatle, senior officer in the merger control unit of the SDE, in Brasilia on 2.6.2008.

¹⁴³ *Supra*, meeting with Ana Paula Martinez

¹⁴⁴ The CNDC counts today on around 60 employees: 19 economists, 11 lawyers and 30 administrative officers. *Supra*, meeting with Povolo.

¹⁴⁵ *Supra*, meeting with Agra.

conclusion of a bilateral agreement of cooperation. In view of these conclusions, probably a *de minimis agenda* of cooperation, even less ambitious and more cautious than the *agenda minima* proposed by Tavares de Araujo, should be advised in the case of Brazil and Argentina. A bilateral agreement which provides for consultation, exchange of information and cooperation will never be enforced if the two authorities are at different levels of development, as in the case of Brazil and Argentina at the moment. As a consequence, a more realistic solution would probably be a shorter agreement, establishing the institutional framework necessary to organize joint seminars/workshops and for the exchange of officers between the Brazilian and the Argentinean institutions. In practice, an agreement is limited for the moment to providing technical assistance to the Argentinean authorities. Obviously, it is more difficult for a competition authority of a developing country, like the Brazilian ones, to provide technical assistance to a partner authority, due to the limited internal resources. However, the previous pages showed that at the moment Brazil has a great deal of knowledge to share with Argentina, such as in the field of the leniency and settlements for cartels. In particular, the competition authority of an emerging economy can show to a partner authority of another developing country how it overcame the hostile environment which usually characterizes the fight against cartels in these countries, where the judiciary, other bodies of the State administration and the entrepreneurs are often hostile to an effective enforcement of competition law. Moreover, SDE and the SEAE could show to the CNDC how to work autonomously in spite of their position within two Ministries. As mentioned above, the SDE is already providing technical assistance to the Chilean authorities, why not replicate the same experience with Argentina. Finally, the exchange of officers, at the moment non-existent, should be the cornerstone on which building that ‘epistemic community’ mentioned by Lubambo de Melo in his article as one of the short terms objectives before introducing competition law at the Mercosur level.¹⁴⁶ However, as we all know, technical assistance is not the solution to all the problems; without an internal development of the Argentinean system of competition law, cooperation with Brazil will not be possible.

CONCLUSIONS: LESSONS FOR OTHER DEVELOPING COUNTRIES

The case study focussed on two emerging economies which have two closely connected economies in terms of bilateral trade and cross-border acquisitions of companies. Moreover, like the majority of the developing countries, they have been enforcing a modern competition law for more than ten years. However, the competition authorities of Argentina and Brazil, in spite of a number of attempts at the Mercosur and at the bilateral level, still fail to cooperate with each other. The lessons drawn from this research may be of interest for the competition authorities of other emerging economies:

- 1) It is well known that the competition authorities of the developed countries are not used to cooperating with those ones of the developing countries, due to the fact

¹⁴⁶ *Supra*, LUBAMBO DE MELO M.O. 2007.

they do not trust them. However, the same is true between the competition authorities of different developing countries, which are at different stages of development of their national competition law.

- 2) One way to build such confidence is to encourage the personal contacts between the officers of the different authorities. International *fora*, such as the meetings organized by ICN and the OECD, are often the only opportunities for the officers of the authorities of the developing countries to meet their foreign colleagues. Participation in these meetings should be encouraged as much as possible, even if only from an observer point of view. However, a certain degree of turnover should be achieved, in relation to who attends these meetings. All the Commissioners should be encouraged to periodically participate to these meetings, in order to allow them to establish contacts with foreign colleagues. These contacts will be useful for solving multi-jurisdictional cases in the future.
- 3) Although one of the key problems of the competition authorities of the developing countries is the lack of human resources, one permanent officer should be in charge of dealing with international cooperation issues. The latter could become the reference point when foreign authorities try to establish a contact with that authority. In order to solve the problem of lack of human resources, the selected officer could split its working time between enforcement cases and international cooperation issues.
- 4) The technical cooperation between the competition authorities of developing countries is possible and it should be encouraged. Institutional problems related to the lack of independence from the executive, bad functioning of the judicial system, lack of human and financial resources are shared by all the competition authorities of the developing countries during the early stages of activity. The authorities which are at a more advanced level of development could show their experience to their partner authorities, taking into consideration these institutional problems, unknown by the authorities of the western countries.
- 5) The final conclusion is that any bilateral agreement between the competition authorities of the developing countries should be anticipated by a *de minimis* agenda with the objective of organizing workshops, conferences and exchange of officers. Only after a certain number of years, when the confidence and the personal links mentioned above are established and when the two authorities are at a comparable level of development, the two authorities will also be able to begin exchanging information. The national competition authority needs to meet some basic standards before significant international cooperation is likely to be acceptable to other countries. The body administering the competition rules will need to be impartial and free from external political pressures and corruption. It must also have the legal, human and financial resources to be able to effectively implement national competition law and fulfil its international obligations. The law must be applied promptly and without unnecessary expense. Complainants must be able to inexpensively make a complaint, feel that the complaint actually will be investigated.

Procedures must be fair and allow defendants to respond to all allegations and appeal against adverse decisions. The decision of courts and regulators must be transparent and reasoned and outcomes of cases must be reasonably predictable. The organization of workshops and conferences could strengthen the capabilities of the weakest competition authority in the partnership relationship. When the conditions mentioned above are met by both authorities, a bilateral agreement based on the OECD guidelines of 1995 will be concluded to institutionalize such partnership. Finally, the establishment of regional competition rules, such as the Fortaleza Protocol, should be a long term objective, once the bilateral cooperation has been consolidated.