Competition Policy and MERCOSUR

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CIP
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreward</td>
<td>v</td>
</tr>
<tr>
<td>Preface</td>
<td>vi</td>
</tr>
<tr>
<td>Abstract</td>
<td>vii</td>
</tr>
<tr>
<td>Executive Summary</td>
<td>viii</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>The Scope of Competition Policy</td>
<td>2</td>
</tr>
<tr>
<td>Harmonization</td>
<td>4</td>
</tr>
<tr>
<td>MERCOSUR Competition Policy Initiatives</td>
<td>6</td>
</tr>
<tr>
<td>Nexus with Other Policy Areas</td>
<td>7</td>
</tr>
<tr>
<td>Other Initiatives Related to Competition Policy</td>
<td>11</td>
</tr>
<tr>
<td>Conclusion</td>
<td>13</td>
</tr>
<tr>
<td>II. MERCOSUR Legal and Institutional Foundation</td>
<td>14</td>
</tr>
<tr>
<td>Institutions</td>
<td>14</td>
</tr>
<tr>
<td>Dispute Resolution Procedures</td>
<td>16</td>
</tr>
<tr>
<td>Decision-Marking and Legal Hierarchies</td>
<td>17</td>
</tr>
<tr>
<td>III. Argentina</td>
<td>20</td>
</tr>
<tr>
<td>The Economy</td>
<td>20</td>
</tr>
<tr>
<td>Treaty and Integration Law in the Argentine Legal System</td>
<td>25</td>
</tr>
<tr>
<td>Competition Policy</td>
<td>25</td>
</tr>
<tr>
<td>Enforcement of the Current Competition Law</td>
<td>28</td>
</tr>
<tr>
<td>The Proposed Amendments to the Competition Law</td>
<td>29</td>
</tr>
<tr>
<td>Current Consumer Protection Policy</td>
<td>30</td>
</tr>
<tr>
<td>Anti-Dumping and Countervailing Measures</td>
<td>32</td>
</tr>
<tr>
<td>Intellectual Property Policy</td>
<td>35</td>
</tr>
<tr>
<td>Foreign Investment Policy</td>
<td>36</td>
</tr>
<tr>
<td>Bilateral Investment Treaties</td>
<td>37</td>
</tr>
<tr>
<td>Bankruptcy Policy</td>
<td>39</td>
</tr>
<tr>
<td>Conclusions and Recommendations</td>
<td>41</td>
</tr>
<tr>
<td>IV. Brazil</td>
<td>47</td>
</tr>
<tr>
<td>Economic Background</td>
<td>47</td>
</tr>
<tr>
<td>Applications of MERCOSUR Norms under Brazilian Law</td>
<td>49</td>
</tr>
<tr>
<td>Competition Policy</td>
<td>50</td>
</tr>
<tr>
<td>Nexus with the Privatization Process</td>
<td>59</td>
</tr>
<tr>
<td>Key Legal Concepts</td>
<td>60</td>
</tr>
<tr>
<td>Consumer Protection Policy</td>
<td>61</td>
</tr>
<tr>
<td>Trade Policy and Competition</td>
<td>63</td>
</tr>
<tr>
<td>Intellectual Property Policy</td>
<td>64</td>
</tr>
<tr>
<td>Foreign Investment Policy</td>
<td>66</td>
</tr>
<tr>
<td>Bankruptcy Policy</td>
<td>68</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>V. Paraguay</td>
<td>74</td>
</tr>
<tr>
<td>Economic Background</td>
<td>74</td>
</tr>
<tr>
<td>Competition Policy</td>
<td>75</td>
</tr>
<tr>
<td>Foreign Investment Policy</td>
<td>77</td>
</tr>
<tr>
<td>Intellectual Property Policy</td>
<td>78</td>
</tr>
<tr>
<td>Bankruptcy Policy</td>
<td>79</td>
</tr>
<tr>
<td>Conclusions and Recommendations</td>
<td>80</td>
</tr>
<tr>
<td>VI. Uruguay</td>
<td>83</td>
</tr>
<tr>
<td>The Economy</td>
<td>83</td>
</tr>
<tr>
<td>Place of Treaty and Integration in the Uruguayan Legal System</td>
<td>84</td>
</tr>
<tr>
<td>Competition Policy</td>
<td>85</td>
</tr>
<tr>
<td>Consumer Protection Policy</td>
<td>85</td>
</tr>
<tr>
<td>Anti-Dumping and Countervailing Measures</td>
<td>86</td>
</tr>
<tr>
<td>Intellectual Property Protection</td>
<td>86</td>
</tr>
<tr>
<td>Foreign Investment Regulation</td>
<td>88</td>
</tr>
<tr>
<td>Bankruptcy Law</td>
<td>88</td>
</tr>
<tr>
<td>Conclusions and Recommendations</td>
<td>90</td>
</tr>
<tr>
<td>VII. MERCOSUR Harmonization Efforts</td>
<td>93</td>
</tr>
<tr>
<td>Competition Policy</td>
<td>93</td>
</tr>
<tr>
<td>Consumer Protection Policy</td>
<td>96</td>
</tr>
<tr>
<td>Anti-Dumping and Countervailing Measures</td>
<td>97</td>
</tr>
<tr>
<td>Intellectual Property Protection Policy</td>
<td>97</td>
</tr>
<tr>
<td>Foreign Investment Regulation</td>
<td>98</td>
</tr>
<tr>
<td>Bankruptcy Policy</td>
<td>100</td>
</tr>
<tr>
<td>Conclusions and Recommendations</td>
<td>101</td>
</tr>
<tr>
<td>References</td>
<td>104</td>
</tr>
</tbody>
</table>
FOREWORD

The core objective of competition policy in nearly all jurisdictions is to preserve and protect the process of competition, not competitors, with a view to maximizing economic efficiency by achieving efficient market outcomes in the form of lower consumer prices and better quality products. Competition policy can be defined narrowly to include the body of laws/regulations and institutions that govern business practices relating to conduct (both vertical and horizontal) and structure. But it is also viewed in a broader context to include the range of Government policies that impact competition at both the local and national level including consumer protection, trade liberalization (import competition) and the use of anti-dumping and countervailing duty measures, foreign investment regulation, the protection of intellectual property rights and bankruptcy with respect to the need for the orderly liquidation of non-viable enterprises from the market.

This paper, the first of its kind, provides both an assessment of the legislative/institutional and enforcement effectiveness of the competition framework, broadly defined, of the four MERCOSUR countries and also examines the scope and potential for harmonization of competition policies within MERCOSUR, drawing on as appropriate analogies from other regional integration efforts such as the European Union.

Sri-Ram Aiyer
Director
Finance, Private Sector & Infrastructure (FPSI)
Latin America and the Caribbean Region
PREFACE

This paper was prepared by Malcolm Rowat, Michele Lubrano, and Rafael Porrata Jr., as part of the World Bank's Latin American and Caribbean Country Department I MERCOSUR Project. The views expressed are those of the authors and do not necessarily represent the opinions or positions of the World Bank or its affiliates. The authors wish to express thanks to a number of reviewers who made very helpful comments including Antonio Estache, Homi Kharas, Shyam Khemani, Paul Meo, Alan Winters and Douglas Webb. Karen Ravenelle provided the secretarial support for the preparation of the report.
ABSTRACT

Over the past decade, Latin America has undergone profound economic and structural changes fueled by fiscal crises, rising expectations from citizens and the globalization of markets that has put increasing pressure on virtually all sectors of the economy, both public and private, to become more efficient.

Initially state reforms concentrated on macroeconomic and balance of payments adjustments, the restructuring of incentives and relative prices and privatization. These “stage one” reforms were capable of being accomplished very quickly and in a largely technocratic fashion. However, “stage two” reforms were needed to support the longer-term institutional adjustments that are needed to consolidate and sustain these reforms.

At the heart of the “stage two” reforms is the need to develop a transparent, predictable and accountable legal and regulatory framework (both laws and institutions) particularly for private sector development. While such a framework has many potential components, one of the most crucial is the need to ensure that market forces operate in a fair and efficient manner in the context of commercial activities, be they public or private. Protecting the process of competition requires rules as well as administrative and enforcement institutions to deal with both conduct (e.g. price fixing, bid rigging, abuse of dominance, etc.) and structure (criteria for mergers linked to levels of concentration). Other policy elements of tangential importance to competition include that of consumer protection, international trade, foreign investment regulation, intellectual property protection and bankruptcy (exit policy).

Over the past 5-6 years, a large number of Latin America countries have either created or modernized their competition policy frameworks, which is of particular importance given the high levels of industrial concentration compared to OECD averages. Some of this activity has been driven partially by the growth of sub-regional integration agreements. A case in point is that of the competition policy framework of MERCOSUR, the subject of this paper, involving Argentina, Brazil, Paraguay and Uruguay as founding members, in addition to Chile and Bolivia as associate members. The paper analyzes and makes concrete recommendations both with respect to the legal/ institutional/enforcement competition framework at the national level for the four founding member countries in addition to the harmonization potential for competition policy within MERCOSUR.
INTRODUCTION

MERCOSUR, the “Common Market of the Southern Cone” was formed on March 26, 1991 by the Treaty of Asuncion and currently consists of Argentina, Brazil, Paraguay and Uruguay, with Chile and Bolivia becoming associate members as of October 1, 1996 and March 1, 1997, respectively. Its purpose was to establish a common market which would include the free movement of goods, services and factors of production; the elimination of customs duties and non-tariff restrictions; the establishment of a common external tariff and the adoption of a common trade policy; and the coordination of macroeconomic and sectoral policies. The fundamental elements of a common market were achieved by January 1, 1995 with the establishment of a common external tariff and the reduction in stages of internal tariffs subject to a number of significant subsector exceptions.

Amongst the many topics foreseen to be the subject of coordination at the MERCOSUR level was that of competition policy. This can be defined narrowly in accordance with the practice of the majority of OECD countries as the body of laws and regulations governing business practices (horizontal or vertical agreements between enterprises, abuse of dominant positions, monopolization, mergers and acquisitions). This is the focus of the latest MERCOSUR Protocol on competition policy (para VI.). However, it is often viewed in a broader context to include the range of government policies that impact competition both at the local and national level, including consumer protection, trade liberalization (import competition) and the use of anti-dumping and countervailing duty measures, foreign investment regulation, the protection of intellectual property rights that can affect competition both with respect to licensing restrictions and levels of foreign and domestic investment, and bankruptcy with respect to the need for the orderly liquidation on non-viable enterprises from the market (exit policy), to cite the most important.

This paper will provide an assessment of the legislative/institutional and enforcement effectiveness of the competition (antitrust) framework of the four MERCOSUR countries including specific recommendations for reform, drawing analogies where appropriate to the experience of the European Union and NAFTA. This will include the important interface issues between competition policies and regulated industries. It will also provide additional assessments of the related policy areas (consumer protection, trade, foreign investment regulation, intellectual property and bankruptcy) that have an impact on competition policy. Finally, the report will analyze the desirability and scope for harmonization/convergence of competition policies within the MERCOSUR context as well as the role of MERCOSUR institutions, both in shaping competition policy and in dispute resolution.
COMPETITION POLICY IN MERCOSUR

The core objective of competition policy in nearly all jurisdictions is to preserve and protect the process of competition, not competitors with a view to maximizing economic efficiency (both allocative and dynamic) by achieving efficient market outcomes in the form of lower consumer prices and better quality products.

In May of 1995, the MERCOSUR Trade Council approved a draft Protocol for the Defense of Competition within MERCOSUR which contained a list of acts of conduct that should be prohibited by national law as well as provisions regarding concentration acts that result in at least a 20% share in the relevant market. Such initial attempts at harmonization are vital, particularly given the rapid increase in mergers and acquisitions involving Brazilian and Argentine companies (the two large members of MERCOSUR), as well as through outside investors and the incompatibility of present legislation in the two countries (e.g. Argentina has no merger guidelines) while Paraguay and Uruguay have no competition law at all.

This was superseded by the approval of a “final” protocol (Decision No. 18/96) for the defense of competition within Mercosur on December 17, 1996 by the Mercosur Trade Council. This protocol focuses directly on public and private entities within

INSTITUTIONAL FOUNDATION OF MERCOSUR

The Treaty of Asuncion and the Ouro Preto Protocol create six different institutions that are charged with implementing MERCOSUR’s principles and purposes. These include the Council, the premier political institution that has supervisory authority over all other MERCOSUR institutions and can issue decisions that are obligatory for the member states’ institutions; the Common Market group, the “executive organization” of the Community that has both policy-making (it can issue binding resolutions on member states) and administrative responsibilities (budget preparation); the Commerce Commission along with its 11 sub-working groups that are responsible for monitoring the application of the common commercial policy through Directives (binding) or Proposals (non-binding) on member states as well as resolve under the Brasilia Protocol on Dispute Resolution complaints by individual/member states if direct negotiations had failed (if this also fails then ad hoc arbitration is required). Other institutions include the Joint Parliamentary Commission, the Legislative body; the Forum, an advisory body, and the Secretariat, a small (30 professionals) administrative body with no substantive decision-making power.

The MERCOSUR legal system consists of the Treaty of Asuncion, its Protocols, Annexes and related agreements. The effectiveness of these treaties and the hierarchy given them in each member state depends on the national law of each member state. In the case of Argentina, international treaties such as MERCOSUR have a higher place in the legal hierarchy than national laws, whereas in the case of the other three countries, the place is equal with national laws. The second “level” of the MERCOSUR legal system consists of the Council Decisions, Group Resolutions and MCC Directives, which seek to create a
common external tariff, customs procedures and commercial policy by harmonizing disparate national rules. This “administrative law” of the MERCOSUR community does not become effective until it is incorporated into each member state’s legal system in accordance with their national legislation.

ARGENTINA

The country’s historical legacy of high levels of import protection and inward-looking and partly subsidized industry led to high levels of concentration (e.g. 4-plant concentration ratios of between 33% and 80% in 15 major subsectors in 1985) and relative inefficiency, which may even have been exacerbated over the past 10 years as a result of some privatization. As a result, Argentina is in great need of an effective competition policy.

Though a competition law has been on the “books” since 1919 (most recently amended in 1980), its effectiveness has been hampered for a number of reasons: (a) lack of ‘per se’ prohibitions against price-fixing, bid-rigging, etc., (b) lack of provisions for mergers and acquisitions including as part of the privatization process; (c) a shortage of staff and budgetary resources in the Competition Commission; (d) the lack of independence of the Competition Commission; (e) and the lack of understanding and support by the public as well as the business community on the merits of competition policy, all of which should be rectified.

In related policy areas, Argentina has led MERCOSUR in developing a modern bankruptcy policy system giving creditors substantially increased property rights with the passage of its new law in August 1995 in addition to foreign investment regulation. It has also developed an effective separate injury determination with respect to dumping policy. Areas, however, that require further work include consumer protection policy (e.g. imposition of significant fines) and intellectual property policy (e.g. inclusion of trade secrets).

BRAZIL

Like Argentina, Brazil has, until recently, been characterized by public sector dominance, protectionism, heavy regulation of private industry, high industrial concentration and the utilization of price controls as a mechanism of controlling competition and inflation. The important reforms of recent years, including the passage of a new competition law in 1994, have cut away much of this and set the stage for a more dynamic and competitive Brazilian economy. For example, merger transactions within Brazil increased from US$1 billion in 1994 to US$4.2 billion in 1995 (out of a total of US$14.8 billion for all of Latin America). Overall, Brazil’s competition law provides comprehensive coverage of the major issues including an extraterritorial “effects” test; private rights of action; use of consent decrees; liability for individuals as well as corporations, which permits the competition agencies (CADE and SDE) to examine public as well as private actions including privatization transactions; and a 20% market threshold for merger analysis. Areas that could be improved include a better definition of the relevant market; use of pre-
merger notification for merger control; a deemphasis on the possible use of compulsory licenses (except perhaps as a remedy in a merger case) and price controls; greater involvement in the privatization process; and a simplification of the process through innovative rule-making.

The initial implementation of the new law in 1994 proved troublesome due partly to lack of resources of the main adjudicating agency (CADE) as well as unhappiness with some of its decisions by the private sector to the point where a backlash had developed in the private sector that sought to lobby for an amendment to the law to reduce CADE’s power. This was unsuccessful, and indeed by virtue of an energetic new head of CADE, six new Commissioners, and resources to begin the process of building up a permanent staff in addition to technical support from fixed contracts with outside agencies, CADE is beginning to build up institutional capacity to fulfill its functions. It has also sought to build a more effective relationship with the other agencies involved in competition policy, SDE (investigatory) and Ministry of Finance (MoF).

In related policy areas, Brazil has effectively implemented a comprehensive consumer protection law (1990), and has modified its anti-dumping law (1995) to bring it into line with WTO requirements, though it still does not distinguish between Mercosur and non-Mercosur countries. In the area of intellectual property protection, the new law passed in May 1996 goes a long way to provide the kind of protection that both foreign and domestic investors have been clamoring for. The major policy shortcoming lies in the area of bankruptcy where an archaic law continues to deny creditors adequate protection against one-sided insolvency proceedings which undermines access to credit and at the same time prevents the liquidation of otherwise non-viable companies.

PARAGUAY

Paraguay’s entry into Mercosur precipitated the need for an overhaul of economic legislation given the historical record of public sector industrial concentration as well as concentration in importation and internal distribution of goods including through smuggling. Moreover, Paraguay has historically had a relatively weak public sector institutional capacity and ineffective court system.

Paraguay has prepared draft legislation for a first competition law which, while a step in the right direction, suffers from a number of shortcomings including: (a) limiting the definition of the market to Paraguay; (b) excluding the need to review privatization transactions; (c) the need to set priorities to focus on the most egregious offenses; and (d) given the lack of experience with independent agencies, the need to place the competition agency within a ministry that would have an objective view of competition issues (e.g. Finance or Justice). Also, to improve the likelihood of enforcement, consideration should be given to the creation of specialized courts including special training for competition judges.

Similarly, Paraguay needs to develop a modern legislative framework in the areas of consumer protection, intellectual property and bankruptcy. In the case of foreign
investment regulation, while its legal framework is more than adequate, foreign investment interest has been modest and declining attributed in part to the less than transparent business practices, significant corruption in government agencies and uncertainty of enforceability of contracts due to a lack of confidence in the judiciary.

**URUGUAY**

Uruguay's economy has historically been characterized by the large size of its public sector, particularly in infrastructure and some manufacturing coupled with pervasive government regulation that controls many inputs to the public sector, itself characterized by a highly oligopolistic structure. This environment suggests the need for a comprehensive competition policy framework both at the national level and within the framework of MERCOSUR. Therefore, since the MERCOSUR Protocol is in addition, and not a substitute to national competition laws, Uruguay should pass a domestic competition law using the 'Basic Elements' and Brazil precedent duly adjusted to local circumstances.

In related areas such as consumer protection policy, there is a need to codify, simplify and modify its legislation and to create a public agency to monitor implementation and provide information to consumers. Secondly, Uruguay should support the harmonization of a MERCOSUR Anti-Dumping Code for non-member countries.

In the area of intellectual property protection, there is a need for modernization of patent legislation (inclusion of trade secrets, extent of ten to 20 years, inclusion of pharmaceutical products etc. and upgrading of the Directorate of Industrial Property); trademark legislation (to prevent speculative registration); and copyright legislation (very broad educational exemption); improve enforcement effectiveness particularly given the lack of judicial knowledge.

In the area of foreign investment regulation, there is a need for new legislation to provide clear norms and minimal restrictions on investment compatible with efficiency. While in the area of bankruptcy policy, modern legislation similar to that of Argentina is required.

**MERCOSUR HARMONIZATION EFFORTS**

**Competition Policy.** On December 14, 1994, the MERCOSUR Council, in its Decision 21/94, approved a document entitled “Basic Elements of the Defense of Competition in MERCOSUR” (“Basic Elements”). This document was intended to harmonize the member states’ national laws in the area of competition and to create a scope for coordinated action by the member states to prevent anticompetitive practices. Decision 21/94 also requested the member states to submit detailed information concerning the compatibility of their national current or proposed competition law with the basic elements. This information was to serve as the starting point in the drafting process of a protocol on the defense of competition in MERCOSUR.
In May 1995, the MERCOSUR Commerce Commission approved a draft Protocol for the Defense of Competition within MERCOSUR. The draft Protocol first, in a verbatim adoption from the Basic Elements, prohibits all concerted agreements and practices entered into by enterprises and whose purpose or effect is to impede, restrict or distort competition or the free access to the market in production, processing, distribution and marketing of goods and services throughout all or part of MERCOSUR and adopts the examples of these practices set forth in the Basic Elements. Secondly, again in a verbatim adoption of the language of the Basic Elements, the Protocol forbids the abuse of a dominant position and adopts the examples of these practices set forth in the Basic Elements.

The draft Protocol does not appear to make the distinction as to whether it seeks (a) to harmonize the law of the member states by making certain types of practices prohibited, or (b) to make certain types of practices prohibited only if (in the language of the Protocol) they affect competition “in all or part of MERCOSUR”. This distinction is critical because two of the MERCOSUR member states (Paraguay and Uruguay) have no competition law regimes as yet and those of the other two member states (Argentina and Brazil) are not compatible with each other. One critical area of dissonance in the existing competition regime is in the area of pre-merger notification, review and evaluation. While Brazil has such a concept in its competition statute, Argentina does not. It is much easier to halt a business combination which will have anticompetitive effects prior to its competition than to undo a combination that has already taken place. Furthermore (taking the European Union experience as a guide) because of the nature of national economies, there may be practices and business concentrations which may have very different competitive effects in one or another state but, when taken as a whole, may have a detrimental effect on the economic system of the entire region. These combinations and practices may not be able to be policed adequately by one or another national competition authority. This problem may be solved in two ways: either by harmonization of national competition law and enforcement mechanisms and through cooperation agreements among the various enforcement institutions in the region through the creation of a MERCOSUR level institution charged with the regulation and enforcement of competition law at a community level, with the national competition enforcement authorities remaining responsible for the regulation of competition at a national level. Given the nature of MERCOSUR, it appears that the former solution is the only one that will be acceptable to the member states. In this case, the Protocol is only the first step. Enforcement mechanisms and procedures, including common merger filing requirements, must also be harmonized and cooperation measures among national competition authorities must also be established. Without these additional steps, there will be no effective system of competition law within the MERCOSUR community.

Consumer Protection Policy. MERCOSUR has not engaged in either the examination of consumer protection regulations within its member states or in the creation of any harmonization initiatives in this area. The absence of protection against such practices as false advertising and mislabeling can harm the competitive environment. However, many regulatory measures whose justification is given as consumer protection are in reality mechanisms designed to protect domestic producers of particular goods from foreign
competition or to require foreign competitors to purchase local components or services in order to sell their goods in the local economy. The existence of these measures hampers competition at the national and regional levels. Furthermore, the existence of inconsistent bona fide consumer protection measures in the region makes it more difficult and expensive for firms to compete regionally and limits the choice of products available at a reasonable price to consumers in the region. There is therefore a direct correlation between consumer protection regulation and competition policy. Accordingly, MERCOSUR should examine the extent to which the consumer protection regulations of the member states hamper free competition in the region and, if so, how these regulations should be harmonized.

**Anti-Dumping and Countervailing Measures.** MERCOSUR has not yet adopted any harmonization measures in the area of anti-dumping and countervailing duties. Representatives of the member states and of the MERCOSUR institutions have indicated that the member states agree that such harmonization is desirable and harmonization efforts in this area are underway. To date, no agreements have been reached, on either a general concept of regulation or on specific approaches thereto. At this point, Argentina and Brazil have formalized anti-dumping and countervailing duty regulations and Paraguay and Uruguay have not.¹

**Intellectual Property Protection Policy.** All of the MERCOSUR countries are signatories to the Paris, Berne, and Geneva treaties in addition to the WTO-TRIPs agreement which requires that they adhere to its provisions by January 1, 2000. In August 1995, the four countries signed a protocol for the common treatment of trademarks and indications of origin which is now pending ratification in each of the countries and was prepared under the auspices of MERCOSUR’s working group No. 7. A tentative agreement has been reached in the area of copyright and related rights which would meet TRIPs standards. However, no progress has been made in the area of patents or trade secrets, though particularly in the area of patents, major reforms have taken place at the national level (e.g. Brazil).

**Foreign Investment Regulation.** MERCOSUR has adopted two very effective harmonization measures regarding foreign investment: the Colonia Protocol for the Promotion and Reciprocal Protection of Investment in MERCOSUR (Intrazone) (“Colonia Protocol”) and the Protocol Regarding Promotion and Protection of Investments from Countries not Part of MERCOSUR (“Third Party Countries Protocol”).

**Bankruptcy Policy.** MERCOSUR has not yet adopted any harmonization measures in the area of bankruptcy policy nor has it reached any agreements on either a general concept regarding the harmonization of insolvency law or on specific approaches thereto. At this point, Argentina has new insolvency legislation, and Brazil, Paraguay and Uruguay do not.

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¹ In the case of Argentina, this includes an effective innovation of having an independent commission determine injury using rigorous criteria.
Cross border insolvencies involving firms doing business in more than one country have become an increasingly common phenomenon in recent years. These insolvencies typically involve obligations, creditors, property and other parties located in more than one country. Frequently, foreign creditors may find that local bankruptcy policy may make it very hard or impossible for them to assert a claim in local insolvency proceedings. Local bankruptcy courts will often not recognize claims asserted or orders entered in proceedings held abroad. Furthermore, local creditors may find themselves barred from access to property of the debtor located abroad, and this lack of access may have a significant effect on their ability to recover. On the other hand, different substantive standards set forth in the regulatory system of each jurisdiction may significantly affect the rights of the parties involved in the insolvency. Certain issues that only arise in cross border insolvencies may not be covered by any national regulatory system. These systemic inconsistencies in the regulation of the exit of insolvent multinational firms from the global economy significantly affect competition among firms. Clearly, harmonization of substantive and procedural standards and institutions in the area of insolvency is essential for the protection of firms, creditors and consumers in the international marketplace.

CONCLUSIONS AND RECOMMENDATIONS

MERCOSUR has, in a remarkably short period time, commenced an admirable set of efforts to legalize and strengthen competition law and regulation within its member states. The achievement of so much in such a short time period is remarkable and speaks very highly of the desire of the member states to work together in this area and of the efficiency and effectiveness of those who work in MERCOSUR. Much work still needs to be done, however, as noted below.

a. Competition Policy.

1. The draft Protocol and Basic Elements represent an admirable attempt to harmonize competition law in MERCOSUR. These documents should make clear, however, whether they represent an attempt to harmonize the law of the member states by making certain types of practices prohibited or an attempt to make certain types of practices prohibited only if they affect competition in more than one of the member states.

2. If the intent of the draft Protocol and Basic Elements is to harmonize the competition law of the member states, then the member states who presently do not have competition statutes and institutions to administer them need to enact such statutes and create institutions to administer them. These statutes should be consistent with the Protocol and Basic Elements.

3. If the intent of the draft Protocol and Basic Elements is to create a body of law applicable only to anticompetitive practices having an
interstate effect or dimension, then MERCOSUR needs to create institutions and systems to administer these standards.

4. If the intent of the draft Protocol and Basic Elements is to create a body of law applicable to anticompetitive practices having both an interstate and intrastate effect or dimension, then MERCOSUR and its member states need to determine the appropriate coverage of community law and its appropriate relationship with national law.

5. Regardless of the intent of the Protocol and Basic Elements, the national and/or community-wide institutions charged with the enforcement of competition law throughout MERCOSUR must harmonize their enforcement mechanisms and devise cooperation measures among themselves in order to ensure the efficient and effective enforcement of competition law throughout the region.

6. The adjudication procedures for competition law enforcement disputes arising at the regional level set forth in the draft Protocol and Basic Elements are inadequate. Experience elsewhere indicates that competition law enforcement disputes tend to be highly complex and technical. Individual adjudicators without knowledge and experience in such matters may not be able to adjudicate appropriately such a dispute. Furthermore, arbitration or submission to ICSID may also be extremely time consuming. Furthermore, the inability of an individual firm or entity to pursue a remedy in the event of a competition law enforcement dispute is troubling. MERCOSUR should create either a community-wide “Competition Court” or establish within the MERCOSUR Commerce Commission a permanent expert competition dispute adjudication panel with jurisdiction over such disputes.

b. Consumer Protection.

MERCOSUR has not engaged in either the examination of consumer protection regulations within its member states or in the creation of any harmonization initiatives in this area. It should also consider whether the consumer protection policies of the member states hamper free competition in the region and, if so, how these regulations should be harmonized or changed to eliminate these anticompetitive effects.

c. Anti-Dumping and Countervailing Duty Policy.

1. MERCOSUR should adopt harmonization measures in the area of anti-dumping and countervailing duties. Free-competition of firms within the MERCOSUR area may be jeopardized by application of inconsistent norms by its member states. Furthermore, MERCOSUR should adopt a common external anti-dumping and
countervailing duty system. Such a system should be compatible with the international norms set forth by the World Trade Organization.

2. MERCOSUR and its member states need to determine the appropriate coverage of any community law it adopts in the area of anti-dumping and countervailing duties and its appropriate relationship to national law.

d. Intellectual Property Policy.

The 1995 Protocol on harmonization of norms with respect to marks and indications of origin should be expanded to cover patents, trade secrets, copyright and other high-tech categories (e.g. mask works), particularly since all MERCOSUR countries are signatories to the WTO-TRIPS agreement as well as the Paris, Berne, and Geneva treaties. Consideration could also be given to creating a MERCOSUR regional patent office or availing of the research capacity provided under the PCT.

e. Foreign Investment Policy.

The two MERCOSUR harmonization measures in the area of foreign investment law, the Colonia Protocol and the Third Party Protocol, create an excellent system which will ensure free competition within the region.

f. Bankruptcy Policy.

1. MERCOSUR should adopt harmonization measures in the area of bankruptcy and insolvency law.

2. The MERCOSUR member states which do not have modern insolvency statutes (Brazil, Paraguay, and Uruguay) should modernize their systems. These new standards and systems should be consistent with each other and provide for consistent standards and enforcement mechanisms and institutions.

3. The MERCOSUR member states should ensure that their enforcement institutions enter into cooperative agreements with each other in order to ensure the efficient and effective enforcement of insolvency law within the region.

4. MERCOSUR should create either legislation or procedural systems which deal with intra-MERCOSUR cross border insolvencies. Such a system would protect the interests of creditors and consumers in situations involving the insolvency of an enterprise engaged in operations in more than one MERCOSUR state.
5. MERCOSUR should create either legislation or procedural systems which deal with cross border insolvencies involving non-MERCOSUR states. Such a system would protect the interests of creditors and consumers in situations involving the insolvency of an enterprise engaged in cross border operations.

6. MERCOSUR and its member states need to determine the appropriate relationship between any community insolvency law and the national insolvency law.
INTRODUCTION

MERCOSUR, the "Common Market of the Southern Cone," was formed on March 26, 1991 by the Treaty of Asunció and currently consists of Argentina, Brazil, Paraguay and Uruguay, with Chile and Bolivia becoming associate members as of October 1, 1996 and March 1, 1997, respectively. Its purpose is to establish a common market which would include the free movement of goods, services and factors of production; the elimination of customs duties and non-tariff restrictions; the establishment of a common external tariff and the adoption of a common trade policy; the coordination of positions in regional and international economic and commercial fora; and the coordination of macroeconomic and sectoral policies amongst the member states in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other means that may be agreed upon. The fundamental elements of a common market were achieved by January 1, 1995 with the establishment of a common external tariff and the reduction in stages of internal tariffs subject to a number of significant subsector exceptions.

Among the many sub-topics included in this list was that of competition policy for which a draft protocol outlining broad general principles among the four countries was approved in May 1995 by the MERCOSUR Commerce Commission. Subsequently, in December 1996, the Common Market Council, Mercosur's senior decision-making organism (para. 24) approved a more detailed "Protocol for the Defense of Competition within Mercosur."

Competition policy (or antitrust policy in the US) can be defined narrowly in accordance with the practice of the majority of OECD countries "as the body of laws and regulations governing business practices (horizontal or vertical agreements between enterprises, abuses of dominant positions, monopolization, mergers and acquisitions)"¹.

This is the primary focus of the MERCOSUR protocols on competition policy. However, it is often viewed in a broader context to include the myriad of government policies that impact competition at both the local and national level including consumer protection, trade liberalization (import competition) and the use of anti-dumping and countervailing duty measures, foreign investment regulation, the protection of intellectual property rights, and bankruptcy (or exit policy) to name the more important.

The core objective of competition policy in nearly all jurisdictions is to preserve and protect the process of competition not competitors with a view to maximizing economic efficiency (both allocative and dynamic) by achieving efficient market outcomes in the form of lower consumer prices and better quality products. Some countries or jurisdictions also include broader "public interest" objectives (regional development,

promotion of small business, export promotion, decentralization of decision-making) which often tend to undercut the fundamental efficiency objectives of competition policy.

This paper provides an assessment of the legislative/institutional and enforcement effectiveness of the competition (antitrust) framework of the four MERCOSUR countries including specific recommendations for reform, drawing analogies where appropriate to the experience of the European Union and NAFTA. This includes the important interface issues between competition policies and regulated industries. It also provides additional assessments of the related policy areas (consumer protection, trade, foreign investment regulation, intellectual property, and bankruptcy) that have an impact on competition policy. Finally, the report will analyze the desirability and scope for harmonization/convergence of competition policies within the MERCOSUR context as well as the role of MERCOSUR institutions, both in shaping competition policy and in dispute resolution.

**THE SCOPE OF COMPETITION POLICY**

Competition policy (laws/regulations and enforcement capacity) under the narrow definition should cover all business practices, whether public or private, with exemptions limited to certain aspects of activities already regulated under other statutes (e.g., natural monopolies). Where public enterprises operate in markets in competition with private firms, they should be subject to the same restrictions on anti-competitive behavior as private firms in the market.

While some variations exist across countries, most competition laws can be broken down into components dealing with enterprise conduct and market structure. Either of these may be subject to civil and/or occasionally criminal procedures. In turn, conduct restraints can be divided into horizontal and vertical.

In the case of horizontal agreements competing in the same market between/among enterprises, these are normally considered *per se* illegal when they represent "naked restraints" such as agreements involving bid rigging, price-fixing, output restraints, market segmentation and customer allocation. The enforcement of these "per se" laws can be difficult in the absence of concrete evidence, particularly where the collusion transcends national borders. However, there may be other kinds of agreements that have potential pro-competitive effects such as R&D cartels that benefit from risk and information sharing as well as scale economies or joint purchasing arrangements. These usually fall under a

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3. Under common law jurisdictions regardless of the facts and circumstances, such conduct is illegal; this is the opposite of "rule of reason" requiring case by case analysis based on the facts and circumstances. Under civil law systems, legislation tends to be more specific to provide more certainty to private parties (less reliance on court interpretation) such as through block exemptions in the European Union with the possible drawback that the law will not "evolve" in the light of changing external market circumstances.
"rule of reason" analysis or may benefit from certain "block exemptions" as under the European Union's (EU) know-how licensing, patent licensing, exclusive distribution agreements, etc. In the latter case, block exemptions under Article 85 (3) of the Treaty of Rome eliminate the notification requirement to the Commission in areas that would otherwise constitute a "per se" violation.

In the case of vertical restraints (contractual agreements between supplier and purchasers/retailers in both upstream and downstream markets), experience has varied widely across developed countries. In the EU, for example, vertical restraints are more forcefully prohibited particularly when there is an underlying regional integration objective or concern with the freedom of economic action. The EU has block exemptions for exclusive distribution, exclusive purchasing and franchising. However, the European Commission recently (January, 1997) issued a "Green Paper on Vertical Restraints in EC Competition Policy" that includes a variety of options for change in the block exemption system (as well as the option of maintaining the status quo) but which categorically maintains that absolute territorial protection and resale price maintenance (RPM) are unlikely to be exempted but fall within the 'per se' violations of Article 85 (1). The Green Paper has been prepared in the knowledge that the single market legislation for the free movement of products is now largely in place; the Regulations governing vertical restraints are due to expire by the end of 1999 and there have been major changes in the methods of distribution that can have implications for policy. In the US, enforcement has been much more uneven. It is useful, however, to distinguish between vertical price restraints and non-price type restraints. In the former case, RPM (where a supplier conditions sale on controlling the distributor's price) has been the subject of considerable debate in different jurisdictions since in some cases it may be efficiency enhancing (in many OECD countries and the EU, it is prohibited "per se").

In the case of non-price vertical restraints (e.g., exclusive dealing where the distributor cannot purchase the competitor's products, refusal to deal, exclusive territory, tying, and full line forcing where supplier requires the dealer to carry all supplier's products), the impact on competition will depend on the facts and circumstances of each case necessitating a "rule of reason" analysis.

A special category of the conduct portion of competition policy is the "abuse of dominant position" (AOD) doctrine, whereby "relatively large" firms engage in anti-competitive conduct by preventing entry or forcing exit of competitors through various kinds of monopolistic conduct, including predatory pricing, market foreclosure as described above, etc. However, in these cases, it is not always apparent whether the large firm is simply more efficient than its competitors and/or enjoys the benefits of sunk costs as opposed to engaging in noncompetitive behavior to raise rivals' costs. Further, it is also debatable as to what constitutes a "large" firm, and by deduction, market power. This may, of course, be of greater relevance to the countries of MERCOSUR where levels of economic concentration are much higher than in OECD countries.

With respect to issues of market structure, competition authorities have naturally taken an interest in the potential impact of inter-corporate transactions involving horizontal or
vertical mergers, takeovers, joint ventures or asset transfers and conglomerate transactions involving firms in unrelated businesses since these can lead to a reduction in the independence of competing suppliers or increased concentration of the market. A variety of merger guidelines have been used in developed countries, along with pre-notification procedures to assess the efficiency claims of mergers, etc., as against the likely rise of excessive concentration. In the context of developing countries, such considerations take on heightened importance where particular industries tend to be already highly concentrated and where economies of scale become an important consideration in developing export potential in the absence of a large domestic market.

From a developing country perspective, conduct violations are difficult to enforce in the absence of experienced investigatory capacity to bring provable cases. On the other hand, market structure violations generally assume the availability of good quality economic and market data in order to be able to analyze the costs and benefits of complex transactions. Setting competition policy priorities will have to factor in these institutional constraints on a case by case basis.

**HARMONIZATION**

"Two driving forces have put harmonization on the policy agenda. The first is the globalization of economic activity over the past quarter century. This has expanded trade and investment flows, increased competition interactions which cut across individual national economies, and generated an explosion of international mergers, joint ventures and strategic alliances. The second is the enactment or expansion of competition laws, including merger pre-notification requirements, by many nations, and the extraterritorial application of such laws. Both of these developments have contributed to uncertainty, complex legal disputes, political conflicts and multiplying costs."

Not surprisingly, the substantial increase in foreign investment, transnational mergers, joint-ventures, international licensing arrangements, and strategic alliances has magnified the problem of difference in both substance and procedure in national (and in some cases supranational) competition laws, which creates uncertainty (since private parties need to seek authorizations from multiple jurisdictions) and raises transactions costs.

Moreover, use of extraterritorial jurisdiction, based on the "effects" doctrine, particularly by the US, has created a backlash from other countries resulting in blocking statutes. While proposals have been made to harmonize national competition laws (e.g., by the publication of a draft International Antitrust Code in 1993 by the Max Planck Institute, an UNCTAD draft of a model law), it remains to be seen even after the establishment of the Working Party on Competition Law which was established as part of the World Trade Organization’s Ministerial Discussions in Singapore in December 1996, how much will happen at the multilateral level in this area in the foreseeable future. Most likely, efforts

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will be made to coordinate and cooperate across jurisdictions at the bilateral or sub-regional level to the extent feasible, particularly with respect to procedural standards, or perhaps with universal "floors."

Moreover, in the OECD's Interim Report on Convergence of Competition Policies (June 1994), the following recommendations for the harmonization of merger guidelines were proposed:

- development of more specific guidelines for the application of the 1994 OECD Recommendation in connection with merger investigations, including suggestions to: (i) notify at an earlier stage; (ii) establish contact directly between the competition authorities, and, (iii) notify every other competition authority known or understood to be investigating, or likely to investigate, the transaction;

- development of one or alternate models of a protocol for parties to a merger to waive confidentiality protection in order to permit the sharing of confidential information among reviewing authorities;

- collection and dissemination to other member countries of each member's guidelines on the application and interpretation of their confidentiality laws as applied to merger investigations;

- development of a model formulation that member countries could incorporate into their merger notification forms to elicit information about notifications to, and inquiries by, competition authorities of other jurisdictions;

- measures to encourage competition authorities when requested to identify for foreign counterparts publicly available information relevant to the investigation at hand and, as far as practicable, assist in obtaining such information;

- authorities examining consideration of the feasibility of model filing forms for those questions that are likely to be common to the same transaction.

In the case of Latin America, the emergence of a number of regional integration agreements at a time when competition policy is being accentuated naturally raises the issue of regional or sub-regional harmonization. This can apply both to the substantive provision of respective laws for both conduct and structure violations.

The removal of barriers to trade and the establishment of a common market can be expected to encourage economic actors with competing or complementary products to enter into a variety of forms of cooperation—from franchising and licensing to strategic cooperation.

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alliances to mergers. Unfortunately, there are no comprehensive data on the number, nature and size of cross-border alliances and combinations among Argentine, Brazilian, Paraguayan and Uruguayan enterprises since the beginning of the negotiations for MERCOSUR. What information is available is generally prepared for very limited purposes (examining only certain industries or types of transactions) and amounts to little more than a tally of local and international (usually English language) press reports. Clearly there is need for serious empirical work in this area. In addition to thoroughly examining activities involving companies based in two or more MERCOSUR countries, such empirical work on cross-border economic activities and cooperation would have to consider the investment and strategic activities of enterprises outside the Region with important subsidiaries, partners, licensees, etc. in more than one MERCOSUR country.

Notwithstanding the dearth of good available data, it is apparent that a great deal of activity has taken place and is continuing as enterprises look ahead to their future in a common market. A review of the combinations and strategic alliances reported by one source of anecdotal evidence in the half-year period between July 1995 and February 1996 reveals close to two dozen transactions ranging from cross-border franchising to large cross-border investments in companies providing complementary goods and services. Transactions in a wide variety of industries were reported, including food processing, energy, footwear, paper and publishing, chemicals, tourism, transport including automotive, and financial services. Every possible combination of MERCOSUR countries was represented, except for transactions involving only an Uruguayan and a Paraguayan enterprise. Other sources report very heavy activity in the automotive industry, while even within Brazil itself, there has been a 42% increase in the number of mergers in the 8 months of 1996 compared to the same period in 1995.

MERCOSUR COMPETITION POLICY INITIATIVES

At its meeting on December 14, 1994, the MERCOSUR Trade Council (para 51) approved a document entitled “Basic Elements of the Defense of Competition in MERCOSUR” with the goal of harmonizing law in this area and creating scope for coordinated action by the MERCOSUR countries to prevent practices contrary to free competition. The council called upon its members to submit detailed information concerning the compatibility of its current or proposed competition laws with the “Basic Elements” to serve as the starting point for a statute or protocol on the defense of competition in MERCOSUR.

At its second meeting on May 22-24, 1995, the MERCOSUR Trade Council Technical Committee No. 5 - Competition Laws approved a draft Protocol for the Defense of Competition Within MERCOSUR. The draft Protocol, which was based on a Brazilian draft, contained a list of acts of conduct that should be prohibited by national law as well as provisions regarding concentration actions. With respect to the latter, Article 5 of the

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6 TIPS - Servicio de Análisis Económico, Montevideo, Uruguay.
Protocol adopted the general standards set out under Brazilian law, requiring the authorities to examine concentrations that restrict competition or result in a participation of 20% or greater in the relevant market. At the same time, the Protocol accepted that concentration acts may be authorized if they have as their objective to increase production, improve quality or foster efficiency or technological or economic development and that the benefits are passed on to consumers and provided that such concentration does not result in the elimination of competition in a substantial part of MERCOSUR.

This was superceded by the approval of a “final” protocol (Decision No. 18/96) for the defense of competition within Mercosur on December 17, 1996 by the Mercosur Trade Council. This protocol focuses directly on public and private entities within Mercosur where conduct affects the competition environment and commerce between States, as opposed to conduct within a State. The Protocol covers all of the major conduct violations (paras. 9-12) that are found in most advanced jurisdictions either in legislation or case law, and makes mention of merger guidelines obliquely in Article 7. The committee for the Defense of Competition working under the Authority of the Mercosur Commerce Commission (with representation from each of the four full member states) would be expected to play a significant role in implementation of the protocol, including the preparation of norms and the development of cooperative arrangements amongst national competition agencies. This is expected to be undertaken by national authorities within two years of the protocol’s ratification. The committee would review the preliminary evaluation work of the national authority in matters that had extra-territorial effect and have the power, after consultation with the Commerce Commission to issue injunctions, set fines etc., based on its own analysis guidelines to be implemented by national authorities. However, because all Mercosur institutions operate by consensus, this does not represent a movement towards supranational authority since one national authority can effectively exert veto power over Committee decisions. When there were disagreements within the Committee, the institutional hierarchy (see Chapter 2) would review and failing that, the dispute resolution procedures of the Brasilia Protocol would be used.

**NEXUS WITH OTHER POLICY AREAS**

**Consumer Protection.** Consumer protection is only beginning to emerge as an area of concern and emphasis in the Latin American region. Nonetheless, it is not surprising that many of the countries that have recently enacted new competition legislation have also legislated in the consumer protection area. This is particularly true of the Andean Pact countries that have often included a separate consumer protection unit/secretariat within the Competition Authority. There is no doubt that consumer protection issues such as false advertising, mislabeling of products, quality standards, etc., are closely linked to the broader concern of competition policy and need to be addressed simultaneously to ensure maximum effectiveness.

**Trade Policy.** In the case of trade policy, it is not accidental that as trade was liberalized throughout the Region, countries developed or strengthened anti-dumping legislation...
(e.g., Brazil, Argentina), which in theory and practice could be used to diminish import competition. Where such instruments are captured by domestic interests, they can seriously undermine the efforts of competition authorities. Of note is the fact that in the US and EU, the agencies dealing with competition and anti-dumping are kept quite separate and independent, and countries like Brazil and Argentina have followed this practice. On the other hand, regional trade bloc partners such as Australia and New Zealand have eliminated anti-dumping suits within the trading bloc, as has the EU, and this appears to be the pattern in the Andean Pact countries as well. Under the new competition protocol (Dec. 18/96), national dumping investigations against Mercosur members would continue until December 31, 2000 after which new approaches to regulation would be examined. For example, in the year ending June 30, 1996, Argentina brought 42 antidumping actions of which 10 were against Brazil and one against Uruguay. In essence, competition policy could replace the anti-dumping regimes within a trading bloc, and when it exists externally, policy makers should coordinate their responses in the two areas (e.g., Canada sometimes attaches import liberalization conditions to the approval of a merger transaction).

Intellectual Property (IP). The linkage between levels of intellectual property protection and competition policy occurs at two distinct levels. To begin with, levels of foreign investment particularly in high technology industries are highly correlated with the level of intellectual property protection particularly in the area of patents, trademarks, trade secrets and marks. For example, in a series of empirical studies commissioned by the International Finance Corporation (IFC), Professor Ed Mansfield from the University of Pennsylvania examined the influence of intellectual property protection on levels of private investment, joint ventures and technology licensing in 16 countries (including 14 developing countries) based on responses from close to 150 multinational corporations. He found that "in relatively high-technology industries like chemicals, pharmaceuticals, machinery, and electrical equipment, a country's system for intellectual property often has a significant effect on the amount and kinds of technology transfer and direct investment to that country by Japanese, German, as well as US firms. Also, where a variety of relevant factors are held constant in an econometric model, the effects of such protection on US direct foreign investment are substantially significant". Thus, the level and degree of intellectual property protection can have a direct impact on the levels of investment activity, both foreign and local, in an economy, and by deduction on the degree of competition in terms of ease of entry.

A second more complicated nexus between competition policy and intellectual property protection occurs in the context of licensing restrictions embodied in technology

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8 For a detailed discussion of this phenomenon, see Guasch and Rajapatirana, "The Interface of Trade, Investment and Competition Policies: Selected Issues and Challenges for Latin America", October 5, 1994 at 21-23.

9 Of which five were from Latin America (Argentina, Brazil, Mexico, Chile and Venezuela).

agreements. For example, in the US, "antitrust concerns may arise when a licensing arrangement harms competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of a license... A restraint in a licensing arrangement may harm such competition, for example, if it facilitates market division or price-fixing. In addition, license restrictions with respect to one market may harm such competition in another by anti-competitively foreclosing access to, or significantly raising the price of, an important input, or by facilitating coordination to increase price or reduce output". More specifically, even though the IP Guidelines recognize that licensing agreements are typically pro-competitive, antitrust concerns can arise where (1.) "the license restrictions apply to goods and technologies other than those that are the subject of the license; (2.) the license restrictions otherwise exceed the scope of the intellectual property that is the subject of the license (e.g., they exceed the duration of the relevant patents); (3.) they create disincentives for the licensee to deal with suppliers of competing goods or technologies; or (4.) they involve a firm or firms with significant market power in a relevant market." While these guidelines are relatively recent (no cases have been brought yet), they do provide a harbinger of likely directions of competition/intellectual property policy in the future-initially with respect to the scrutiny of US foreign technology agreements that could impact US exports under the "effects" doctrine to eventual domestic scrutiny (e.g., in MERCOSUR) of local technology agreements.

Similarly, in the European Union, the nexus between competition policy and IP is well established by virtue of the establishment of block exemption regulations covering the licensing of patents and know-how and more recently, technology transfer agreements, which provide a coherent framework for analyzing both sets of issues simultaneously.

Thus, it can be expected that as both competition and intellectual property regimes are "modernized" in the countries of the MERCOSUR, some attempt will be made to link the two policies as is beginning to occur in the Andean Pact countries.

**Foreign Investment Regulation.** An additional important area has been that of foreign investment regulation where historical restrictions on foreign investment in Latin America hindered the domestic competitive environment. As capital inflows have become an increasingly important source of funds for Latin America, not surprisingly countries have simultaneously sought to modernize their foreign investment laws (e.g., Mexico) to make them more hospitable to foreign investors, particularly by removing restrictions on eligible sectors for foreign investment, repatriation rights, compensation for expropriation and provisions for dispute resolution.

Many countries in Latin America (e.g., Argentina) have entered into bilateral investment treaties (BITs) primarily with developed countries. A good example of this was the

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US-Argentina Treaty (1993), the first to be concluded by the US with a Latin American country since the announcement of the Enterprise for the Americas Initiative in June 1990. Of particular note was the fact that by providing for international arbitration of investment disputes including under the International Center for the Settlement of Investment Disputes (ICSID), which 21 Latin American and Caribbean countries have now signed, the Treaty repudiated the Calvo Doctrine (of Argentine origin), which requires that aliens submit disputes arising in a country to local jurisdiction. Other features of the treaty include provision for national treatment, freedom from "performance" requirements, and the freedom to hire top managers of their choice regardless of nationality.

**Bankruptcy (Exit Policy)**. In market economies where a loan contract is breached, debt collection laws provide the initial framework for protecting creditors' rights through foreclosure on collateral and/or using the court systems to seek redress through breach of contract suits. However, where multiple creditors are involved as financiers of a corporate entity, there is a risk that, in the absence of a bankruptcy/reorganization framework, there will be a tendency to grab assets (the 'common pool' problem) that could lead to sub-optimal results.

While bankruptcy policy is often not associated directly with competition policy, it in fact plays an integral role in the sense that failing firms should be allowed to go under (and not continue to receive government subsidies or forced concessions from creditors where restructuring is not a realistic option), thereby freeing up market 'space' for more viable firms. "If a company cannot regain profitability even under the most efficient restructuring scheme, then economic logic dictates that it should go out of business. Again, bankruptcy provides a mechanism through which such winding up can take place. Through liquidations, bankruptcy law is believed to enhance economic efficiency by allowing the timely exit of unproductive economic units, and by promoting the transfer of ownership of productive assets to entrepreneurs or managers who can make better use and thereby reducing excess capacity, bankruptcy policies also help eliminate an important potential barrier to entry."14

Much of the debate over bankruptcy policy concerns the relative weight given to the rights of debtors vs. creditors (priority in claims, exemptions, automatic stop, control of the enterprise, etc.) in a bankruptcy proceeding in addition to the role of courts in enforcing the results of those proceedings, and indeed these are important aspects in determining the impact of the bankruptcy law framework on overall competition policy.

However, an additional important dimension to the problem results from the fact that globally many bankruptcy or insolvency proceedings have taken on a multinational dimension, thereby calling for the need for greater harmonization and/or coordination of cross-border bankruptcy policies/procedures.

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13 This section covers only corporations and partnerships rather than natural persons.

Ironically, it is only recently that multilateral efforts at bankruptcy coordination across jurisdictions have begun to yield results. Initiatives include the International Bar Association's Cross-border Insolvency Concordat, approved by the Council of the Section of Business Law in September 1995, which was successfully used for the first time in 1995/96 in the Everfresh bankruptcy case involving both Canada and the US. The Committee J of the International Bar Association (IBA) is also preparing a model insolvency code while the United Nations Commission on International Trade Law (UNCITRAL) approved a model law for cooperation across jurisdictions in May 1997.

Secondly, the American Law Institute (ALI) is engaged in a project to develop cooperative bankruptcy procedures (Preliminary Draft Report No. 2 was issued on March 21, 1997) for use in business insolvency cases involving more than one of the three NAFTA countries (on the premise that harmonization of the laws of the three countries nor an international treaty are likely in the near future).

Finally, the EU in September 1995 approved the Convention on Insolvency Proceedings (after 30 years of work) but its ratification has been held up by the UK, which was boycotting EU agreements as a result of the 'mad cow' dispute. This is likely to change following the UK election in May 1997. The Convention adopts the principle of a main insolvency proceeding with an official representative to operate with full powers in all EU member states, coupled with a parallel local proceeding ("secondary") that can cover the assets which are located in that particular member state so that creditors may use the secondary proceeding as protection against the application of foreign law.

Having said this, "there is a highly noticeable lack of attention among national governments toward implementing effective multinational or bilateral treaties in the insolvency area. There's also a lack of attention, albeit not as pronounced, about enacting provisions in domestic legislation, which would deal effectively with the cross-border impact of insolvencies and reorganizations".

OTHER INITIATIVES RELATED TO COMPETITION POLICY

Double Taxation Treaty (Argentina - Brazil). One of the earliest efforts at economic cooperation among the MERCOSUR countries was the Treaty to Avoid Double Taxation entered into by Argentina and Brazil on May 17, 1980. The treaty (which went into effect on November 7, 1982) provides that income on investments made in one country by an investor resident or headquartered in the other country will be taxed in the country in which the investment is made and will be exempt from taxation in the home country. The

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15 One of the few examples worldwide of an effective regional bankruptcy system is the Inter-Nordic Insolvency Convention that has been in effect for over 60 years based upon very similar legal systems. However, once the new EU Convention becomes effective, the Inter-Nordic Convention will only be applicable to subjects not covered by the EU Convention (e.g., insurance bankruptcy).

Treaty also provides for cooperation between the tax authorities in Brazil and Argentina to stem tax evasion.

**Investments in Securities.** In 1993, the MERCOSUR Council (para 57) issued Decision 8/93 covering capital market regulations. Decision 8/93 establishes the principle that residents of the MERCOSUR countries may participate in each others' capital markets subject to the same rules and regulations as nationals. This is of particular importance to MERCOSUR investors in Brazil, who are now exempted from the requirement (still applicable in the case of non-MERCOSUR residents) of conducting security exchange operations through an investment fund or securities portfolio. Decision 8/93 does, however, authorize the CMG to permit temporary protective measures (for up to six months) in the event that short-term capital movements threaten to have significant negative effects on monetary and exchange policies in the affected member state. To date, no such temporary measures have been enacted.

Although Decision 8/93 requires that each country treat residents of the other MERCOSUR countries in the same manner as nationals with respect to trading and holding securities, it does not by itself affect the exchange regime applied to foreign investment in securities. Accordingly, foreigners investing in the Brazilian stock exchanges are required to register investments with the Central Bank and must enter into an exchange contract which provides for a floating rate of exchange on repatriation under Central Bank resolution No. 1552 (December 22, 1988).

Further integration of the MERCOSUR securities markets is likely to continue with or without further initiatives from the Council. In 1993 the Central Bank of Brazil and the Brazilian Securities Commission authorized the issuance of Share Deposit Certificates (CDA) of the privatized Argentine petroleum company, Yacimientos Petrolíferos Fiscales (YPF). The CDAs, which trade on Brazilian stock exchanges in local currency, represent underlying Argentine shares on deposit in Argentina. Much like US American Depositary Receipts, the CDA permit Brazilian investors to trade and invest in an Argentine company in precisely the same manner as they trade and invest in domestic companies.

**Bi-national Corporations.** Prior to the establishment of MERCOSUR, Brazil and Argentina signed the Treaty for the Establishment of Bylaws for Argentina/Brazil Bi-national Companies on June 6, 1990. The treaty's provisions went into effect in July 1992 after approval by the two governments. The treaty provides for the establishment of bi-national companies to be treated as entirely domestic companies under both Argentine and Brazilian law in such areas as internal taxation; access to domestic credit; eligibility for incentives and programs for national, regional or industrial development; eligibility to bid on government contracts; and exemption from certain import duties. Since MERCOSUR continues to permit member states to treat foreign companies differently in these respects, the use of bi-national companies remains attractive when feasible.

Bi-national companies can adopt any legal corporate form permissible in the country it chooses as its headquarters (which must be Brazil or Argentina). Once organized, such companies will be required to comply with the corporation laws of the jurisdiction in
which they are headquartered. Bi-national companies must indicate in their corporate name that they are bi-national companies. In order to qualify as a bi-national company, the enterprise must adopt by-laws (estatutos) which comply with the treaty. At least 80% of the share and voting capital of the enterprise must be held by Argentine and Brazilian nationals and at least 30% must be in the hands of investors from each country. The bylaws must also provide that each of the Argentine and Brazilian investor groups must be entitled to elect at least one director and one internal auditor (comisario) of the company.

The treaty requires that Brazil and Argentina permit bi-national companies to transfer capital goods from installations in one country to the other free of tariff or non-tariff restrictions. Bi-national companies are also entitled to special expedited immigration law treatment to expedite the transfer of Brazilian staff to Argentina and Argentine staff to Brazil. Additionally, both countries undertake to facilitate international transfer of net profits of bi-national companies, free of the usual requirements for repatriation of profits. The idea is to permit bi-national companies to operate facilities in both countries in the same way as they would be able to manage them if they were located entirely within one jurisdiction.

CONCLUSION

Competition policy defined broadly encompasses a wide range of policy measures that taken together and implemented effectively can provide a propitious framework for market-oriented enterprise activity at the national or sub-regional level, as in the case of MERCOSUR.

Achieving this framework normally requires reforms of a legislative, institutional and enforcement nature. Inevitably, the reforms generate a set of "winners" and "losers" since in most situations, there are vested interests that benefit from the status quo (e.g., oligopolists with market power, debtors who seek protection from a non-functioning bankruptcy system, etc.). Thus, reform efforts should identify those "winners" and "losers" and fashion reforms that can provide alternative kinds of compensation (perhaps over time through better functioning markets) to the short-term "loser". Moreover, in many of these areas, public education efforts are necessary to explain the costs and benefits of a well-functioning competition framework. Finally, effective implementation of such reforms will also be a function of building up the appropriate administrative capacity of relevant agencies responsible for these substantive areas, in addition to the court system that in the ultimate analysis may be called upon to enforce the legal principles underlying competition policy.
II. MERCOSUR LEGAL AND INSTITUTIONAL FOUNDATION

INSTITUTIONS

The Treaty and the Ouro Preto Protocol create six different institutions that are charged with implementing MERCOSUR's principles and purposes. These institutions are the Council, the Common Market Group ("Group"), the MERCOSUR Commerce Commission ("MCC"), the Joint Parliamentary Commission, the Forum and the Secretariat.

The Council is MERCOSUR's premier institution, composed of the Foreign Relations and Economics Ministers of the four member states and has no permanent staff. The Council is clearly the most powerful institution within MERCOSUR and is responsible for its political leadership. It also creates the policies that are needed for the implementation of the principles and purposes of the common market and acts on policy proposals sent to it by the Group. It also has supervisory authority over other institutions and is the legal representative of MERCOSUR, empowered to negotiate and execute agreements with third parties, including international organizations. The council's policies are known as Decisions and they are "obligatory for the member states''.

The Group is referred to as the "executive organism" of the Community and is composed of four principal and four alternate members from each member state. These members must include representatives from the central banks and the economics and foreign ministries of each member state. Its responsibilities include drafting policy proposals to be decided by the Council and implementing Council decisions. The Group also analyzes and makes recommendations on proposals or recommendations submitted to it for comment by other MERCOSUR institutions. It also may adopt "Resolutions'' on financial and budgetary matters, based on guidance received from the Council and may, if authorized by the Council, negotiate agreements on behalf of MERCOSUR with others. The Group also has significant administrative responsibilities, including the approval of the MERCOSUR budget, the approval of the Secretariat's annual expenditures, the supervision of the Secretariat staff, the election of the Director of the Secretariat, and the organization of Council meetings. The Group's "Resolutions'' are "binding on the member states.''

The Council and the Group resemble the European Union's Council and Commission in that the superior institution (in both cases the Council) is controlled by the member states and has the power to create policy (or "community law'') while the inferior institution (the Commission in the EU and the Group in MERCOSUR) has the power to propose and implement policy. The European Commission, however, is very different from the Group. The European Commission, whose membership consists of 17 "independent'' individuals elected by a consensus of the member states and whose permanent staff numbers in the thousands, is clearly meant to be a powerful cadre of independent civil servants beyond the political control of the member states. They are meant to be the "engine of the Union,' ensuring that the process of integration moves on at a stable pace. The Group, whose
membership consists of representatives of the governments of the member states and which has no permanent staff, is more of an administrator, ensuring that technical proposals (many emanating from the MCC) are evaluated and transmitted to the Council for decision and that policy pronouncements of the Council are implemented.

The MCC is composed of four representatives and four alternates from each member state. It is charged with monitoring the application of and implementing the common commercial policy agreed to by the member states, making decisions regarding the administration and application of the common external tariff, proposing changes to the common external tariff and the common commercial policy for consideration by the Group, and keeping the Group informed on the evolution and application of the common commercial policy. Furthermore, the MCC has the power to resolve, in accordance with the procedure set forth in the Brasilia Protocol on Dispute Resolution, complaints by individuals concerning the application by member states of legal or administrative sanctions in violation of the “law” of the MERCOSUR community. The MCC has created 11 Sub-Working Groups to examine and make proposals regarding different specific areas related to the common external tariff and the common commercial policy. The MCC issues either "Directives" or "Proposals," with the former being "binding on the member states". The MCC has no direct counterpart in the EU. It appears to be charged with the analysis and implementation of technical matters, much like the Directorates-General of the European Commission. Its chief importance appears to be that of "technical experts" charged with analyzing specialized areas of policy and preparing proposals relating thereto for decision by the political leadership, the Council. The MCC also appears to be very similar to the NAFTA Commerce Commission, which is composed of cabinet ministers of the three member states, operates by consensus and has no permanent staff. The NAFTA Commerce Commission seems to have a similar consultative and analytical role, with "committees" and "working groups" having roles similar to the MERCOSUR Sub-Working Groups.

The Joint Parliamentary Commission is the MERCOSUR institution representing the legislatures of the member states. Its members will be designated by the parliaments of the member states, with each member state having an equal number of members. It is to assist in the acceleration of the implementation of all policies enacted by other MERCOSUR institutions and will assist in the harmonization of national legislation, as may be required by the harmonization process. The Joint Parliamentary Commission has no decision-making powers and has only an advisory function. It greatly resembles the EU’s original European Parliament, which under the provisions of the Treaty of Rome had identical composition and similar functions.

The Forum is the MERCOSUR institution whose members represent the various sectors of economic and social life in MERCOSUR, including producers, consumers, workers and merchants. Its functions are purely advisory and this advice takes the form of non-binding "Recommendations" to the Group. Its equivalents in the EU are the Consultative Committee of the European Coal & Steel Community and the Economic and Social Committee of the European Economic Community and Euratom. These EU institutions have similar membership and are also purely consultative functions.
The Secretariat is the only institution within MERCOSUR to have a permanent staff. It is permanently headquartered in Montevideo, Uruguay and, at present, its staff consists of approximately 30 professionals and a small support staff. It has purely administrative responsibilities. The Secretariat has no substantive functional responsibilities and no decision-making power. Again, the member states of MERCOSUR have clearly sought to ensure that control over the integration process remains in the hands of the member states and not in a group of independent international civil servants. The Secretariat is headed by a director which is appointed by the Group. The MERCOSUR Secretariat greatly resembles the NAFTA Secretariat, which also has a small permanent staff mainly charged with logistical, administrative and technical support.

MERCOSUR has no judicial institutions similar to the European Court of Justice, the Court of First Instance and the Court of Auditors in the EU. Disputes among member states or involving individuals and a member state or states shall, under the Brasilia Protocol, be resolved by either direct negotiations, resolution by the Group or arbitration before an arbitral tribunal created thereunder.

**DISPUTE RESOLUTION PROCEDURES**

Under the Brasilia Protocol, controversies between member states regarding the interpretation, application or failure to comply with the Treaty of Asunción or any of its Protocols, Council Decisions and Group Resolutions are subject to a three part dispute resolution process which includes negotiations, recommendations by the Group, and arbitration before an ad hoc arbitral tribunal. The parties involved are first required to engage in direct negotiations to resolve the controversy, and the Secretariat must be informed of the progress and result of these negotiations. If negotiations fail to resolve the controversy (or resolve it partially), then any member state involved may submit it to the Group. The Group will permit each party to the controversy to present its position, consult experts, and generally evaluate each party's claim. At the end of this process, the Group will present a recommended resolution to the parties. If the parties don't accept the Group's recommendation, then any party to the controversy is free to seek arbitration before an ad hoc arbitral tribunal of three arbitrators (from a list kept by the Secretariat). The arbitral tribunal is free to apply "community law" and "applicable principles of international law" to resolve the controversy and must render its award within a maximum period of 90 days.  

Individuals with a claim against a member state based on the sanction or application by that state, in violation of "community law" or of legal or administrative measures which have a restrictive, or discriminatory competitive effect on that individual may initiate such a claim before the National Section of the Group where the claimant resides. The National Section of the Group to which such a claim is submitted will either a) negotiate

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17 Such an award is firm, final and unappealable and must be complied with. Member states refusing to comply with such an arbitral award may, under Article 23 of the Brasilia Protocol, be subject to "temporary compensatory measures" imposed by the other member states.
with the National Section of the Group to which the member state against whom the claim has been brought to resolve it, or b) send the claim to the Group without any recommendation. The Group will then evaluate the claim and may dismiss it or convoke a panel of experts on the subject matter of the controversy for an opinion on its merits. The experts will render a decision regarding the individual controversy to the Group. If the decision agrees with the claimant, then any member state may request from the defendant member state the annulment of the challenged actions or corrective measures. If the defendant member state refuses to provide relief, then the member state requesting relief may commence an arbitration proceeding against the defendant member state under the previously discussed process.

**DECISION-MAKING AND LEGAL HIERARCHIES**

Most policy decisions in MERCOSUR appear to be taken by the Council based on proposals submitted by the Group or the MCC and its Sub-Working Groups. Decisions made by the Group or the MCC appear to be of a technical nature or implementation of political decisions made by the Council. All decisions made by all MERCOSUR institutions must, according to Article 37 of the Ouro Preto Protocol, be made by.

The MERCOSUR legal system consists of the Treaty of Asunci6n, its Protocols, Annexes and related agreements. The effectiveness of these treaties and the hierarchy given them in each member states depends on the national law of each member state. The second "level" of the MERCOSUR legal system consists of the Council Decisions, Group Resolutions and MCC Directives, which seek to create a common external tariff, customs procedures and commercial policy by harmonizing disparate national rules. This "administrative law" of the MERCOSUR community does not become effective until it is incorporated into each member state's legal system in accordance with their national legislation.

The Ouro Preto Protocol does specify, however, that all member states have an obligation to implement the "administrative law" provisions described above into their national legislation. The implementation process set forth therein requires the member states to adopt first all measures necessary to incorporate the provision into their national legal system and upon incorporation promptly notify the Secretariat of such incorporation. When the Secretariat has such notice from member states, the provision then becomes

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18 The panel of experts consists of at least three members appointed by the Group.

19 Thus, MERCOSUR does not have the equivalent of an EU Regulation which, under Article 189 of the Treaty of Rome (as amended) is directly applicable to the member states without the need for incorporation into the national legal system. Furthermore, it also appears that the familiar EU law principle of supremacy of community law over national law (see, *Costa v. ENEL*, Case 6/64 [1964] ECR 585) is not applicable in the MERCOSUR legal system. To the contrary, MERCOSUR "law principles" become part of national law only if the member states choose to make it so.
effective after 30 days. Once this happens, community "law" is applicable in the member states because it has become part of national law and for no other reason.20

The place of the "MERCOSUR law" described above within the national legal hierarchy of each of the member states depends on the constitutional law of each member state. Argentine constitutional law appears to indicate that international treaties to which Argentina has subscribed have a higher place in the legal hierarchy to national laws. Similarly, the Argentine Congress can approve integration treaties that delegate jurisdiction and competency to international organizations. In these cases, the policies or norms dictated by these organizations have, again, a higher place in the legal hierarchy than national law.

In Brazil, Article 4 of the Brazilian Constitution enumerates integration with other Latin American countries as a principal goal of the national government. Other provisions, however, also enunciate the "guarantee of national development" and the maintenance of state monopolies involving vital areas for the national economy as principal goals which the national government must safeguard. It also appears that that Brazilian constitutional law does not have provisions regarding the hierarchy of treaty and supranational laws similar to those existing in Argentina. These provisions seem to lead some constitutional scholars to consider that, under Brazilian constitutional law, any "community law" that conflicts with the obligations of the national government to maintain state monopolies or "guarantee the national development" would be void and unconstitutional. Since Brazil (as well as all other member states) must incorporate most MERCOSUR community law norms into their national legal systems in order for them to be effective, these constitutional provisions might create a substantial problem. Therefore, it appears that any MERCOSUR "community law" incorporated into the Brazilian legal system through national legislative action would have the same hierarchical status as any other law passed by the Brazilian Congress.

The Uruguayan Constitution indicates that the national government has the exclusive right to establish laws that will apply in the national territory. The Constitution also provides that the state is to seek economic and social integration with other Latin American states. Thus, it appears that Uruguay may incorporate MERCOSUR norms into its national legal system through national legislative action. As in the case of Brazil, it appears that such norms adopted into the national legal system would have the same hierarchical status in the Uruguayan legal system as any other statute passed by the Uruguayan legislature. The Uruguayan Constitution also provides that the Uruguayan government should propose the inclusion of clauses dealing with arbitration or alternative dispute resolution in any treaties or other agreements established between the Uruguayan government and foreigners.

20 The EU principle of "direct effect", (see, Van Gend en Loos NV v. Nederlandse Administratie der Belastingen. Case 26/62 [1963] ECR 1), whereby certain provisions of community law were enforceable within (and by) the member states' legal system without the need for any incorporation action, is also not applicable in the MERCOSUR legal system. Unlike the European Union, MERCOSUR is not a "new legal order...comprising not only the Members but also their nationals" (id. at 29).
The Paraguayan Constitution also anticipates that Paraguay may seek to join international organizations or participate in regional or international integration efforts. Indeed, the Paraguayan Constitution also recognizes that the state may participate in the creation and administration of supranational legal norms. A law seeking to incorporate such supranational legal norms must, however, be passed by an absolute majority of both houses of the national legislature. Again, it appears that any supranational norm incorporated into the Paraguayan legal system through the process set forth above would have the same hierarchical status as any other law passed by the Paraguayan legislature.
III. ARGENTINA

THE ECONOMY

A complete discussion of the major sectors of the Argentine economy and their complex interrelationships is beyond the scope of this paper. This section will, however, relate some characteristics of the significant sectors of the Argentine economy that are relevant to the area of competition.

Argentina's international trade policy through the late 1980's was extremely protectionistic, with high tariffs, significant quantitative restrictions and surcharges on foreign imports. Restrictive governmental regulation made direct foreign investment and operations by representatives of the large international banks and other foreign sources of capital in Argentina extremely difficult and burdensome. On the other hand, the Argentine government, through subsidies and other assistance, strongly encouraged exports in the traditional sectors, which chiefly included agricultural products, raw materials and other commodities. Prices of essential commodities were kept low through price control laws and regulations. Procurement statutes, regulations and policies required the public sector, an extremely large and powerful sector of the economy, to purchase exclusively Argentine products. In short, the Argentine economy was not hospitable to international trade during this time period and imports consisted chiefly of capital and other finished goods that were necessary and not obtainable in the domestic market.

The position of Argentine industry since the mid-1960's, in comparison to that of other middle-income countries, has eroded steadily. This erosion is rooted in a perverse synergy of two factors. First, severe macroeconomic instability and repeated policy shocks generated excessively risk averse and anti-competitive conduct. Secondly, the Argentine government's policy of high trade barriers, combined with generous long term investment incentives to domestic firms, gradually deterred competition and mobility. As a result of these two factors, Argentine industrialists became unusually risk averse in their investment decisions and manufacturing firms, in an attempt to insulate themselves against market shocks, have consolidated their positions and increased their market power by vertical and horizontal integration. Indeed, the Argentine economy has been described as strongly oligopolistic.

An example of this phenomenon is found in the following table, which is drawn from a 1988 World Bank Study and which describes the overall level of concentration in the Argentine manufacturing industry as of 1984. The table presents the four-plant and eight-plant concentration ratios, as well as the Herfindahl index for a number of industrial subsectors. The data indicated that fairly high levels of concentration (a Herfindahl index of .15 or above) prevailed in the Argentine manufacturing industry in 1984.\(^\text{21}\) Such high

\(^{21}\) The criteria set by the United States antitrust legislation to determine what are acceptable levels of concentration in a given sector of its national industry are useful points of reference. With a Herfindahl index above .18, an industry is considered too highly concentrated and authorizations for
concentration levels were most common in the intermediate goods sector. The mean concentration level (eight-plant ratio) of intermediate goods, capital goods, consumer durables and non-durables were respectively 67.3%, 56.5%, 48.9% and 54.0%. Despite the fact that this data is rather old, the concentration data shown therein has probably worsened over time at least with respect to manufacturing industries. While international comparisons are always fraught with statistical anomalies, orders of magnitude can be provided by concentration ratios from other countries. For example, in 1983, in Canada, a country with relatively high concentration ratios by OECD standards, the largest 100 manufacturing enterprises (using corporate assets) represented 51% of the total. Similar figures for roughly the same time period for the U.S. and Japan were 28% and 25% respectively.22

The public enterprises owned or controlled by the Argentine state, and the defense industries owned by the General Directorate for Military Factories, a holding company owned by the Ministry of Defense (PEs) were a major drain on public funds. Through the late 1980's, the Argentine government owned or controlled many manufacturing, industrial and other enterprises. These companies represented a large portion of the Argentine economy and operated in a fashion similar to that of the national government: they were overstaffed, noncompetitive, inefficient and managerial decisions therein were generally made for political and not managerial reasons23. Furthermore, purchases of the rest of the needs of these PEs were regulated by statutes which favored domestic private industry. Since the private sector is still oligopolistic in nature, sales from the private sector to public enterprises were often executed at a premium and implied subsidies to private industry. These policies generated enormous losses which were covered by disbursements from the Treasury. These deficits (before transfers from the Treasury) totaled 3.4% of GDP in 1989.


23 For example, in 1988, YPF (the then government oil and gas company) was required to sell gas to Gas del Estado below its own production cost and to buy coal from YCF (the government coal company) at a price three times the international price for coal. Earnings from YPF were diverted for social security system payments.
Table 3.1: INDUSTRIAL CONCENTRATION IN ARGENTINA  
Four-plant, Eight-plant Concentration Ratios (in %) and Herfindahl Index ~ 1984

<table>
<thead>
<tr>
<th></th>
<th>Four-plant Concentration Ratio (%)</th>
<th>Eight-plant Concentration Ratio</th>
<th>Herfindahl Index</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consumer Goods</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food Products</td>
<td>39.8</td>
<td>52.2</td>
<td>0.11</td>
</tr>
<tr>
<td>Beverages</td>
<td>46.2</td>
<td>63.5</td>
<td>0.10</td>
</tr>
<tr>
<td>Tobacco</td>
<td>79.9</td>
<td>95.0</td>
<td>0.25</td>
</tr>
<tr>
<td>Footwear</td>
<td>36.0</td>
<td>42.9</td>
<td>0.10</td>
</tr>
<tr>
<td><strong>Intermediates</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Textiles</td>
<td>42.2</td>
<td>55.4</td>
<td>0.12</td>
</tr>
<tr>
<td>Wood and Cork</td>
<td>32.6</td>
<td>43.9</td>
<td>0.06</td>
</tr>
<tr>
<td>Pulp, Paper Products</td>
<td>41.9</td>
<td>53.7</td>
<td>0.21</td>
</tr>
<tr>
<td>Chemicals</td>
<td>58.6</td>
<td>72.6</td>
<td>0.18</td>
</tr>
<tr>
<td>Rubber and Plastic</td>
<td>66.9</td>
<td>82.1</td>
<td>0.16</td>
</tr>
<tr>
<td>Cement</td>
<td>43.9</td>
<td>72.6</td>
<td>0.09</td>
</tr>
<tr>
<td>Basic Metals</td>
<td>69.8</td>
<td>83.2</td>
<td>0.16</td>
</tr>
<tr>
<td><strong>Capital Goods and Consumer Durables</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metal Products</td>
<td>32.8</td>
<td>43.8</td>
<td>0.06</td>
</tr>
<tr>
<td>Non-Electrical Equipment</td>
<td>51.1</td>
<td>62.2</td>
<td>0.17</td>
</tr>
<tr>
<td>Electrical Machinery</td>
<td>47.4</td>
<td>59.6</td>
<td>0.09</td>
</tr>
<tr>
<td>Transport Equipment</td>
<td>45.2</td>
<td>58.4</td>
<td>0.10</td>
</tr>
</tbody>
</table>

Note: The three index-numbers were computed separately using 5-digit-level data, and taking an unweighted average for the sectors. For example, among the subsectors which make up transport equipment (i.e. autos, two-wheel vehicles, trucks, etc.), the average four-plant concentration ratio is 45.2 percent.


The Argentine government through the late 1980's was characterized by its enormous size, its involvement in almost all sectors of the economy, its massive expenditures and deficits, and its inability to either control its expenditures or increase its revenues. In order to operate and fund ever-increasing deficits, the government was required to borrow both from domestic and international sources, thus limiting or eliminating private sector access to capital.

This situation changed drastically in 1989. The Menem administration, which took office that year, made a number of significant reforms to the legal system, administrative institutions and policy to reform completely and restructure the national government. These reforms, and a large number of divestitures of PEs and other governmental units, have drastically reduced the size of the bureaucracy, rationalized the scope of regulation and administration, and have made the national government far more efficient. They have also significantly reduced government spending and increased its ability to raise revenue.
Efforts to reduce substantially accumulated public sector debts and deficits have been extremely successful, with the combined public sector deficit falling from 10.5% of GDP in 1989 to a slight surplus in 1992.

Argentina committed itself to a wide-ranging privatization program covering utilities and transport services under the National government authority in addition to divestiture of manufacturing facilities (e.g., steel). The initial objective was fiscal: the government had decided that it could no longer afford to subsidize these services nor finance the investments required to ensure their proper operation. But in the process the government also tried to improve the efficiency with which these services were being delivered. This entailed a major restructuring of each sector and the development of a regulatory capacity which has proven to be one of the main challenges of the reforms.

The main objective of the restructuring was to introduce competitive forces wherever possible. Competition requires multiple players and one way to increase the number of players was to unbundle services wherever possible. In electricity and gas, the vertical and horizontal separation of generation, transmission and distribution had been considered a sine qua non condition to the creation of effective competition in the sector. Horizontal unbundling was the key to the restructuring of telecommunications, with the division of the public enterprise into two companies getting each roughly half of the country and with the separation of activities into three service groups, basic telephony (infrastructure and local phone services), international services (international calls, telex and data) and service in competition (national telex, national data, Maritime radio...). The division of the national rail company into three separate businesses, freight, intercity passenger and commuter rail—which were privatized or transferred to the provinces was instrumental to the major restructuring of this sector as well. Intercity passenger services were ultimately abandoned and freight and passenger services were themselves divided into separate lines (six for freight and seven for commuters) before offered in concessions to the private sector. Argentina’s main container port was also divided into its terminals which were awarded to five different concessionaires.

To maximize the benefits from competition in each sector, competitive bidding was the standard way of passing the service to private operators, although every sector adopted a somewhat different bidding approach. An elaborate system of weighted criteria was

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24 In transport, whatever could not be privatized was to be decentralized and it became up to the provinces to decide what to do with costly infrastructure services. The decentralization of rail and ports unfit for rapid privatization by the National government lead to the abandonment of many low traffic services for instance. As for water and electricity distribution, they were provincial responsibilities to begin with and not all provinces have followed the lead of the national government in getting the private sector involved so that public and private enterprises are coexisting in these two sectors.

25 The terms of these concessions varied significantly: 7-year exclusive licenses for telecoms, 95 years for electricity distribution and transmission, 35 years for gas, 12 years for intercity roads, an average of about 23 years for BA access roads, 30 years for freight rail and 10 years for commuter rail (20 years for the metro).
used to select the winners for the freight rail concessions while winners for the first round of road concessions were selected simply on the amount of the fee to be paid to the government. The designers of the electricity sector introduced a sophisticated system of management period which maintained the competitive pressure on the initial winners of the distribution and transmission concessions. As for water, where the bidding process was so critical to the introduction of competition in the sector, the procedure involved multiple stages, including a prequalification, a technical qualification focusing (some would argue excessively) on the way the bidders were proposing to meet quality and investment targets and a final stage in which the financial proposal for the lowest tariff was to be decisive. Overall, however, the design of the bidding process clearly revealed that the fiscal concerns of the government were tainting the search for efficiency through the bidding process. The search for a minimum price for the consumers was only obvious for the water sector and the access roads to Buenos Aires. In all other cases, the award criteria was centered around some form of payment to the government (cash or debt reduction) or the minimization of subsidy requirements. As for the effectiveness of the bidding procedures in enhancing competition, the results were at best mixed: while many bidding documents were sold, often several buyers of these documents ended up merging so that there were seldom many bidders for each transaction (i.e., 2 and 3 for telecoms, between 1 and 5 for the electricity distribution and transmission companies, between 2 and 8 for the gas distribution and transmission companies, 4 for the water company, 1 or 2 for the freight railways).

While the unbundling and competitive bidding procedures were certainly important to introduce some of the benefits of competition in the delivery of infrastructure services in Argentina, the government was very aware of the need for continuous direct regulation of these industries since once the concessions were awarded, many of these were essentially local private monopolies that were purchased, to a significant extent (in addition to foreign purchases) by a small number of Argentine private firms that had the funds, infrastructure and expertise to make these purchases. This is why each sectoral restructuring was accompanied by the creation of a sector specific regulatory agency. To some extent, the creation of each agency had its origin in three main reasons: (i) the monitoring of compliance with the contractual obligations of the concessionaires; (ii) the need of consumers to be protected from the private monopolies; (iii) the needs of the private concessionaire to be protected from the government who still might be tempted to interfere with the private concessionaires’ management. But once more, the specific approach adopted by each sector was quite different.

While the creation and staffing of the electricity and gas regulatory agencies followed international best practice and have not yet had major problems in fulfilling their obligations, the experience of the other regulatory agencies or authorities has been much more problematic. The most difficult may have been the Telecoms and Water regulators where there are not only staffing problems (skill mix and excessive numbers) but also concerns with the lack of transparency of the decision making process. As for transport regulators, who have recently been merged into a single regulatory agency, the main issue has been the lack of independence from the political power. Unfortunately, there is some concern with the fact that the division of responsibilities between the regulators and their
sector ministries and secretaries is increasingly being blurred for all sectors, reducing the independence of most regulators and in the process their accountability as regulators. There is also some concern that the statutory framework under which these regulators operate do not really address the need to protect would-be competitors and grant equality of access to essential facilities to ensure that competitive pressure remains in the sector. Without this responsibility and without the tools (including access rules and pricing options), the regulatory agencies are unlikely to be filling their role in the promotion of competition in infrastructure services.

The Menem administration has also radically changed trade policy. Most quantitative and other restrictions on imports have been eliminated and tariffs have been significantly reduced and rationalized. Most export subsidies have been eliminated and trade-related taxes and fees have been rationalized. Price control laws have been eliminated. Argentina has joined MERCOSUR, adopted its common external tariff, and is enthusiastically supporting its regional integration efforts. Restrictions and limitations on foreign investment have been essentially eliminated and Argentina has entered into a number of bilateral free trade agreements with a number of countries, including the United States.

In short, the Argentine economy has, in a few years, changed drastically. These changes, and the change in trade mindset associated with them, will take time to be assimilated by the public and private sectors. There is evidence to indicate that this assimilation has not yet taken place, especially in the area of competition. Representatives of both the public and private sectors have asserted that many Argentine consumers and businesses still feel that free and open competition is a state of affairs that they should be protected from, not encouraged to participate in. As shall be seen below, this mindset creates roadblocks for the modernization and implementation of competition law.

TREATY AND INTEGRATION LAW IN THE ARGENTINE LEGAL SYSTEM

As noted above, the Argentine legal system appears to be extremely receptive and gives great deference to international treaties and "community law". Argentine constitutional law appears to indicate that international treaties to which Argentina has subscribed have a higher place in the national legal hierarchy than national ("federal") laws passed by the National Congress. Federal laws also have a higher place in the national legal hierarchy to statutes and ordinances passed by provincial or local legislative bodies. Similarly, the Argentine National Congress can approve integration treaties that delegate jurisdiction and competency over legal and technical matters to international organizations. In these cases, the policies or norms dictated by such international organizations to which Argentina belongs, such as MERCOSUR, would, again, have a higher place in the national legal hierarchy than federal laws.

COMPETITION POLICY

Introduction. As noted above, in spite of recent reforms, the Argentine economy is plagued by widespread practices which restrict competition and create substantial barriers
to entry in a number of industries. Analysts and a number of representatives of the public and private sectors have stated that, in many parts of Argentina, competition itself is not understood or accepted. Many business managers view competition itself in a highly negative fashion. Indeed, there are apparently many managers who do not even know that there is a competition law in Argentina. This state of affairs is remarkable in view of the fact that Argentina has had an antitrust statute since 1919.

In the area of competition policy, this section will first describe the competition and consumer protection policy systems currently in force in Argentina. It will then examine and evaluate the enforcement of this system by the Competition Commission. Lastly, this section will also briefly describe the proposed amendments to the Competition Law which are currently pending before the Argentine National Congress and will present assessments and recommendations.

Current Competition Law. The competition law which is currently in force in Argentina is Law 22, 262, the Competition Law of 1980, a Federal statute which only affects conduct that occurs within more than one province or which affects the general economic interest. There are no provincial equivalents to the current law. Violations of the law may give rise to three different types of actions, which include an administrative action before the Competition Commission ("the Commission") which is decided by the Secretary of Commerce and Industry ("the Secretary"), a criminal action before the Federal Courts in the Provinces or the Criminal Economic Courts in Buenos Aires, and common tort actions which may be initiated by parties injured by violations of the law.

Forbidden Acts. The current law forbids abuse of a dominant position in a market. It indicates that a person has a dominant position in a market when it is the only supplier or producer of a product or service in the national market or when it does not face substantial competition by other producers or suppliers. Two or more persons have a dominant position in a market when there is no effective competition between them (or substantial competition by third parties) with respect to a certain type of product or service in the whole or any part of the national market. Merely having a dominant position in a market is not a violation of the current law. Only the abuse of such a dominant position does.

The law also prohibits all acts and conduct which result in a limitation or distortion of competition or that damage the general economic interest. Such acts may include cartels, boycotts, refusals to sell, anticompetitive mergers, tying arrangements or price fixing. Criminal proceedings may be filed only when certain intentional acts such as boycotts, tying arrangements and price fixing take place.

The current law does not, however, have any provisions requiring prior governmental examination and regulation of business mergers or combinations of any type in order to determine whether these combinations result in any forbidden acts under the law. The lack of this provision in the current law hampers its enforcement, since it is much easier to prevent an anticompetitive business combination before it occurs than to undo a completed transaction.
The Enforcement Agency. The current law created the Competition Commission to enforce its provisions. The Commission is organized under the authority of the Secretary and is composed of the president, who is one of the undersecretaries of commerce, and four other members (two attorneys and two economists) who are designated by the Ministry of Economy and who are not elected on staggered terms.26 The Commission has a small staff (17 professionals as of February of 1996) to assist its members in discharging their functions.

The Commission also has the power to act anywhere within the country where acts or conduct subject to the current law have occurred.

Administrative Procedures. Under the law, any forbidden act or conduct may give rise to an administrative proceeding by the Commission. This proceeding may be commenced by the Commission itself or in response to a complaint by a third party. In the case of a third party complaint, the Commission must carry out a preliminary investigation and then submit a report with its conclusions to the Secretary, who may decide to dismiss the case. The Secretary's decision may be appealed to the courts, which may order the Commission to proceed with the investigation.

The Commission first conducts an investigation of the acts and conduct that is claimed to violate the law. This investigation may involve information requests from public or private parties, the interrogation of witnesses, the testimony of witnesses or the presentation of expert reports. The defendant may participate in all investigatory proceedings and may request specific proceedings or actions. The Commission has wide powers during the investigatory phase of these proceedings, and may request the attachment of assets by a court, enjoin persons subject to investigation from leaving the country, and enter buildings open to the public.

Once the investigation is completed, the defendant has thirty days to request evidence and present a defense. Once the evidence and defense have been presented, the Commission prepares a recommendation to the Secretary. During this period, the defendant may file a settlement offer with the Commission. This offer must include an offer to cease or modify, either immediately or gradually, all or some of the acts or conduct under investigation. If this settlement offer is approved by the Secretary, it is implemented and the administrative proceedings are suspended. If the settlement is not complied with during the three year period following its approval, the Secretary may apply fines to the settling party. Criminal liability may also arise from the violation of the settlement agreement.

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26 Members of the Commission have a status similar to that of federal judges and have a four year tenure. They can be discharged from their position for only a limited number of reasons and their discharge must be decided upon by a special tribunal appointed yearly by the Executive Power. Dismissal can be ordered for poor performance in office; misconduct; repeated negligence when carrying out investigations; the commission of crimes that are incompatible with membership on the Commission; lack of ability and conflict of interest.
If the settlement offer is not approved or if there is no such offer, the Commission's report goes to the Secretary for decision. The Secretary may reject the report and find that there was no violation of the law. The Secretary may also approve the report, find that a violation occurred, and prohibit the status quo from changing, order that the noncompetitive conduct be discontinued, assess fines (which may be adjusted for inflation and may be increased to 20% more than the gains derived from the anticompetitive acts or conduct), or order the dissolution or liquidation of the business enterprise involved through a special procedure.\textsuperscript{27}

**Criminal Actions.** The current law also provides that certain intentional conduct results in an abuse of dominant position or acts or conduct in restraint of trade, criminal actions may be commenced and criminal penalties may be imposed. This conduct includes price fixing; limiting or controlling, through concerted action, technological developments, investments, distribution or marketing; tying arrangements; allocations of territory; refusals to deal; discriminatory pricing; impeding or obstructing access to the market by competitors, and others. Criminal actions may result in penalties that may include one to six years in prison, fines of up to two times the profits derived from the anticompetitive activity, or bars from participation in commercial matters for three to ten years.\textsuperscript{28}

**Tort Actions.** A party that has been damaged by another's anticompetitive actions may obtain damages by filing a tort action under the appropriate provisions of the Argentine Civil Court. This action is heard by judges with commercial jurisdiction. Tort actions may be filed only after the approval of a settlement by the Secretary, the decision of the Secretary regarding a complaint of anticompetitive acts or conduct, or after eighteen months have elapsed from the commencement of the administrative proceeding described above. Tort actions are subject to a two year statute of limitations.

**ENFORCEMENT OF THE CURRENT COMPETITION LAW**

**Case Statistics.** Since its inception through August of 1992, the Commission had opened 285 dossiers involving 78 different industries. Of these 285 dossiers, 199 had been concluded, with the remaining 86 dossiers still open. Of the completed cases, 129 were forwarded by the Commission to the Secretary. The other 70 were dismissed by the Commission for any of several reasons. Of the 129 cases reviewed by the Secretary, 53 resulted in acquittals and 49 others resulted in convictions. Twenty two cases were dismissed because the specific complaints did not fall under the purview of the law and 5

\textsuperscript{27} The Secretary's decision may be appealed to the National Court of Appeals for Economic Criminal Matters in the City of Buenos Aires or in a Federal Appeals Court in the provinces. The appeal may be filed by either the complainant or the defendant. When the defendant appeals, the implementation of the Secretary's decision is suspended.

\textsuperscript{28} The decision to initiate a criminal action is made by the Secretary only after the administrative procedure has been carried out. These actions are heard before the Criminal Economic Court judges in the city of Buenos Aires and Federal judges in the provinces. In these actions, both the Secretary and the damaged parties may appear as complainants. Criminal actions are subject to a six year statute of limitations.
others were settled. Thirty eight of the Secretary's decisions were appealed. Complainants in cases where the Secretary dismissed the complaints filed some of these appeals. Others were filed by defendants after convictions. Of these appeals, 18 resulted in upholding the Secretary's decision totally, two resulted in partial upholding, 13 others were overruled and 5 were still under consideration. Through 1992, cases appeared to last from one to eight years, with four years being the average.

From January of 1993 through February of 1996, the Commission has opened 65 dossiers. Of these 65 dossiers, proceedings in 62 have been concluded, with the remaining dossiers still open. Of the completed cases 53 were forwarded by the Commission to the Secretary. The other 9 were dismissed by the Commission for any of several reasons. Of the cases sent to the Secretary, 4 were settled, 21 were dismissed, 21 were listed as having "explanations accepted" and 3 resulted in sanctions. Of the cases decided by the Secretary, 3 were appealed. No information was available regarding the status of these three appeals.

**Commission Resources.** The number of professional and administrative employees on the staff of the Commission had steadily declined since 1980 until recently. The Commission's staff (not including Commissioners) declined from 12 in 1980-1983 to 5 in August of 1992. In February of 1996, the Commission's President (who was also Under Secretary of Deregulation and Interior Commerce in the Ministry of Commerce) indicated that, as of that date, the professional staff numbered 17. The President also asserted that he had been able to supplement temporarily the Commission's permanent staff with additional personnel from other areas of the Ministry in order to deal with the processing of cases. Since October 1996, the new President has increased the professional staff to 24 including 9 lawyers and 8 economists, selected through competitive exams, and has substantially succeeded in clearing the case backlog.29

The Commission has also benefited from recent increases in its budget resulting in better funding for new office space, computers, staff and investigator expenses. It has also enabled the Commission to conduct and/or contract out (e.g. El Instituto Torcuato di Tella) concentration studies on key Argentine industrial sectors.

**THE PROPOSED AMENDMENTS TO THE COMPETITION LAW**

Approximately eight drafts of bills seeking to amend the Competition Law of 1980 have circulated or have been introduced in the National Congress since 1992. These draft bills have run the gamut from one seeking to have the national government "organize competition within certain industrial sectors", to others seeking to transform the Commission into a Competition Court and requiring pre-clearance of proposed mergers.

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29 For the period 1981-1996, 1.67 cases per month were processed; from February-March 1997, 4.5 cases per month were processed; and from April-June 1997, 16.3 cases per month are expected to be processed, with all cases dealt with in 6 months.
All but one of these drafts did not garner enough support for passage by one of the houses of the National Congress.

Recently, one of these draft bills was passed by the lower house of the Congress and is presently pending in the Senate that corresponds to a significant extent to a draft bill prepared by the World Bank and consultants in collaboration with the Argentine government. Under Argentine constitutional law, if this bill is not passed by the Senate before a stipulated time, it will expire and must be reintroduced in the lower house for passage.

The bill has been amended several times since its introduction and the latest amendments were unavailable. Nevertheless its major provisions, both substantive and procedural, appear to have remained unchanged. The substantive provisions include sections which expand and clarify the nature of conduct deemed to be anticompetitive, and include sections making certain types of cartel behavior illegal per se. Furthermore, the bill for the first time includes mergers and combinations within the purview of competition law and introduces the concept of pre-merger notification and review. But it could also benefit from a stronger statement that the Commission should play a more proactive role in addressing competition issues in the context of the privatization and regulation of infrastructure at both the Federal and local level.

Most importantly, the bill seeks to strengthen enforcement of law by replacing the present Commission with a Competition Court, which would have a vastly expanded staff and resources, and which would be independent of the Executive Power. The court and its staff would have greatly strengthened investigatory and enforcement powers.

Private rights of action for individuals damaged by anticompetitive behavior would also be expanded and strengthened. It is unclear whether this bill will become law. There does not appear to be a major effort by the Executive Power to secure its passage and most private sector observers predicted that it would not pass. It represents, however, the first credible attempt to amend and reform the 1980 Competition Law since its enactment.

CURRENT CONSUMER PROTECTION POLICY

This section examines the area of consumer protection policy and examines and describes the Fair Trade Law (FTL), the Deregulation Decree of 1991 and briefly describes the area of product liability. A new consumer protection law is now pending in Congress.

30 Law 22, 802
31 Decree 2282/91
The FTL: Introduction and Scope. Fair Trade Law regulates the identification and marketing of goods and services and grants the Secretary the power to issue regulations on several matters related to the commerce of goods and services. It applies to all commerce in goods and services, including provincial commerce. Violations may result in fines or in the confiscation of goods.

The FTL Coverage. The FTL first enacts a series of requirements regarding the identification and labeling of goods. It generally provides that all goods and products marketed in Argentina must bear labels in Spanish clearly describing their contents and origin. The law also prohibits any labels, product, packaging or wrapping that may be misleading as to the nature, quality, origin, uses and other characteristics of the goods and products being marketed.

The law also bars any type of advertising or representation of goods and services which, by means of misrepresentations, falsehoods and incomplete labels leads to any kind of a mistake or confusion as to any characteristic of the goods or services being offered. Lotteries, gifts and prices that are conditioned upon the goods and services that are being advertised by such practices are covered. The law applies to producers, manufacturers, packagers and importers. Merchants are not permitted to sell any goods or products that do not comply with the substantive provisions of the FTL. These merchants are also responsible for the accuracy of the labels on the goods and services being sold, unless the responsible parties are clearly identified on said labels. The provision of the FTL also apply to any state entities that are engaged in commercial activities.

The FTL: Administration. The law is administered by the Secretary of Commerce and Industry for matters involving federal trade. In cases of intraprovincial trade, the governors are responsible for the administration of its provisions. The Secretary has significant powers under the FTL to establish criteria for the identification of goods, products and services; to provide minimum safety requirements for goods and services; to establish a measurement system under which goods are sold; to obligate the publishing of prices; to obligate parties rendering services to clearly inform the consumer about the nature of the services being offered; and, in general, to issue any administrative regulations required for the protection of consumers of goods and services.

The Deregulation Decree of 1991. The Deregulation Decree of 1991 also had an impact on the field of consumer protection policy. This Decree repeals all restrictions on the offering of goods and services for sale, deregulates pharmacies and the selling of medicine.

32 A party failing to comply with obligations under the FTL is given ten days to present a defense and present any supporting evidence. The Secretary must issue a decision within twenty days after the defendant has produced its defense and supporting evidence. If the Secrerary finds a violation of the law, he may impose a fine, which may be increased in cases of repeated offenses within a three year period. In serious cases, the Secretary may order the forfeiture of goods that violate the law. When the offense involves the publication of falsehoods or misrepresentations, the Secretary may order the publication of his decision. These decisions may be appealed to the Economic Criminal Court of Appeals in Buenos Aires or to the Federal Appeals Courts in the provinces. An appeal suspends the effect and implementation of a decision.
repeals the "Buy Argentina Act," (which, inter alia, required the public sector to purchase exclusively Argentine products and raw materials) and repeals other restrictions on the importation of foreign goods.

**Product Liability Responsibility Policy.** No single statute covers product liability. This body of law has arisen from the constructions of the provisions on torts and contractual liability set forth in the Civil and Commercial Codes. Certain other statutes dealing with specific matters contain special provisions on the liability of wholesalers, importers, retailers and producers. These provisions tend to be very similar to the general provisions of the Civil and Commercial Codes.

Section 1113 of the Civil Code provides that manufacturers are strictly liable for damages caused by their products. In contract disputes, the manufacturer is held to owe an implicit safety obligation which is violated when the product causes injury. This obligation shifts the burden of proof of negligence to the manufacturer. In either tort or contract cases involving merchants, the plaintiff has the burden of establishing negligence. Some specific laws do impose strict liability on merchants and others within the stream of commerce. In either of these cases, damages are awarded for bodily harm and damages to goods.

**ANTI-DUMPING AND COUNTERVAILING MEASURES POLICY**

**Legislative Framework.** Law 24, 176, which was adopted by the National Congress in 1992, ratifies and adopts the GATT Anti Dumping Code. Law 24, 425, adopted by the National Congress in December of 1994, and manifests Argentina's adoption of the Uruguay Round Anti-dumping Agreement. Thus, the World Trading Organization's ("WTO") anti-dumping and countervailing duty norms form the basis of Argentine anti-dumping law. Decree 2121/94 of November 30, 1994 implements GATT anti-dumping and countervailing duty norms into the Argentine legal system and establishes institutions and procedures to evaluate allegations of dumping and to recommend and implement appropriate remedies therefor.

**Substantive Norms.** The decree establishes that a product is dumped when it is introduced into Argentina at a lesser price than the normal value of a like product sold for consumption in the exporting country. The usual motives for dumping are international price discrimination, price promotion policies, predatory pricing policies and government export subsidies.

Export subsidies are economic or financial benefits given (directly or through third parties) by the government or a government instrumentality to exporters which are contingent upon export performance.

The mere existence of dumping or export subsidies with regard to a particular product does not justify the imposition by Argentina of any remedial measures. In order to justify the imposition of remedial measures, there must be damages to the national market caused by the importation of the subsidized or dumped product. Damage to the national market is an existing important damage or prejudice or a threat of a real or imminent damage to
the national market for the particular product under scrutiny. The determination of damage to the national market must be based on actual objective information and facts, and must include an evaluation of the volume of the dumped or subsidized imports and their impact over the prices of similar products in the internal market and the subsequent effects of these imports over local producers of similar products.

**Institutions: Ministerial Level.** The decree provides that the determination of whether a product or products imported into Argentina has been dumped or is subject to export subsidies is made by the Subsecretary of Foreign Commerce. The Subsecretary has a technical staff which conducts investigations on dumping complaints. The determination of whether the dumping has caused damage to the national market is not made by the Subsecretary or any other official in the Ministry. Rather, the determination of damage and causation is made by the National Foreign Commerce Commission ("NFCC") an independent body described below. Once the investigation into a dumping complaint is completed, the Subsecretary makes findings regarding the existence of dumping or export subsidies. If the NFCC has found that the dumping has caused damage to the national market, the Subsecretary forwards the findings of both agencies and its recommendations regarding remedial measures through the Secretariat of Commerce and Investment to the Minister of Economics, Works and Public Services. The Minister is the state official with the authority to impose remedial measures on the dumped or subsidized products.

**Institutions: the NFCC.** The NFCC is an independent Commission created by Decree 766/94 of May 12, 1994. The decree gives the NFCC several major areas of responsibility, which include: the analysis of trends in international commerce and their impact on national markets; the analysis and evaluation of the nature and effects of proposed or existing measures of political economy (including economic integration measures); and the analysis and reporting of trends regarding barriers to Argentine exports that may exist in the rest of the world. A principal responsibility of the NFCC is conducting investigations and making findings regarding damages to the national market which arise as a result of dumped or subsidized imports.

The NFCC's Directory is composed of a president and four members appointed by the Executive upon the recommendation of the Minister of Economics, Works and Public Services. Members of the Commission serve renewable four year terms and may be removed by the Executive "for grave cause" only. The president serves at the pleasure of the executive and may be removed at any time, with or without cause. The Directory formulates institutional policy, prepares strategic plans, interprets existing rules and makes findings regarding the existence of damage to the national market arising as a result of dumped or subsidized imports in cases that are submitted to it for consideration. The NFCC has a technical staff of attorneys, economists and accountants which is organized in five areas (Analysis of International Competition, Legal and Institutional Affairs, Internal

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33 The Subsecretary is an official of the Secretariat of Commerce and Investments, which is a dependency of the Ministry of Economics, Works and Public Services, whose minister is a cabinet level official.
A principal responsibility of the NFCC is the determination of damages to the national market caused by dumped or subsidized imports. The decree provides that, in making this determination, the NFCC must consider a number of factors. These include: the value and volume of the dumped or subsidized imports; the effect of these imports on prices in the local market; the effect of these imports on factors such as employment of workers, utilized industrial capacity; rate of return on investment and similar factors; the effects of these imports on other factors relating to the competitive situation of the industry, including cyclical factors, managerial capability and regulatory environment; projections on the development of the local market in the absence of remedial measures; and the probable behavior of the market after the application of remedial measures. The NFCC must also consider the effect of the dumped or subsidized imports, and of any proposed remedial measures, on the consumers in the local market. The latter factor, highly unusual in the area of anti-dumping regulation, requires the NFCC to consider consumers in the local market, as well as producers, in determining the existence of any damages.

Complaint Dumping Proceedings. The procedure established by the decree for the investigation and resolution of dumping complaints requires first that an enterprise or group of enterprises "representing a national production sector which produces identical or similar products to those being imported" file a petition with the Subsecretary requesting a dumping investigation. This petition must present evidence of dumping or subsidization and of the damages caused to the national market by these practices. If the Subsecretary determines that the enterprise filing the petition is an adequate representative of the relevant national production sector, the petition is accepted and a copy thereof is sent to the NFCC. Once the petition is accepted, both the Subsecretary and the NFCC must, respectively, make a preliminary determination of the existence of a presumption that the import was dumped or subsidized and that it has caused damage to the local market. This preliminary determination is based on an evaluation of the information attached to the petition and in the possession of the Subsecretary and the NFCC. If both institutions make such a preliminary determination, a formal investigation is instituted. If one or both institutions fail to make such a preliminary determination, then the petition is dismissed.

Once a formal investigation is instituted, the staff of both the Subsecretary and the NFCC begin the collection of evidence, which may include requiring the importers of the goods in questions or local enterprises to provide information. Once the investigation is concluded, the Subsecretary makes a final determination of the existence of dumping. At the same time, the NFCC also makes a final determination of the existence of damage to the local market caused by the imported goods at issue and transmits this determination to the Subsecretary. If the Subsecretary has found the existence of dumping or subsidization and the NFCC has determined that the dumping or subsidization has caused damage to the local market, then the former institution makes a recommendation regarding remedial measures and transmits this recommendation, together with the final determinations described above, to the Minister of Economics, Works and Public Works for action. The
Minister then makes a final decision regarding what countervailing duties or remedial measures to apply in the matter.

**Enforcement History.** From 1988 through December of 1994, 135 petitions alleging dumping or subsidizing of imports were filed. Of these, 50 petitions resulted in the opening of an investigation and, of those, 19 resulted in the application of temporary or permanent remedial measures. During this period, the NFCC did not exist, and decisions on the existence of dumping or subsidization and of damages caused thereof were made by the Subsecretary. During this time period (before the GATT procedures and timetables were adopted in Argentina), the processing and disposition of dumping or subsidizing complaints was very ineffective.

The NFCC began to conduct investigations and hear cases in 1995. During that time period, a total of 18 new cases were filed. Statistics on the disposition of cases since December 1994 are not yet available, but representatives of both the Subsecretary and the NFCC indicated that by the fall of 1996, there will be no backlog of cases.

**INTELLECTUAL PROPERTY POLICY**

**Adoption of TRIPs Agreement.** Argentina has adopted the WTO/TRIPs Agreement and has until January 1, 2000 to comply with most of the provisions of this agreement and a further five years to comply with its provisions regarding pharmaceutical inventions.

**Present Patent Law.** Argentina's present patent protection statute consists of Laws 24.481 and 24.572, which were passed in October of 1995, after an extended constitutional battle regarding patent protection policy between the executive and legislative branches. The Regulations to the existing law are set forth in Decreto Nacional 360 of January 3, 1996.

The law provides patent protection for inventions and designs based on novelty criteria, covering both product and process patents. Article 4 of the law, however, specifically excludes product patent protection for scientific theories, surgical or medical treatment, computer programs, and items which violate Argentine law or morals. Article 7 of the existing law also excludes "the totality of biological and genetic material existing in nature or its replication in the biological processes implicit in animal, vegetable or human reproduction."

The existing law provides for patent protection for twenty years from issuance (no extensions). A patent lapses if it is not worked within three years from the date of issuance, or if there is more than a one year interruption in working the patent.

Article 44 of the existing law provides that a compulsory license may be given when the "competent authority" has determined that the holder of the patent has engaged in anticompetitive practices. Anticompetitive practices shall include: the setting of comparatively excessive or discriminatory prices relative to the market, particularly when the market offers the same product for substantially lower prices from those offered by the patent holder; refusal to deal in commercially reasonable situations; the hindering of
productive or commercial activities; or any other act which is considered illegal under the current Competition Law or any future competition law.

The existing law has greatly strengthened the area of remedies and their enforcement. Preliminary injunctions are now permissible in infringement cases, remedies include a maximum criminal sentence of six months to three years, and fines, which can be doubled for subsequent offenses.

Present Trademark Law. Argentina registers both trademarks and service marks, and trademark registration is valid for ten years and renewable for additional ten year periods, though violations are subject to imprisonment of one month to one year and a fine of 500 pesos (US $500).


The Copyright Act provides for protection for the life of the author plus his heirs for fifty years, a "normal period" by comparative standards and requires publishers of works to register and deposit copies of their works at the Argentine National Copyright Registry within three months of the date of publication, or face a fine and suspension of the author's economic rights. The Copyright Act provides for preliminary injunctions and confiscation of infringing works as well as criminal sanctions involving imprisonment from between one month to one year, and a fine of 1,000 pesos (US $1,000). Estimates of US trade losses in 1991 due to piracy of motion pictures, sound recordings and musical compositions in Argentina were approximately US $43.6 million, involving primarily computer software, video, cable and audiocassette piracy.

FOREIGN INVESTMENT POLICY

Introduction. In the last five years, the current Argentine administration has engaged in a number of initiatives designed to eliminate any restrictions on foreign investment in the national legal system and to create a trade climate which encourages foreign investment. Among these initiatives are the new Foreign Investment Law, a series of bilateral investment treaties and a series of treaties designed to eliminate double taxation. These will be discussed below.
The New Foreign Investment Law. The new Foreign Investment Law was approved by Decree 1853/93 of September 2, 1993. The law first indicates that foreign investors in Argentina will have the same rights and duties accorded to domestic investors by the Argentine constitution and laws. In short, foreign investors have the right to equality of treatment with domestic investors. Foreign investment in Argentina can be made through a virtually unlimited variety of vehicles and foreign investors have the right to repatriate freely their capital and earnings. Furthermore, foreign investors also have the right to use any legal form of organization recognized in national legislation. Local enterprises with foreign capital (defined as companies domiciled in Argentina where foreign residents own more than 49% of its capital or control the number of votes necessary to prevail in stockholders' or partners' meetings) also have free access to the internal credit market as local enterprises with national capital. Agreements or other legal operations entered into between local enterprises with foreign capital and the enterprise or enterprises directly or indirectly controlling them (or other branches of either enterprise) will be recognized as having been entered into between independent parties when its terms and conditions conform with local market practices involving independent parties. Lastly, the new law indicates that regulations under this law will be issued by an administrative agency to be designated which will be at least an Undersecretariat within the Ministry of Economy, Works and Public Services.

The decree first states that foreign investors may invest in Argentina, under the same conditions as local investors, without prior approval in any economic activity, which is defined as including "all industrial, mining, agricultural, commercial, financial, service and other activities related to the production or exchange of goods or services". Foreign investors may also repatriate their capital and remit their earnings abroad at any time. Decree 1853 also repeals the prior approval required by the Technology Transfer Act (Law 22, 426). Lastly, the decree designates the Secretariat of Commerce and Investment within the Ministry of Economy, Public Works and Public Services as the Enforcement Authority under the new law. The Enforcement Authority will gather statistical information on foreign investments and will issue general interpretative rules and take other actions necessary to enforce the new law.

BILATERAL INVESTMENT TREATIES

The Argentine government has, in the last five years, negotiated and entered into a series of bilateral treaties concerning the reciprocal encouragement and protection of investment. Representatives of the Foreign Ministry indicated to us that the United States-Argentina

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35 For purposes of the Technology Transfer Act, however, all legal deeds entered into between independent companies as well as those reached between a domestic company with foreign capital and the company which directly or indirectly controls it (or any other subsidiary of the latter) must be registered with the National Institute for Industrial Technology for informational purposes only.
Investment Treaty of November, 1991 serves as the model for all such treaties. The provisions of the US Treaty are discussed below.

The US Treaty first provides that both countries will permit and treat investment, and all activities associated therewith, on a basis no less favorable that that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable. Each country may make or maintain exceptions to this policy falling within one of the sectors or matters listed in the Protocol to the Treaty. Both countries shall at all times accord investment fair and equitable treatment, and neither country shall in any way impair, by arbitrary or discriminatory measures, the management, operation, maintenance, use, enjoyment acquisition, expansion or disposal of investments. Neither country may impose performance requirements as a condition of establishment, expansion or maintenance of investments which require commitments to export goods produced or which require that goods or services must be purchased locally.

The US Treaty also indicates that investments shall not be expropriated or nationalized, either directly or indirectly, except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable at the prevailing market rate of exchange on the date of expropriation. Each country shall also ensure that those whose property was expropriated have the right to prompt review by appropriate judicial or administrative authorities to determine whether the expropriation conforms to the provisions set forth in the US Treaty and to applicable principles of international law.

The US Treaty also provides that each country shall permit all transfers related to an investment to be made freely in and out of its territory in a freely usable currency at the prevailing market rate of exchange on the date of the transfer.

Investment disputes between a national of one country and the government of the second country arising out of an investment agreement or authorization granted to that national or an alleged breach of any right conferred by the US Treaty should first be resolved through consultation and negotiation. If the investment dispute cannot be resolved in this manner, the national may seek a resolution in the courts or administrative agencies of the country involved in the dispute; in accordance with any previously agreed upon dispute settlement procedures; to ICSID in accordance with the ICSID Convention (of which Argentina is a signatory) if the country involved in the dispute is a party thereto; or to arbitration. The US Treaty then specifies a number of procedural matters regarding the submission of such investment disputes for resolution.36

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36 The US Treaty also contains two exceptions to the rules stated above. Article IX thereof indicates that the dispute resolution procedures discussed above shall not apply to any dispute arising under
**Taxation Treaties.** Representatives of the Foreign Ministry have indicated that they are in the process of negotiating a number of taxation treaties with a number of other countries that are designed to avoid double taxation and to simplify tax assessments, collections and withholding. These negotiations have not yet resulted in any treaties, other than a tax treaty with Brazil. They are hopeful that many of these tax treaties will be signed within the next two years.

One issue that should be included in such taxation treaties should be that of transfer pricing, which affects the pricing of inputs and outputs between parent and subsidiary companies located in countries with different business tax rates. This tax rate differential can be quite large, and the inputs and outputs subject to such pricing adjustment can be quite extensive.

**BANKRUPTCY POLICY**

**The 1995 Insolvency Statue (Law 24.522).** Argentina has a new bankruptcy statute which became effective in August of 1995. The new law is meant to simplify and streamline insolvency and bankruptcy proceedings, in order to make them more flexible and efficient. It also seeks to limit the powers of the bankruptcy judge and to increase the role of creditors in these proceedings. The new law has been reasonably well received by the business and legal communities though it is probably too early to assess the implementation experience and a number of its principal innovations are discussed below.

**Substantive Changes.** The new law substantially changes the role and powers of the debtor's employees during an insolvency or bankruptcy proceeding. Unlike the previous law, this law provides that employee actions in Labor Court (typically claims for unpaid wages and benefits) will be suspended in the event the debtor files an insolvency or bankruptcy proceeding. Employees will now become creditors of the debtor and will have to prove the existence and amount of their claim in Bankruptcy Court instead of Labor Court. The debtor may now also re-negotiate all of its employment terms with its employees and may cut salaries, limit employment terms and otherwise change previously existing employment contracts.

The law also changes the Argentine practice with regard to pre-bankruptcy transfers. Presently, certain actions of the debtor during the period of two years prior to the filing of insolvency proceedings or bankruptcy petition (the "periodo de sospecha") may be invalidated and declared ineffective. These transactions must have been performed with a third party that knew at the time of execution that the debtor was insolvent and which are

the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or under other official credit, guarantee or insurance arrangements to which the parties to the treaty have agreed to other means of settling disputes. Article XI indicates that measures necessary for the maintenance of public order, the fulfillment of the obligations of a party to the agreement with respect to the maintenance or restoration of international peace or security, or the protection of said party’s essential security interests, shall not be precluded by the Treaty.
detrimental to the other creditors. The third party who entered into the transaction with the debtor must, in order to sustain the validity of the transaction, now prove that the transaction was not detrimental to the creditors.

The law also provides that enterprises owned or controlled by the Argentine public sector may now commence insolvency or bankruptcy proceedings. Furthermore, the law also creates a National Registry of Insolvencies and Bankruptcies, which will contain a listing of all bankruptcy and insolvency proceedings commenced within Argentine territory.

**Insolvency Proceedings.** The law now requires, as a prerequisite for the commencement of an insolvency proceeding, that the debtor be in a state of "cesación de pagos" and that explain the reasons for the present financial situation and the circumstances that resulted in such "cesación de pagos". The debtor must also submit with its petition a detailed breakdown of its assets and liabilities and of all its creditors. Certain requirements of the previous law, such as the certification that the debtor was current in the payment of all salaries and social security contributions for all its employees, have been eliminated.

The new law authorizes the creation of a creditors' committee, which is composed of representatives of the different categories of creditors. The debtor, once the insolvency proceeding has been initiated, presents a payment proposal for approval by the creditors. Different proposals for each category of creditor may be made, and each proposal may give the creditors to which it is submitted several choices (such as reduction of the debt, restructuring thereof, or transformation of the debt into an equity interest) to consider. The creditors, or each class thereof, may approve the proposal or proposals by the required majority and the bankruptcy judge would confirm this approval. If the approval is confirmed, the monitoring of its implementation becomes the responsibility of the creditors' committee and not of the bankruptcy judge, as was the case previously.

Once the debtor presents a proposal to the creditors, said proposal must be approved within a specific time period. If creditor approval has not been obtained prior to the expiration of the term for acceptance of the proposal, then the creditors or other third parties may present a payment proposal for approval by the creditors. If such a proposal is approved, the creditors or third parties presenting it may acquire the equity presently held by the debtor's shareholders.

**Bankruptcy Proceedings.** The new law greatly simplifies bankruptcy proceedings. Bankruptcy proceedings may be commenced if an insolvency proceeding has not been successful or at the request of the debtor or a creditor. The bankruptcy petition must establish that the debtor was in "cesación de pagos" at the time of its filing. Proceedings

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37 "Cesación de pagos" is a doctrine of Argentine bankruptcy law that has been construed to mean a general and permanent state in which the debtor is incapable of complying with its financial obligations as they become due.
under the new law appear to be greatly simplified from previous practice, with the receiver (or "síndico") having a much greater role than previously.

**Administration of Insolvency Proceedings.** There appears to be a consensus within the representatives of the private sector that a number of systemic problems within the Argentine judicial system make the administration of the new law very difficult. These systemic problems were identified as: overcrowded dockets, which created logjams in the disposition of matters; insufficient infrastructure (including personnel and equipment), which again delayed the disposition of matters; insufficient numbers of judges assigned to handle commercial matters; and commercial judges who did not have the training or experience to understand complex proceedings involving large companies.

Moreover, while it is too early to make definitive judgments about the law, it is apparent that some fine-tuning will be needed in some of the provisions as practitioners gain more experience with it.

**CONCLUSIONS AND RECOMMENDATIONS**

The Argentine economy has, in a few years, changed drastically. These drastic changes, and the change in trade mindset associated with them (which have been discussed above) will take time to be assimilated by the public and private sectors. There is evidence to indicate that this assimilation has not yet taken place, especially in the area of competition. Representatives of both the private and public sectors have asserted that many Argentine consumers and businesses still feel that free and open competition is a state of affairs that they should be protected from, not encouraged to participate in. This mindset, which still appears in some of the legislation discussed above, creates roadblocks for the modernization of the Argentine economy and the implementation of a system of free competition.

**(a) Competition Policy.** The Competition Law of 1980 has not been vigorously enforced by the Commission and has therefore not prevented widespread anticompetitive activity in the economy. One of the reasons for this failure is the fact that the Commission until recently had few staff and resources. The Commission's staff has now been substantially increased with the addition of attorneys, accountants, economists and other professionals. However, the compensation scale for staff should be reviewed to ensure that it is appropriate to attract the best possible people to the Commission. Furthermore, funding and procedures should be set in place to allow the Commission to retain expert consultants in appropriate cases. Appropriate computer technology and other equipment should be provided to enable the Commission to function more effectively. Lastly, funds obtained from the EU (through the EU-MERCOSUR Cooperation Agreement) or through USAID should be used to train Commission staff, either at the EU Commission, the United States Department of Justice or Federal Trade Commission, or elsewhere.
(b) There is a significant interface between the Argentine government’s privatization program and the effectiveness of competition in the economy. Care should be taken by the Argentine government to ensure that the privatization process of public enterprises as well as ensuring regulatory framework (e.g., network access, pricing, etc.) do not result in an increased industrial concentrations and lessened competition.

(c) The Commission's backlog of pending cases has been greatly reduced. The remaining backlog will soon be eliminated as regulations, guidelines and procedures are set in place to ensure that new cases are processed and decided in an expeditious manner.

(d) Many observers in Argentine society feel that the Commission is not politically independent because it has no enforcement powers and is controlled by the Secretary, who is responsible more for industrial promotion and development than the assurance of competition. Steps should be taken to transform the Commission into a quasi-judicial independent body of experts in law and economics who would be able to decide whether the law had been violated and to order, in an expeditious manner, a remedy that would be sufficient to deter anticompetitive behavior and protect those firms and individuals that have been damaged by such behavior. The Commission's investigatory functions could be performed by its staff under the direction and supervision of a Prosecutor General, as is done in other countries. This Prosecutor General would also present the results of the investigation and the recommendations of the staff to the Commission for its decision.

(e) As noted above, the legal community, business community, public sector and the public are ignorant of the law and of the remedies available to those who have been the victims of anticompetitive practices. A continuing information and education campaign, supported by adequate public funding, should take place through the mass media, the educational system (including law schools), chambers of commerce and other institutions to inform attorneys, the public sector, judges, the business sector and the public about the importance of free competition to the Argentine economy, the behavior proscribed by the competition law, as well as the process for seeking redress for damage caused by anticompetitive behavior and the penalties imposed for violating the law.

(f) As part of this process of education, the public should have as much information as possible. Accordingly, the Commission should publish regulations that will explain how investigators will apply the law to decide whether to bring matters in front of the Commission, especially in cases where there is little or no case law. The purpose of these regulations would be to inform the legal and business communities of the analysis employed by the Commission's investigators in applying the law.
Furthermore, the Commission should publish all of its decisions and make them generally available. These decisions should indicate the facts and analysis considered by the Commission in making its determinations.

(g) A substantive change should be made to the current law to make certain types of concerted activities which are so clearly anticompetitive that no analysis into its effects is required, illegal per se. These could include agreements among competitors to fix prices, rig bids, allocate customers or territories, or restrict output or capacity. Repeated per se violations by the same individuals should be subject to higher penalties, including substantial fines and jail terms.

(h) The current law does not cover mergers and concentrations. Another substantive change should be made to the present law to ensure that all mergers, acquisitions or other transactions involving the partial or complete union of two or more substantially independent enterprises should be reported to the Commission and should not be consummated until it has acted or failed to act to stop the merger or combination within a particular time period. The transactions to which this provision should apply should be those involving those firms whose assets and resources are large enough to have possible anticompetitive effects. As is done in other countries, a minimum monetary threshold should be set for these transactions. Small and medium sized enterprises should be exempted from this requirement.

(i) Alleged unilateral anticompetitive conduct by business enterprises is often ambiguous. It may reflect anticompetitive behavior or desirable and successful efforts to compete vigorously. Another substantive change should be made to the current law to indicate that unilateral activity taken by a dominant firm or indirectly in support of concerted action by competitors constitutes anticompetitive activity. Regulations should be issued describing the analysis on various unilateral anticompetitive practices that will be brought to bear by the Commission's investigators in deciding whether to seek a remedy from the Commission.

(j) A number of observers in Argentina have argued that the Competition Law of 1980 has created substantive norms and institutions that can adequately control and deter anticompetitive conduct in Argentina. These observers feel that the reason for inadequate enforcement of the law is that the Commission has not been given sufficient funding, personnel and publicity to enable it to complete its mission in an effective manner. Accordingly, if, rather than changing the present system, the existing institutions are strengthened by providing them with adequate funding, personnel and publicity, the enforcement problems described above would be significantly ameliorated and the present system would serve as an adequate deterrent to anticompetitive behavior. Once the present system is working as designed,
then consideration can be given to improving it by law reform which changes substantive and procedural norms.

This is a sequencing argument that, to some degree, presents a chicken and egg problem. Clearly, the strengthening of the present institution presents a laudable goal and would represent a short term solution to a major problem. The elimination of the Commission's backlog and the increased efficiency of its operations would indeed improve enforcement of the law. Increased publicity of the Commission's operations and of its decisions would send a valuable message to the legal and commercial communities and the public regarding competition in the Argentine economy. As has been noted above, however, the present system has a number of systemic weaknesses that mere strengthening of the present institutions will not resolve. Accordingly, legal reform is needed and should be undertaken. As has been noted above, the process of legal reform by the National Congress is a long and complicated one.

There is no reason why both approaches cannot be followed simultaneously. The present institutions and enforcement of the present norms should be strengthened while a legal reform effort is undertaken before the National Congress.

CONSUMER PROTECTION

(a) In the area of consumer protection, the present fines set forth in Law 22, 802 for disobeying regulations issued by the Secretary should be substantially increased in order to deter consumer protection problems. Consideration should be given to giving the Secretary the power to order business enterprises to stop practices that violate the law or to provide restitution to victims or to seek judicial injunctions to accomplish this.

(b) The details of consumer protection issues should be incorporated in regulations rather than in the law itself. This will give the Secretary the flexibility to adapt to changes in the economy which require additional regulation without the need to submit draft amendments to the National Congress. As has been seen in the case of the proposed amendments to the Competition Law of 1980, this procedure can be controversial and time consuming.

ANTI-DUMPING AND COUNTERVAILING MEASURES

(a) The adoption in Argentina of the WTO procedures and timetables has resulted in increased efficiency in the processing and resolution of complaints of dumping and subsidization. The previous backlog of cases is being eliminated and new cases are being processed in an expeditious and efficient manner.

(b) The NFCC appears to be a highly regarded institution with a reputation for technical expertise, efficiency and independence and it appears to be
working quite well. The Executive should ensure that the NFCC receives sufficient funds and other resources to ensure that it can continue to perform its missions well.

(c) The consideration of the effects of dumped or subsidized exports on the Argentine consumer in the determination of damages is a laudable inclusion in Argentina's anti-dumping norms and should be continued.

(d) Representatives of the Subsecretary have indicated that Argentina is presently enforcing its national anti-dumping norms against the other MERCOSUR member states (Brazil, Uruguay and Paraguay). Once a MERCOSUR anti-dumping code is in effect, Argentina should not enforce its national anti-dumping norms against its MERCOSUR partners. The MERCOSUR integration, competition law and anti-dumping norms should be enough to protect producers and consumers in Argentina from unfair competitive practices.

INTELLECTUAL PROPERTY POLICY

(a) The new Patent Law must be amended (or a separate statute passed) to include protection for trade secrets.

(b) The Copyright Act should be amended to include provision for the coverage of computer programs, compilations and databases, right of public performance to include retransmission by wire, protection against the parallel importation of works, and enactment of stiffer fines. Protection should also be extended to new forms of expression, such as works produced in the Internet.

FOREIGN INVESTMENT POLICY

(a) The new Foreign Investment Law and Decree 1853 represent very positive advances by the Argentine government. They have resulted and should continue to result in an influx of foreign investment capital into Argentina and a diminution in disputes between the Argentine government and foreign investors.

(b) The negotiation of and entering into Bilateral Investment Treaties with other countries modeled after the US-Argentina Treaty also represent very positive advances by Argentina and should also be continued. The US-Argentina Treaty should continue to be used as a model.

(c) The negotiation of bilateral tax treaties between Argentina and other countries also represents a very positive step that should be encouraged and continued. The Argentine government should make the successful
conclusion of these negotiations a substantial priority. Any resulting treaties should include provisions to resolve transfer pricing issues.

BANKRUPTCY POLICY

Argentina's new insolvency statute represents a very positive step in the modernization of its system for dealing with failing companies. It has been reasonably well received by the local bar and business community, which have predicted that it will work effectively through a detailed assessment must await its implementation. Furthermore, the Uruguayan government is apparently considering adopting Argentina's new law as national legislation. Since the new law, and the procedures created therein, have been in force for a little over a year, further "fine tuning" should await further implementation experience.
IV. BRAZIL

ECONOMIC BACKGROUND

Prior to the current period of economic reform, the Brazilian development model was, if anything, antithetical to competition and free access to markets. For at least the preceding thirty years, the Brazilian economy was characterized by public sector dominance, protectionism, heavy regulation of private industry, high concentration and utilization of price controls as a mechanism of controlling competition and inflation. The important reforms of recent years have cut away at much of this and set the stage for a more dynamic and competitive Brazilian economy. Although in certain industries (notably agriculture and auto parts) it remains government policy to encourage greater concentration on the theory that this will result in increased international competitiveness, the clear trend is toward less intervention, lower tariffs and fostering greater competition. Nevertheless, some elements of the traditional interventionist and price control mentality survive and are reflected in the legal/regulatory framework in the areas discussed in this paper.

The state's involvement in the economy in the 1960s, 70s and 80s directly impeded competition through the creation and continuance of state-controlled monopolies. Indeed, both within the state sector as well as in those industries in which private capital participated, for much of the period mergers and greater concentration were actively encouraged as a way to compete against imports and achieve economies of scale. The government's efforts to foster industrialization and import substitution included the promotion of joint ventures with the collaboration of the Federal and State governments and domestic and foreign private capital. Notably in steel and other heavy industries, the government eventually came to own a majority of such concentrated industries. The government's continuing interest in the success of such enterprises was inconsistent with deconcentration of industry and aggressive enforcement of the competition laws then in force.

At the same time, competition from abroad was severely limited by policies to promote import substitution, including high tariffs and restrictive government procurement policies. The high levels of protectionism that reigned in Brazil at least until the 1988 tariff rationalization efforts also contributed to the oligopolistic structure of Brazilian industry. As late as 1987 the average tariff level was 55.6%, with some items subject to tariffs as high as 105%. In addition, quantitative restrictions were maintained in many products.

For much of the period 1960-1990, various price control regimes to contain chronic bouts of inflation also constrained competition. Agreements to fix prices and profit margins were generally negotiated with input from producer organizations. In many cases suppliers were forbidden to sell at prices below those negotiated with the authorities. The regular resort to price controls did more than simply limit the potential for price competition among suppliers, it eroded the culture of competition. Industry and
consumers were conditioned to think of prices less as the product of competition among rival producers and more as the outcome of negotiations between the government and a small number of producers.

**Current Period of Reforms.** Following the return of democratic rule and the adoption of a new constitution in 1988, successive federal administrations have undertaken a set of structural changes in the economy, involving important measures in trade liberalization, privatization and deregulation. Although progress in all three areas has been palpable, the pace has been uneven. The greatest advances probably have been made in trade liberalization, with efforts in the areas of privatization and deregulation somewhat lagging. These steps have undoubtedly increased the potential for greater competition among Brazilian producers and exposed Brazilian producers to competitive pressure from foreign imports. The competitiveness of Brazilian industry can be expected to benefit in the long run. However, the degree to which this takes place and the speed of economic transformation will depend importantly on the pace of further privatization and deregulation, the direction of competition policy and progress in the other areas of law and regulation discussed later on in this chapter.  

MERCOSUR is just the latest stage in the Brazilian tariff reform process. Prior to the temporary (one year) tariff increases on automobiles and consumer durables imposed in March 1995, the maximum tariff rate came down from 105 percent to 35 percent, with the average rate falling from 32.2 percent to 14.2 percent. Although some small efforts had been undertaken by the military regime, the privatization and deregulation process began in earnest only after 1991. Between 1991 and 1995 the sale of Federal-owned enterprises, primarily in steel, fertilizers and petrochemicals, resulted in a return to the State of close to US $9 billion. Further privatizations of key sectors of the economy -- telecommunication, power, petroleum exploration and distribution, water and transport -- are anticipated. However, the positive effects of the privatizations carried out thus far on competition and competitiveness may prove to be limited by two factors: (i) the minimal participation of foreign capital thus far; and (ii) the lack of review of the terms of such sales by the authorities for the likely impact on competition in their respective markets.

Since early 1994, the economic transformation process has taken place against a backdrop of a macro-economic stabilization program. The program involves a sequence of efforts to restore and sustain operational balance in the fiscal accounts, a roll-back of indexation, introduction of a new currency, a tighter monetary policy and use of the nominal rather than the estimated real exchange rate as an anchor. This program has succeeded in introducing a degree of price and exchange rate stability, and considerable growth response in 1994 (5.7 percent). However, after the market disruptions following the Mexican devaluation of December 1994, the immediate social and political costs of the stabilization program have increased. The eventual restoration of price stability is a precondition to changes in Brazil’s price control mentality and greater reliance on competition policy and efficient markets to protect consumer welfare.

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34 Rowat, ibid.
**Current Concentration Levels.** Brazilian industry remains characterized by high and perhaps increasing levels of industrial concentration. A recent study of 23 economic sectors reported four-firm market shares of 60-80% in eight sectors, 40-60% in ten sectors and less than 40% in only 5 sectors. The average four-firm concentration in the 23 sectors was over 50%.\(^35\) In a separate study, Herfindahl-Hirshman Indices were calculated for 25 sectors. Twenty sectors were reported with an index of over 1800 and the average index for the 25 sectors was 2918.\(^36\) The pace of merger and acquisitions has accelerated over the course of recent years. According to statistics from Securities Data Company, the value of merger and acquisition transactions more than quadrupled from a little over US $1 billion in 1994 to US $4.2 billion in 1995 (out of a total of US $14.8 billion for all of Latin America). The same source estimates that the Brazilian figure for 1996 will approach US $7 billion.

In this context of increasing merger and acquisition activity, it is not surprising that some representatives of private industry have opposed active enforcement of Brazil’s antitrust law. Active application of anti-concentration provisions of competition law has an economic impact on sellers (including the state) in two ways -- it decreases the number of qualified bidders and reduces the premium associated with market power. The press has reported considerable clamor, principally from old-line industrialists, that the current law inhibits the potential for mergers that may be desirable to provide Brazilian industry with the necessary resources and secure domestic markets to compete internationally. These maintain that competition from abroad, particularly from within MERCOSUR is sufficient in most cases to prevent abuse of market power. The recent challenge to CADE in the context of the Gerdau case (discussed below) and the reported pressures on the government to revise the current law to weaken CADE reflect the influence of those in the government that maintain that an active competition policy is an impediment to industrial modernization and foreign investment.

**APPLICATIONS OF MERCOSUR NORMS UNDER BRAZILIAN LAW**

During the negotiation of the Protocol of Ouro Preto, the Brazilian delegation was firm in its insistence that the Brazilian constitution is incompatible with a treaty organism empowered to take actions directly enforceable by private parties in national courts.\(^37\) Decisions, resolutions and directives of MERCOSUR organs thus could not have immediate and direct application in Brazil -- private enforcement actions could only be brought under national norms and secure domestic markets to compete internationally. These maintain that competition from abroad, particularly from within MERCOSUR is sufficient in most cases to prevent abuse of market power. The recent challenge to CADE in the context of the Gerdau case (discussed below) and the reported pressures on the government to revise the current law to weaken CADE reflect the influence of those in the government that maintain that an active competition policy is an impediment to industrial modernization and foreign investment.

\(^{35}\) Exame (1995) [From FIESP/CIESP slides, SP 4/17/96]

\(^{36}\) L.H. Salgado (1994) [From FIESP/CIESP slides, SP 4/17/96]

\(^{37}\) See Jorge Pérez Otermin, El Mercado Común del Sur- Desde Asunción a Ouro Preto, Fundación de Cultura Universitaria, Montevideo, 1995 pages 101-110, for a discussion of the direct application of MERCOSUR norms and Chapter IV.
directives require the unanimous agreement of all four countries (i.e., cannot be approved
without Brazil’s consent), such norms should be recognized as a special case and accorded
immediate and direct effect. Nevertheless, the Brazil position and Argentina’s reluctance
on the same issue made inevitable the inclusion of Chapter IV of the Protocol.

As described above, Article 40 of the Protocol provides for the simultaneous entry into
effect of MERCOSUR norms only after all parties have adopted the necessary measures
under national law and formally notified the Administrative Secretary. In the context of
competition law, the provisions of Chapter IV of the Protocol create an ironic situation for
Brazil. The MERCOSUR Competition Protocol, once in force, will for all practical
purposes have direct effect in Brazil (where a full-blown competition law is already in
force), but not in Argentina (which currently has a limited law which does not go as far as
the draft protocol, but whose constitution could arguably permit direct effect of actions of
treaty organisms).

COMPETITION POLICY

History. Brazil’s current competition law framework has its origins in Federal Law No.
4,137 of September 10, 1962. That law set forth a list of prohibited acts, both relating to
conduct and market structure (concentration acts). The law also established an
enforcement agency, the Administrative Council for Economic Defense (CADE), a direct
dependency of the Presidency of the Council of Ministers.

Law No. 4,137 remained in force for almost thirty years, but only in few instances was the
law actually applied by CADE. This lack of enforcement activity is generally attributed to
the lack of independence of the agency during a time when the government’s industrial
development policy generally favored concentration of industry.

Article 173 of the new Brazilian Constitution states that “the law shall repress abuse of
economic power aimed at domination of markets, elimination of competition and arbitrary
increase in profits.” After the election of President Collor, the Brazilian government
embarked on a policy of economic liberalization, including tariff reductions, eliminations
of protection of infant industries and an ambitious privatization program. As part of the
government’s policy to promote greater competition and efficiency, the Collor
administration secured legislative approval of Federal Law No. 8,137 on December 27,
1990 and Federal Law No. 8,158 on January 8, 1991. Law No. 8,137 defined as criminal
offenses such classic acts of unfair competition as price fixing, division of markets and
collective refusal to deal. The latter law conferred upon the Secretariat of Economic Law
(SDE), an instrumentality of the Ministry of Justice, authority to investigate actions that
may be in violation of Brazil’s competition laws. It also provided for cooperation between
SDE and CADE in enforcement of the competition laws, with CADE responsible for
enjoining acts deemed in violation. Law No. 8,137 also amended Law No. 4,137 of 1962
to require SDE approval of certain concentration acts. Under the amendment, mergers,
consolidations and the formation of holding companies must receive SDE approval if the
ultimate participation of the company or group of now related companies is greater than
or equal to 20% of the relevant market.
Law No. 4,137 and Law No. 8,158 were revoked upon the approval by the Brazilian Congress on June 11, 1994 of Federal Law No. 8,884 (the Competition Law). The principal features of the new Law include:

(a) A clear definition of the jurisdictional reach of the law to cover all acts performed in whole or in part in Brazil or which produce or may produce effects within the territorial boundaries of the country ("effects doctrine").

(b) Provision for investigations by SDE to be brought at the instigation of the public, SDE or CADE.

(c) Reorganization of CADE as an independent authority ("autarquia") linked administratively to the Ministry of Justice. CADE is now composed of seven commissioners appointed by the President of Brazil and approved by the Brazilian Senate who may be removed only with the approval of the Senate or in the case of criminal conviction or willful misconduct in office.

(d) Application of the law to individuals, private companies and public entities. CADE is authorized under Article 18 of the Law to "pierce the corporate veil" and take action against controlling persons and companies in cases of abuse of dominant position or in the case of bankruptcy, insolvency, or cessation of activities due to mismanagement.

(e) Definition of "dominant position" under Article 20 as when a company or group of companies controls a substantial portion of a relevant market as supplier, intermediary, purchaser or financing agent of a given product or service. "Substantial portion" is defined under the law as 20% or more of the relevant market.

(f) Inclusion in Article 21 of a comprehensive list of acts deemed in violation of free competition, including such traditional per se offenses as price fixing, division of markets and refusal to deal, but also including action which impede the exploitation of intellectual property rights and technology.

(g) Prohibition of "arbitrary" price increases under Article 21 and authorization of criminal sanctions for violators. The Competition Law was enacted immediately before implementation of the Real Plan. The inclusion of this provision reflects the price control mentality that is still an important element of the economic policy context.

(h) Authorization of CADE to impose fines and administrative penalties. In the case of conduct contravening the Competition Law, CADE is authorized to impose a fine of up to 30% of the gross sales of the offender, but in no case less than the benefit actually garnered.
(i) The requirement that “concentration acts” that may jeopardize free competition or which might result in a company or companies enjoying a dominant position in the relevant market be submitted to CADE for its review. Concentration acts that result in a 20% share of the relevant market or that involve a participant with gross annual receipts of US $390 million or more are required to submit the transaction to CADE for review.

(j) Classification of CADE decisions as “extrajudicial instrument” entitling CADE to summary enforcement proceedings in the Federal district courts or state courts of the infractor’s domicile. CADE may enforce its decisions directly in court or request the Federal Attorney General’s office to effect enforcement.

The key legal concepts of the Competition Law are discussed in greater detail at the end of this chapter.

The Investigation and Determination Process. In conduct as well as concentration act cases, the Competition Law provides generally that SDE is charged with investigating possible infractions and CADE with rendering a final administrative determination, based on the information provided by SDE and CADE’s own analysis. However, particularly in the area of review of concentration acts (merger and acquisitions), the procedure for arriving at a final determination can be quite complex in practice. In such cases, the existing legal/regulatory framework provides for three (and perhaps four) authorities to examine and opine. The steps in this process, may be summarized as follows:

(a) Within 15 days following consummation, parties to a concentration act must file required information with SDE in triplicate. One set of documents is forwarded by SDE to CADE and another is sent on to the Special Secretariat of Economic Monitoring of the Ministry of Finance (MoF). At any point in the review process, the MoF, SDE or CADE may request additional information from the participants.

(b) The Special Secretariat of MoF reviews the information filed by the participants, performs an economic review of the case and remits its recommendation and file to SDE. The MoF’s review focuses on the

38 As originally approved, the Competition Law provided for economic actors to notify CADE of concentration acts prior to, or within 15 days after consummation. However, Federal Law No. 9,021 approved by the Brazilian Congress on March 30, 1995 amended the Competition Law to require that concentration acts must be consummated before they receive CADE review.

39 On June 7, 1995, CADE issued Resolution No. 1, setting forth the list of documents and information participants in concentration acts must submit to CADE. The SDE subsequently issued its own resolution establishing substantially the same informational requirements for submissions to SDE. As discussed below, CADE Resolution No. 5, issued on August 28, 1996, superseded Resolution No. 1 and greatly simplified the requirements. Although not legally required to do so, CADE set the precedent of releasing drafts of each resolution and sought public comment before issuing the final regulation.
compatibility of the act under review with the priorities of the government’s economic policies, particularly the government’s interest in promoting industrial efficiency and competitiveness.

(c) Once the MoF has completed its review, the SDE investigates the case, conducts discovery and administrative proceedings and renders a preliminary opinion of legal and technical issues to CADE. The law allows SDE 30 days for completing its preliminary review, but there are no sanctions for delay. During the SDE investigation, both SDE and CADE may request additional information to be provided by the participants.

(d) CADE then reviews information submitted and the opinions of MoF and SDE and issues its determination. Article 54 of the Competition Law provides that failure by CADE to make a determination within sixty days results in an automatic approval of the transaction by CADE.\(^4\)

Accordingly, the efficiency with which cases are processed and the technical quality of outcomes is dependent on the resources and capabilities of the staff of SDE, MoF and CADE and the degree of coordination among the agencies. However, Resolution No. 5, issued on August 28, 1996, now permits the simultaneous examination of less complex and controversial cases by all three agencies involved. According to officials, the goal is to permit CADE, SDE and MoF to sign off on such cases within approximately four months.

**Caseload: Important Recent Decisions.** In its mid-1994 - mid-1995 session, 28 concentration act cases were presented to CADE, of which 7 were processed to a final decision. Of these decided cases, two were determined not to implicate the Competition Law, two were pre-notification cases in which the transactions were subjected to conditions imposed by CADE, one was an approved pre-notification case and the remaining two were consummated transactions in which CADE required an unraveling of part of the transaction to bring it into compliance with the Competition Law. For the corresponding 1995-1996 period, 41 concentration act cases were initiated before CADE. Information recently provided by CADE shows that between June 1994 and March 1996, a total of twenty concentration act cases were decided. The time period lapsed between the beginning of the SDE investigation and the final CADE decision ranged from thirty-nine to 235 days. The average time for processing of concentration act cases brought between 1994 and 1996 will likely exceed eleven months before the existing backlog of over sixty cases is cleared.

Two recent high-profile cases, **Gerdau** and **Colgate/Kolynos**, highlight some of the legal uncertainties and operational difficulties that have plagued Competition Law

\(^4\) The **Gerdau** case (discussed below), raises the possibility that an administrative appeal of concentration act decisions of CADE may be made to the Ministry of Justice. This would add an additional step to reaching a truly final determination of such cases. See “Caseload; Important Recent Decisions”, below.
administration in the recent past. In the Gerdau case, whose ultimate resolution is still pending, Siderurgica Laisa, S.A. (a steel company belonging to the Gerdau industrial group) purchased a German company, Korf GmbH in 1994. This latter controls Siderurgica Pains which also operates in Brazil. In its determination, CADE ordered the Gerdau Group to reverse the purchase of Pains, since the transactions as originally consummated would have given the group control of almost half of the Brazilian market for ordinary long-rolled steel products. However, following the issuance of CADE's determination, the Gerdau group petitioned the Minister of Justice, alleging errors of fact and law. Although Brazilian laws and regulations generally provide for appeals to the relevant ministry of decisions of instrumentalities under such ministry's control, to buttress CADE's effective independence, Article 50 of the Competition Law provides that "the decisions of CADE are not subject to any review within the Executive Branch, such decisions being immediately enforceable and the contents thereof being communicated to the Attorney General's office for the taking of measures within his authority."

Notwithstanding this provision, on November 1, 1995 the Minister of Justice accepted the petition review of the CADE order. The Ministry justified this intervention on the grounds that the Article 50 exclusion from appeals within the executive branch applies only to cases of conduct and not concentration acts.

The acceptance of the appeal by the Minister of Justice was viewed by many in the legal community as an unfortunate precedent. Indeed, the Ministry itself has subsequently made statements softening its stand on the appealability of such cases to the Minister. Although the federal courts (the Federal Court of Appeals and ultimately the Brazilian Supreme Court) have jurisdiction to decide whether the Ministry of Justice was correct in asserting a constitutional right to review CADE concentration act determinations, in light of such statements and the swearing in of the new councilmembers earlier this year, most commentators expect that a solution will be worked out directly among the Ministry, SDE and CADE.

In the Colgate/Kolynos case, Colgate Palmolive sought to purchase Kolynos, Brazil's largest producer of toothpaste. The acquisition would give Colgate control of more than three-quarters of the toothpaste market. After consideration of factors including the relevance of imports and the contestability of the toothpaste market in Brazil, in a six-to-one decision handed down in September 1996, CADE found the purchase would result in concentration in the relevant market that would be detrimental to competition. Accordingly, CADE agreed to authorize the combination only subject to conditions intended to prevent the abuse of dominant position and permit other producers to contest the market. Colgate will be prohibited from using the Kolynos trademark on toothpaste (but not other products) for a period of four years. Alternatively, Colgate could comply with the order by granting a 20 year license to another company to produce under the Kolynos trademark. Notably, CADE rejected the suggestion of imposing price controls as a condition of the merger - a significant blow against Brazil's traditional price control mentality. The Colgate/Kolynos case was also interesting in that it represented a case in which a competitor (in this case Proctor & Gamble) was permitted to participate to some extent in the process of investigation. Proctor & Gamble conducted a considerable press campaign and proffered data and analysis in an effort to convince CADE (and the public)
that the acquisition would be detrimental to competition (and the ability of Proctor & Gamble to establish a strong presence in the Brazilian toothpaste market). These actions are expected to be a precedent for future consideration of petitions by competitors and consumer groups in concentration act cases.

**Resources of Enforcement Agencies.** Officials of SDE and CADE acknowledge that there have been significant delays in processing cases brought to CADE. By most accounts, the resources of the MoF and SDE have been generally adequate to their tasks. The MoF has only one attorney to coordinate its activities under the competition law and this has apparently resulted in certain delays in processing. However, the MoF reviews are actually conducted by other staff of the Ministry and such reviews, focused as they are on the implications for government economic and sectoral policy, are much less technically demanding than those required of SDE and CADE. Until the appointment of the current SDE Secretary, Aurelio Bastos, in 1994, there was fairly rapid turnover of management in the agency, which may have hampered SDE's effectiveness.

While the staff of the SDE includes approximately twenty-five professionals, principally lawyers and economists, up to now CADE has not been able to count on permanent professional staff besides its Chairman and six councilmembers. The council has depended on the work of staff from other government agencies temporarily assigned to CADE under Article 81 of the Competition Law. For most of 1995, CADE was assisted by five professionals from the Central Bank, the Ministry of Foreign Affairs and the Ministry of Industry and Commerce. According to councilmembers and legal practitioners, lack of sufficient and permanent staff has delayed the procession of cases and contributed to a substantial backlog. CADE councilmembers complained that they were unable to conduct a truly independent investigation, since they are so dependent on the SDE for gathering the information.

Chairman Rui Coutinho and five of CADE's six councilmembers retired when their terms expired in February 1996. Dr. Gesner Oliveira, an economist and former Undersecretary of Economic Policy in the Brazilian Ministry of Finance, was appointed to succeed Chairman Coutinho. During his confirmation hearings in the Brazilian Senate, Oliveira listed the following as priorities for the agency: (1) articulation of a foreign trade and privatization strategy; (2) integration of competition legislation with that of other countries; (3) dissemination of a culture of competition; (4) more rapid processing of Competition Law cases; and (5) greater technical capacity of CADE. Oliveira and five new commissioners were inaugurated on May 15, 1996. On July 9, 1996 a new organizational structure for CADE was authorized under Decree No. 1952. Twelve advisory and technical staff positions directly below the councilmembers were created, to be filled by lawyers and economists. Unfortunately, due to continued budget constraints the personnel recruited have had to be hired on a short-term basis. Councilmembers are preparing draft legislation on CADE's permanent institutional structure (as required under Article 81 of Competition Law).
In addition to analytical staff, twenty assistant prosecutors have been authorized to assist in clearing the large backlog of cases that the new councilmembers inherited. As of September 1996, ten had begun working.

These new staff of CADE, assisted by personnel of a variety of agencies with which CADE has now signed assistance agreements, are expected to provide CADE with manpower to handle cases more expeditiously and the technical capacity to reach better reasoned results. CADE may be one of the agencies to benefit from a new IDB institution-building operation. CADE is currently investigating the possibility of receiving technical assistance from US as well as EU authorities. A representative of the ECU’s DG4 attended the inauguration of the new CADE chairman and councilmembers and the recently signed cooperation agreement between MERCOSUR and the EU should provide an avenue for arranging a secondment training program, as well as with the US FTC and DOJ if USAID funding is available.

**Complexity of the Concentration Act Review Process.** Even if the expected improvement in CADE’s staff and capacity takes place, it is likely that a certain sense of frustration will remain on the part of economic actors subject to review under the Competition Law until more rapid processing of cases becomes the rule. Participants, lawyers and financial intermediaries have all expressed their concern that the review process under existing law is unnecessarily complex. Historically, SDE generally begins its review once the MoF has prepared its opinion. Although the MoF is required to issue an opinion within 30 days, there is no sanction for delay. SDE is similarly required to complete its review within 30 days, but has often taken substantially longer. SDE attributes these delays to the need to request additional information and clarification from companies. Outgoing CADE councilmembers complained that by the time they received cases it was as long as a year after notification and much of the information initially submitted is stale. The process of three separate reviews by three separate agencies delayed final determinations, with the time between submission and final determination involving a period of more than one year on average. In the meantime, affected companies, their investors and financial markets were forced to operate within a context of significant uncertainty.\footnote{The decision of the Minister of Justice to accept the petition for review of the CADE order in the Gerdau case (discussed above), has raised the disturbing possibility that final resolution of cases may be delayed even beyond the three agency review stage.}

New Resolution No. 5, by permitting simultaneous review of some cases by all three agencies should facilitate final determinations and contribute to a reduction of the backlog. Better coordination among the agencies is also clearly required. A step in this direction was recently taken with the initiation of bi-weekly meetings among agency heads and the establishment inter-agency (CADE, SDE, MoF) working groups of technical staff. Since these are recent innovations (since August 1996), it is difficult to assess their long-term effectiveness at this point in time.

**Independence of Authorities.** CADE’s status under the Competition Law as an autonomous entity (autarquia) was an innovation under Brazilian law. The goal was to
provide the reorganized entity with the independence it lacked under earlier legislation, when it was a direct dependency of the Presidency of the Counsel of Ministers. From the events surrounding the Gerdau, Colgate and other cases, it seems clear that under former President Rui Coutinho CADE was able to exercise a fair degree of independence from the Ministry of Justice and the Ministry of Finance.

Small quasi-independent and independent agencies often find themselves susceptible to influences from the subjects of their activities that can prove difficult to resist without the backing of a stronger Ministry. Thus far, despite its autonomy of the Ministries of Justice and Economy, CADE seems to have successfully avoided “capture” by industry. By all accounts, market actors take CADE very seriously. The major concentration act cases that the agency has examined have been the subject of public debate and, as in the case of the Colgate case, aggressive lobbying efforts. Indeed, prior to the installation of Chairman Oliveira in March of this year, there was speculation in the press and government circles that industry was exerting significant pressure on the government to amend the Competition Law to make CADE less independent of SDE and the Ministry of Finance (and presumably more sympathetic to industry). These are all indicative of an agency with sufficient independence to take actions with real “bite.”

The quality of SDE investigations is an important factor in CADE’s ability to render truly objective decisions. Several outgoing CADE councilmembers favored a merger of the SDE and CADE functions within an independent body. In addition to concern about duplication of effort and insufficient coordination between the two agencies, CADE officials expressed the view that SDE was vulnerable to political influence from the Ministry of Finance. Accordingly, in their view SDE was insufficiently attentive to issues of market structure and economic efficiency. However, SDE representatives have expressed satisfaction with the existing division of responsibilities, viewing the MoF review as providing a technical economic evaluation and the SDE as applying the law within the context of the government’s overall economic policy. To the extent that CADE resources and technical expertise increase, the agency will be in a better position to analyze the adequacy of information gathered by SDE investigation and to conduct its own fact-finding.

Enforcement: Consent Decrees: Strategy of Market Actors. An administrative proceeding filed by SDE under the Competition Law may result in dismissal by CADE or a decision against the infringing party. Violations of the Competition Law’s conduct prohibitions are punishable by fines of up to 30% of the annual gross receipts of the company found in violation, part of which may be payable by the individual officer of the company found to have been responsible for the conduct. Where it is not feasible to calculate gross receipts as a basis for fines, infractions may be punished by fixed fines of up to approximately US$3 million.

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42 Oliveira has stated publicly that he accepted the position of Chairman on the understanding that no amendments would be made to the Competition Law that would weaken CADE’s independence.

43 Where it is not feasible to calculate gross receipts as a basis for fines, infractions may be punished by fixed fines of up to approximately US$3 million.
infractor agrees to abstain from the offending conduct or take other steps to bring itself into compliance with the Law. In the case of concentration acts, as in the case of its US and EU counterparts, CADE is empowered to order the transaction reversed, or may condition its approval of the transaction on the spin-off, transfer or sale of all or part of the new enterprise’s subsidiaries or lines of business. Both the Federal Attorney General (at CADE request) and CADE can enforce final determinations and consent decrees through the Federal or local courts. SDE is charged with supervising the continued compliance of the parties with the terms of the conditional approvals granted by CADE or consent decrees entered into between a party and CADE.

CADE’s experience with consent decrees (compromisso de cessação) has been limited thus far. In late 1995, CADE and a group of orange juice manufacturers entered into an agreement pursuant to which the manufacturers agreed to discontinue their long-standing collective arrangement with orange growers and suppliers. Producers alleged that juice manufacturers had organized a buyers cartel, each member offering to purchase oranges at a price based on the same formula taking into account international juice prices and industry costs. The consent decree impliedly recognized that the arrangement amounted to an exercise of market power that unfairly benefited the juice manufacturers at the expense of growers and suppliers. Most legal practitioners in this area expect consent decrees to become a more common outcome of Competition Law cases in the years ahead.

A number of characteristics of the Brazilian Law and institutional framework appear to limit the effectiveness of enforcement. The absence of a pre-notification requirement (since amendments to the Competition Law in March 1995, see below) and the long delays in reaching a final determination encourage actors determined to merge to pursue a strategy of entering into possibly infringing transactions and taking their chances with CADE later. Such companies apparently feel reasonably confident that even if CADE reaches a negative determination about the effects of the merger, by the time the decision is finally rendered (usually after more than a year) the agency will find it difficult to order the unwinding of the transaction. In industries undergoing technological improvement, the exception (described below) that permits concentration acts that result in efficiency gains may encourage actors to believe that if prices decline after the merger it will be impossible for CADE to decide against the merger. However, on October 2, 1996, CADE issued Resolution No. 6 that gives priority for review to merger cases that are notified prior to their consummation.

Private Rights of Action. In addition to permitting private actors and the Congress to bring complaints to SDE for investigation and possible sanctions by CADE, the Competition Law provides, in Article 29, that private parties (such as competitors and consumers) may pursue actions for actual damages or injunctions through the Federal and local courts. Civil suits alleging violation of the Competition Law may be filed as a class action as provided for under Law 7,347 of July 24, 1985. The initiation of court proceedings will not affect parallel administrative actions by SDE and CADE. Although CADE may intervene in a civil case in an advisory capacity, there is no provision for civil actions to be suspended pending an administrative determination. However, according to
Brazilian lawyers, a final determination by a court in a civil case that there was no violation of the Competition Law would amount to judicial review of the administrative proceeding and would be grounds for dismissal.

Thus far there has been little reported activity in the way of private suits under the Competition Law. Most practitioners feel that, except in the case of egregious conduct cases, courts are ill-prepared to assess Competition Law cases. At both the state and Federal level, judges have little background in the areas of law and economics required to reach intelligent decisions. Accordingly, bringing complex cases in the courts is likely to be very risky. In fact, thus far no administrative case brought to CADE has been the subject of a parallel civil suit.

NEXUS WITH THE PRIVATIZATION AND REGULATORY PROCESS

Sale of State-owned Industries. The Competition Law authorizes SDE and CADE to examine the actions of public as well as private actors. Both entities regard themselves as having full authority to apply the Competition Law in cases of privatizations of state-owned assets and the granting of private concessions for public utilities. Presidential Decree No. 1,204 of July 29, 1994, issued in connection with the first round of privatizations (principally the steel and petrochemicals industry), explicitly required purchasers of controlling blocks of shares in a privatization to submit to SDE the information necessary for SDE to evaluate consistency with the Competition Law. Although the Decree refers solely to SDE, in practice, the same procedure of MoF, SDE and CADE review is followed as in cases of concentration acts. The purchase by Usiminas (a recently-privatized steel producer) of COSIPA, a competing company with a plant located in Sao Paulo, has been taken under review by both SDE and CADE. However, no final determination or recommendations have yet been issued.

Concessions for Public Services. Federal Law No. 8,987, approved on February 13, 1995, provides the beginnings of an overall framework for the provision of public utilities by the private sector. Consistent with the goals of the Competition Law, Law No. 8,987 provides that, except where technologically infeasible or where economic reasons justify otherwise, concessions will be non-exclusive and will provide consumers with the option of choosing among competing providers.

In connection with the private provision of public utilities, SDE officials expressed a view that their proper role is to review requests for proposals for consistency with the Competition Law, principally in terms of the permitted activities and exclusivities of the concessionaires. Outgoing CADE commissioners took a more activist view, insisting that CADE examine both the requests for proposals from concession-granting authorities and the resulting market structure for consistency with the principles of Competition Law. Possible actions that might be taken would include requiring the concession granting authority to unbundle concessions to assure greater competition.

To date, there has been limited activity in the area of concessions for public services. In the power sector, only two companies have yet been privatized. In each case, no SDE and
CADE review preceded the consummation of the transaction. However, there are indications that SDE and CADE are likely to be more active in the first round of telecommunications concessions, where the potential for monopolizing potentially competing services and technologies is more apparent. In such cases, it is to be expected that CADE would carefully examine the technological or economic rationale for the granting of any permanent or temporary exclusivity in connection with a concession, but also to focus on the market power that may be exercised by dint of multiple or over-extensive concessions.

KEY LEGAL CONCEPTS

Definition of Concentration Acts. The Competition Law requires that CADE review “any acts which aim at a form of concentration, either by means of merger or consolidation of companies, formation of companies to exercise the control of other companies or group of companies, which result in the participation of a company or group of companies in twenty per cent (20%) or more of a relevant market or in which any of the participants has accounted for total gross revenues in the latest annual balance sheet equivalent to 400,000,000 reais (approximately US$ 390 million).” Failure of a participant to submit a transaction to CADE which is required to receive CADE review within the 15 day period is punishable by a fine ranging from 60,000 to 6,000,000 UFIR (approximately US $50,000 to US $5,000,000).

The Competition Law authorizes CADE, after a determination that a concentration act is in violation of the Law, to determine the measures necessary for unraveling the concentration, in whole or in part, by any appropriate means, including dissolution, spin-off, disposal of assets and partial cessation of activities.

Definition of Relevant Market. The Competition Law does not include a precise definition of “relevant market.” The definition of this important term is expected to develop out of case law rather than out of regulations issued by CADE. However, the requirement in Resolutions No. 1 and No. 5 for companies to report both within Brazil and within MERCOSUR as a whole is a strong indication that CADE is aware that as the economies of the MERCOSUR countries become more integrated the region as a whole may become the relevant market to examine in a growing list of cases.

Exceptions. However, CADE is authorized to approve concentration acts if: (1) the act results in an increase in productivity, improvement in quality or improvements in technology or economic development; (2) the benefits are equitably distributed among producers and consumers; (3) do not in fact result in a substantial reduction in competition within the relevant market; and (4) any limits on activities necessary to assure items (1) through (3) are strictly observed. Unfortunately, there is no explicit provision for considering contestability as a factor in Article 54. However, the drafters of the decision in the Colgate case clearly considered this concept in their analysis.

Effects Doctrine. As noted above, the Competition Law provides for jurisdiction in cases where the activity produces or may produce effects within the territorial boundaries of the
country ("effects doctrine"). This raises the possibility for the Law’s possible application in the case of mergers or acquisitions (or abuses of dominant position) that occur entirely outside Brazil, but that have an impact on the Brazilian market. The effects doctrine under the Brazilian Competition Law creates the potential for conflict with Argentina, whose law does not currently provide for administrative review of mergers and acquisitions. Although there has not yet apparently been much discussion of this point in Brazil or in Technical Committee No. 5 (Competition Policy), the further integration of the MERCOSUR economies and the continued absence of merger review under Argentine law would seem to suggest the prospect of issues arising in this area.

Regulations. During his confirmation hearings and in subsequent press statements, Chairman Oliveira has stated his intention to reduce the uncertainty surrounding application of the Competition Law through the issuance of detailed regulations of general application. Thus far, the experience with regulation has been limited. Before its final promulgation, a draft of CADE Resolution No.1 (covering information required to be provided CADE in the case of concentration acts) was published by the agency and comments of practitioners, companies and others were solicited and received. Several of the comments received were accepted and incorporated in the final issued resolution. This process was repeated when Resolution No. 5 replaced No. 1. Although this process of notice and comment is not required under Brazilian administrative law, Chairman Oliveira has stated that he expects CADE to continue the practice.

Compulsory Licenses. The Competition Law appears to empower CADE to order the granting of compulsory licenses of patents as a remedy for conduct in violation of the Law. CADE has never taken such action, and in any case, a strong argument can be made that any such compulsory license would be an impermissible taking of property under the Brazilian constitution. This provision appears to be a legacy of Brazil’s protectionist intellectual property past more than a true element of competition policy.

CONSUMER PROTECTION POLICY

The Brazilian Consumer Protection Code (Law No. 8078, September 11, 1990) establishes a National Consumer Relations Policy (Art. 4), sets out a list of basic consumer rights (Art. 6) and empowers the federal government and state authorities to establish agencies for consumer protection (Art. 5). The Code provides for both civil suits brought by consumers and administrative sanctions and criminal prosecutions brought by public authorities. Actions may be brought based on product and service quality (defects), fair labeling, deceptive advertising and other practices, abusive debt collection, misuse of credit records and overreaching contracts of adhesion.

Civil suits under the Code may be pursued in state courts, or, in the case of suits brought against entities owned by the federal government, in the federal courts. Special petty claims courts and other specialized lower courts are specifically authorized under Article 5. Individuals claiming damages may bring suit against the manufacturer or service provider.
The Code incorporates a number of procedural innovations for Brazilian law, including the ability under Article 28 to “pierce the corporate veil” by disregarding the legal identity of a corporation and bring suit directly against the owners. Such actions are permitted when, in the judgment of the court, there is “an abuse of rights, excessive power, breach of law” or bankruptcy caused by mismanagement. In addition, Article 81 and 82 of the Code provide for “class actions” brought on behalf of groups of identifiable or unidentifiable persons “linked by factual circumstances.” However, the universe of private attorneys general with the right to bring an action on behalf of a class of claimants is limited to municipal, state and federal entities established for the defense of consumers and “associations legally incorporated for one year, whose institutional purposes include the defense of interests and rights” protected by the Code. An independent injured party may not bring suit on behalf of all the members of a class in the broad manner provided for in Rule 23 of the US Federal Rules of Procedure. In practice, the private entities that have brought suits have been permanent consumer federations, labor unions and political parties.

In addition to bringing actions under the specific provisions of the Code, the consumer protection agencies of the state and federal government are empowered to set safety and fair advertising guidelines and monitor compliance in the areas of production, manufacture, distribution and advertising of goods and services in the consumer market. (Art. 55). As noted above, such government agencies may pursue administrative or criminal actions against violators, and may bring civil actions on behalf of a class of similarly situated injured parties.

There are no readily available data on the number of cases brought under the Consumer Protection Law, since as noted above, Consumer Protection Law cases are brought in the state courts except in the case of suits against government-owned entities. However, it is clear from conversations with jurists and press reports that heavy use is made of the Law. State and local governments often have specialized investigators and prosecutors who bring cases based on complaints by the public and the press. Indeed, the news media (particularly television) have instigated many prosecutions through highly publicized investigative journalism.

Attorneys active in this area report that the largest number of cases are probably for misleading advertising, followed closely by suits based on poor product quality. Many cases are “class actions,” brought by public prosecutors, consumer associations, labor unions and political organizations. It is also very common for civil and criminal actions to proceed simultaneously, with private parties suing for damages and the public prosecutor pursuing criminal sanctions. Public support for the law remains strong. After almost six years, the business community seems to feel satisfied that it can live with the Law, and

Without prejudice to additional penalties imposed by the general criminal laws, infractions for violation of the Code may be punishable by up to two years in prison and fines. In addition, courts are empowered to enjoin temporarily the violator from business activities, require the violator at its own cost to disseminate publicly information about the court’s findings and/or perform other community service.
indeed some businesses see it as an instrument in eliminating unfair competition by misleading advertisers. In any case, given the high profile of Consumer Protection Law cases, there would be little prospect of success in repealing or weakening the Law

TRADE POLICY AND COMPETITION

Not surprisingly, the application of anti-dumping and countervailing duty measures in Brazil is a relatively recent phenomenon. High tariffs, reference prices, import surcharges and other anti-competitive devices provided ample protection for domestic producers well into the late 1980s. Prior to the tariff reductions of the end of that decade, very few cases were even initiated. Investigations were handled by the Customs Policy Commission of the Ministry of Industry, Commerce and Tourism. Prior to 1990, only two cases resulted in application of duties, with the remainder dropped or resolved through a negotiated agreement with the importers affected to raise prices.45

The early 1990s witnessed a dramatic increase in the number of anti-dumping cases brought before the Brazilian authorities as well as in determinations against importers. This coincided with similar behavior in several other large developing countries, including some (like Mexico and Korea) that had initiated important trade liberalization processes.46 Seven cases were initiated in Brazil in 1991, another seven in 1992 and 18 in 1993. Eight new cases were brought in 1994. The number of final determinations rendered against importers increased from one in 1991 to five in each of 1992 and 1993 and two in 1994. Combined with the demonstration effect of successful resort to anti-dumping measures by producers in traditional user countries (US, EU, Canada, Australia), the increasing exposure of Brazilian producers to import competition manifested itself in appeals by local industry to protection on the basis of unfair import competition.

Brazilian anti-dumping and countervailing duties law was overhauled in 1995. The stated goal was to bring national practice into line with the new GATT Anti-dumping Code. In addition, the new framework eliminated some of the procedural ambiguities which complicated application of earlier law. The current legal regime is governed by Law 9019 of March 1995, Decree No. 1602 of August 23, 1995 (anti-dumping) and Decree No. 1751 of December 17, 1995 (subsidies).47 Procedural requirements for anti-dumping and countervailing duty cases are set forth in circulars of the Ministry of Commerce.


47 Safeguard measures against import surges (covered by Decree No. 1488 of May 11, 1995) round out Brazil’s package of trade remedies laws.
Complaints brought under Decree Nos. 1602 and 1751 are investigated by the Secretariat of Foreign Commerce (SECEX) of the Ministry of Industry, Commerce and Tourism. Decree No. 1602 provides for SECEX to make separate determinations of the existence of dumping (and dumping margin) (Chapter II) and damages (Chapter III). At the conclusion of the investigation, SECEX renders an opinion including, in cases where both dumping and damages are determined, a recommendation with respect to compensatory duties. Final decision to impose anti-dumping duties must be rendered by decision of the Ministers of State, Industry, Commerce and Tourism, and Finance.

Although the new trade remedies framework was introduced only last year, it does not distinguish between imports from MERCOSUR and non-MERCOSUR countries. To date, the highest profile cases have been against exports from North America, Europe and especially the Far East (Chinese pencils, Chinese toys). It is largely speculation at this point, but since ultimate imposition of remedies depends on consensus among the Ministers of State, Industry, Commerce and Tourism and Finance, special considerations may be brought into play in cases brought against producers from MERCOSUR countries. Resort to alternative remedies may ultimately prove more palatable to policy makers (such as under the MERCOSUR Competition Law Protocol and its progeny and future agreements on state aids), thereby achieving in practice if not in law the principle that such trade remedies be applied only against non-members of the common market.

Intellectual Property Policy

Brazil is a signatory of the Paris Convention and the Patent Cooperation Treaty. Prior to the approval of the new Industrial Property Law, discussed immediately below, the Brazilian Industrial Property Code (Law No. 5772 of December 21, 1971) governed the areas of patents, utility models, industrial designs, trademarks and advertising slogans. The Code established the Brazilian Institute of Industrial Property (INPI) as the agency charged with enforcement of rights in industrial property and with the granting of patents and registration of trademarks and advertising slogans.

Brazil has had a unique and somewhat checkered history with respect to enforcement of intellectual property rights. In particular, Brazil maintained a policy with respect to unpatented technology which did not recognize the licensing of such technology but rather characterized it as a sale by the foreign supplier to the Brazilian recipient. Under Brazilian law, unpatented technology supplied by a foreign company to a Brazilian entity could be used without restriction by the Brazilian company after a fixed period of time, usually a maximum of five years. The old Industrial Property Code, in addition, invalidated contractual arrangements which would restrict the Brazilian licensee from exporting.

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Decree Nos. 1602 and 1751 do not provide for appeal of determinations made by SECEX. However, in the recent case against Russian and US manganese (where dumping but no damages were found), plaintiffs argued that since the GATT Code permits reconsideration based on allegations of material errors of fact, this should be read into Brazilian Law. SECEX has not yet stated whether it will reconsider determinations based on allegations of factual errors.
After years of controversy and intense negotiation, the Brazilian Congress approved a new Industrial Property Law on May 14, 1996 (Law No. 9279, published May 15, 1996). The law, which provides greater protection for patents and trademarks in line with the GATT TRIPs agreements, promises to go a long way toward providing the kind of intellectual property protection that foreign companies, Brazil’s larger trading partners (particularly the US), and certain larger Brazilian enterprises have been clamoring for. The greatest opposition to the new law was voiced by representatives of small and medium Brazilian industry and domestic pharmaceutical companies.

With respect to patents, the principal innovations of the new Industrial Property Law are to confer patentability explicitly to chemical products and processes (most importantly, pharmaceutical and food products) and to provide specifically for patents of transgenic microorganisms (the treatment of such microorganisms was uncertain under earlier law). In addition, the bureaucratic requirements and procedures for filing and approval of patents, long a source of complaints, have been importantly simplified. Industrial models and designs, which under earlier law were subject to the same general rules as patents, are now protected by a much simpler automatic registration regime providing protection for five years renewable up to twenty-five years.

The new law provides for a patent life of twenty years (with a minimum of ten years from the date of the grant). Utility patents are valid for ten years from filing (with a minimum of five years from the date of the grant). Article 230 of the Industrial Property Law provides that foreign patent holders protected under treaties or conventions to which Brazil is a party (including the Paris Convention) are entitled upon filing in Brazil to protection for a period beginning on the date of filing of the earliest patent application abroad.

The provisions of the new law will be applicable to all patent applications pending as of May 15, 1997 as well as filings made after the date of publication of the law. In addition, under the so-called “pipeline provision,” pharmaceutical and bio-technology products (previously ineligible for patent protection) covered by foreign patents can immediately receive the benefits of the new law upon filing of an application with INPI. Such products are eligible for protection under the new law so long as they have not been introduced into the Brazilian market and major investments to exploit or produce the product in Brazil have not yet been made.

One continuity with earlier law is the threat of compulsory licenses for patent holders who do not exploit their patent (either directly or through licensees). Article 68 of the law provides that compulsory licenses may be imposed in the usual cases of non-exploitation or under-commercialization after three years from the date of its grant (Article 68, Section 1).

Article 68 also provides explicitly for the ordering of compulsory licenses in cases where the patent holder “exercises the rights resulting therefrom in an abusive manner or by means of it practices abuse of economic power that is proven by an administrative or court decision.” Such cases would also appear to be cognizable under the Competition Law.

In
such cases, under the Industrial Property Law, the compulsory licensee will also be permitted to import the product covered by the patent for a time pending the initiation of local production. Not surprisingly, Article 72 of the law provides that all compulsory licenses provided for in the law will be non-exclusive. The compulsory licensing provisions of the new Industrial Property Law unfortunately do refer specifically to actions that are also brought under the Competition Law. It will be interesting to see whether complaints requesting a compulsory license under the provisions of the Industrial Property Law will also avail themselves of the Competition Law and what the response will be by the competition authorities to such cases brought under the Industrial Property Law.

The trademark provisions of the new law also provide additional protection to trademark holders when compared with earlier law. Certification trademarks (e.g., names and logos of quality certification organizations) are now protected (the law also includes recognition of geographic indications in accordance with the Paris Convention). Protection against unauthorized use of highly-renowned and notorious trademarks on unrelated classes of products is now provided for under the new law. In the latter case, the applicable provisions (Article 6 Bis) of the Paris Convention are incorporated into Brazilian law. In addition, the period after which the registration of an unused trademark will be canceled is extended under the new law from two to five years. As in the case of patent filing procedures, the paperwork and bureaucratic requirements for trademark registrations have been significantly streamlined.

Upon the enactment of the Competition law, any impediment to the free use or exploitation of intellectual property rights is defined as in violation of free competition. This adds the additional complication with respect to unpatented technology, in that under the Competition Law the granting of a license which in any way sets limits on what the Brazilian licensee can do with it may be seen as a violation of the Competition Law.

FOREIGN INVESTMENT POLICY

Foreign-controlled enterprises and those with significant foreign equity participation have long been accorded free entry into most areas of economic activity in Brazil. The basic foreign investment statutes still in effect, Law No. 4,131 of September 3, 1962, as amended by Law 4595 of December 31, 1964, and Decree 55762 of February 17, 1965, in general establish equality of treatment between local and domestic capital and authorize the Central Bank to register and monitor foreign investments in Brazil. The general foreign investment legislation just described specifically recognizes exceptions to free entry provided for pursuant to Constitutional provisions and specific legislation limiting the participation of foreign capital in certain activities and foreign investment in certain key industries remains excluded or subject to serious limitations. However, amendments to the Brazilian Constitution and legislative changes enacted in 1995 have significantly narrowed such limitations on free entry of foreign capital.

Foreign Capital Registration. Under existing Central Bank regulations, foreign investors must register investment within 30 days of entry or reinvestment of dividends. The
registration establishes the right to remit dividends and repatriate capital investment upon
sale or other disposition. Foreign capital registration also establishes the tax basis of the
foreign investment for purposes of applicable capital gains tax withholding upon
repatriation, where not excluded by treaty.

Prior to the Collor administration, foreign investors reported significant difficulties with
Central Bank administration of the foreign investment laws. Complaints of difficulties in
receiving authorization to remit dividends and often drawn-out disputes over registration
of investment and reinvestments and remission of dividends and capital repatriation were
common. The uncertainty created by Central Bank administration of the foreign
investment laws was often cited as a significant disincentive to investment and an
important contributor to the “Custo Brasil”. Accordingly, with the redirection of the
Brazilian economy under the Collor, Franco and Cardoso administrations, Central Bank
rules, procedures and practices have been streamlined toward the goal of reassuring
foreign investors of expeditious and fair treatment.

1995 Constitutional Amendments and Legislative Changes Constitutional Amendments 5-8
of 1995 and Law No. 8987 of the same year opened up to private capital, and by
extension to private foreign investment, public service concessions and certain other
activities previously reserved to federally-owned and controlled entities. In addition,
Constitutional Amendment 6 revoked Article 171 of the 1988 Constitution, thereby
prohibiting discrimination in treatment between Brazilian companies controlled by
Brazilian nationals and Brazilian companies that are subsidiaries of foreign entities or that
are controlled by foreign investors.

Public service concessions previously reserved for enterprises controlled by the state or
domestic capital that are now opened to foreign investment include telephone and
telecommunications services, natural gas pipelines. In addition, unlimited foreign
investment in such areas as shipbuilding, coastal transport (and freshwater navigation),
mmost mining and hydropower is now permitted. The provisions of Article 171 (II) of the
1988 Constitution, which reserved certain high technology and strategic sectors (including
informatics) to Brazilian-controlled companies, were also eliminated. In line with these
changes, calls for bids in the privatization process and granting of concessions in these
industries make no distinctions between foreign and domestic bidders.

Important remaining limitations. The recent Constitutional amendments and legislative
changes leave intact the state monopoly positions in petroleum, natural gas and minerals.
Nuclear installations are also reserved to enterprises under federal control. The provisions
of Article 21 (XII) of the 1988 Constitution, through which TV and radio broadcasting,
electric energy, airports, seaports, railroads, and interstate and international highway
passenger transport are reserved for domestic capital only, remain in force. Likewise,
foreign investors are excluded from participation in domestic flight concessions, domestic
fishing and the ownership of newspapers and magazines.

The 1995 changes in the legal framework for foreign investment also did not affect the
limitations on foreign investment in the financial sector. Foreign ownership of commercial
banks remains limited to 30% of the registered voting capital (in the case of investments originating from countries according reciprocal treatment). Investments by foreigners in brokerage houses, investment banks and insurance are limited to 50% of registered capital and 33% of voting stock, with exceptions for "grandfathered" investments. Finally, foreigners investing in the Brazilian securities markets are required to channel their investments through such intermediaries as investment companies, investment funds, and managed stock portfolios. However, perhaps presaging changes to the legal framework for the private financial sector, under the Cardoso administration foreign investment in state-owned banks has been approved.

BANKRUPTCY POLICY

Brazil's bankruptcy law continues to suffer from many of the ills that afflict Paraguay and Uruguay and that were common in Argentina prior to its 1995 reform. Paramount among these is the ready availability for distressed borrowers of time-consuming and costly debt-renegotiation proceedings (concordata), during the course of which unsecured creditors are legally barred from taking enforcement action. In practice, the availability of concordata proceedings combined with procedures and priorities in liquidation (quebra) that do not result in maximization of return for creditors places the debtor in a superior negotiating position under concordata. As discussed below, because of their costliness and the preference given to certain other claims, liquidation proceedings (quebra) remains an impractical option for lenders and is therefore not a useful tool or threat for creditors. This state of affairs surely results in higher borrowing costs and causes assets to remain in the hands of inefficient enterprises that would be more effectively utilized in the economy if such entities were dissolved or restructured.

Brazilian law provides that a borrower who has not filed for concordata within the preceding five years and that has assets in value equal to at least 50% of its unsecured obligations may file for protection from creditors. Such a filing may be made either in anticipation of bankruptcy proceedings initiated by creditors (preventive concordata) or after initiation of bankruptcy proceedings by creditors (suspensive concordata). In the case of suspensive concordata, the borrower requesting suspensive concordata must agree to pay 35% of its general credits immediately or 50% within two years and must show that continuing to operate the business will result in greater value to the estate than liquidation. Historically, judges have been generous in granting applications for concordata. Although there are no published quantitative studies on this issue, lawyers report that there has always been a general reluctance on the part of judges to deny concordata requests and close enterprises.

Once a petition for concordata is accepted, the borrower submits a repayment plan to the court. The plan may propose deferral of payments and/or debt forgiveness. The amount of debt that may be forgiven under a plan is limited by a schedule set out in the law. According to the schedule, the longer debt payments are postponed the lesser the degree of permitted debt reduction, with debts rescheduled for two years or more required to be paid in full. This rescheduling provision particularly disadvantages foreign creditors.
Credits in foreign currency are converted to local currency as of the date of the approval of the agreement. There has been a great deal of judicial dispute over whether such obligations should be corrected for devaluation, with decisions going both ways, depending in part on current government inflation-control policies. Unfortunately, no clear jurisprudence seems to be developing on the topic. In the context of Brazil’s history of high inflation rates, this poses a serious risk for foreign lenders.

The borrower’s repayment plan is reviewed by a creditors committee and a referee (comissário) selected from among the unsecured creditors or from among a list of professional referees. The referee prepares a report analyzing the financial condition of the debtor and assessing the likelihood that it will be able to perform under its proposed plan. The court is authorized to accept the plan, with the creditors permitted to oppose it only on the grounds that it is not feasible or that they would receive more in a liquidation. For the reasons set forth below, the creditors are unlikely to request liquidation. The acceptance of a plan in concordata is binding on all unsecured creditors. Secured creditors remain free to pursue their rights in collateral or under guarantees.

Bankruptcy under Brazilian law essentially permits only the liquidation of the assets of the company under the direction of a trustee (sindico). There is no provision for sale of the company as a going concern to creditors or third parties. Most practitioners feel that the time-consuming auction procedures provided for in the bankruptcy law do not result in maximization of return on the sold assets. Another concern expressed is that the order of distribution provided for in the law acts as a disincentive to creditors to opt for bankruptcy rather than agree to the borrower’s concordata proposal. In liquidation, claims for workers compensation, wages and severance, taxes, social security and bankruptcy administration all come before secured and unsecured creditors. Since labor benefits, including severance, are generous under Brazilian law and are usually unfunded, the prior claims may leave very little at the end of the day for creditors. Practitioners report that accordingly, creditors find themselves with little option than to accept the borrower’s concordata proposal.
CONCLUSIONS AND RECOMMENDATIONS

General. As the economies of the MERCOSUR countries further integrate there will be ever greater implications for the domestic law areas discussed in this paper. Although Brazil will remain easily the largest MERCOSUR economy, in increasing numbers cases will arise in which the markets being regulated (as in the case of competition and trade policy) or the companies at issue (as in the case of bankruptcy) will overlap the jurisdictions of two or more countries. Brazilian policymakers must recognize this and endeavor to coordinate policy through an appropriate mixture of accommodating domestic legislation, MERCOSUR rule-making, and inter-governmental coordination.

Brazil is still in the early stages of a fundamental reform of its economic model. The reformed legal frameworks and principles in the areas of law and policy discussed in this paper range from relatively recent to novel. Accordingly, increasing the capacity of staff of agencies to administer new laws and the training of judges in economic law matters (i.e. private rights of action and review of administrative decisions) must remain a high priority.

Public education will also be a critical element of the success of reforms. In the area of consumer protection the Brazilian public seems to have accepted and internalized the principles and procedures. In other areas, notably in competition law, this is less so. A “culture of competition” and general public knowledge of and support for appropriate rules of competition are lacking. Brazilian policy makers need to foster this through better administration of the existing laws and more effective publicizing of the outcomes of cases and their positive implications for consumer welfare.

COMPETITION POLICY

(a) Simplify the Process. Even with the steps recently taken by CADE under Resolution No. 5 (providing, inter alia, for simultaneous action by the three agencies in certain cases) and the establishment of SDE, CADE and MoF coordination at the decision-making and technical levels, the process of investigation and determination of Competition Law cases (particularly concentration acts) remains too complex. Public confidence requires faster, better reasoned and more consistent resolution of cases. Pending refinement of the existing legislation (which may be impractical or which may confuse the public at this time) joint SDE and CADE rule-making on important issues of procedure and interpretation would clarify and simplify the process of investigation and determination and increase the predictability of outcomes.

(b) Assure Adequate Resources. The efficiency with which cases are processed and technical quality of outcomes is dependent on the resources and capabilities of the staffs of SDE, MoF and CADE as well as the degree
of coordination among the agencies. In order for there to be any hope of attracting and keeping good staff CADE needs a reliable source of funding. Some sort of dedicated user fees may provide at least partial insulation from radical fluctuations in financial resources available for administering the Competition Law.

(c) **Increase Predictability of Outcomes Through Interpretive Rule-making.** Business leaders complain that CADE determinations are unpredictable and at times arbitrary. Only once it has generated a substantial body of technically consistent determinations will CADE be able to effectively counter this claim. In the meantime, greater use of interpretive rule-making would increase the predictability of outcomes. Inviting public comment on interpretive and procedural rule-making would further legitimate the activities of the Competition Law authorities in the eyes of both affected industries and the public at large.

(d) **Require Pre-merger Notification.** This would provide CADE/SDE with sufficient opportunity to receive proposals before consummation, after which unscrambling becomes more difficult. However, it would also require a legislative change (beyond what is covered in Resolution No. 6) which may be difficult to accomplish in the short-run.

(e) **Eliminate Protectionist and Price Control Provisions.** As noted in the discussion above. remnants of Brazil’s historic protectionist (e.g., compulsory licensing) and price control policies crept into the final draft of the Competition Law. Fortunately, CADE, most notably in the Colgate case, has pointedly avoided any measures that would hearken back to such discredited policies. To avoid temptation, in future the Competition Law should be amended to remove such provisions.

(f) **Settle the Gerdau Issue.** Permitting appeal of CADE concentration act determinations to the Minister of Justice, only occasions delays and uncertainties and politicizes decision-making. The drafters of the Competition Law wisely sought to avoid this outcome. A clear resolution of this issue needs to be made soon.

(g) **Consent Decrees.** Clearly CADE can make greater use of consent decrees. Caseload considerations, efficiency and good public relations would all favor the maximum use of this measure. Further resources need to be expended in this area, perhaps the establishment of staff specialized in negotiating settlements.

(h) **Privatization.** Up to now the participation of the competition authorities in the privatization and concessioning process has been sporadic and the results uncertain. Ignoring the competition issues involved in privatization and concessioning can generate more anticompetitive effects than are
prevented by the application of the Competition Law in all other areas. As described earlier in this chapter, the existing legal framework contemplates the involvement of the competition authorities in this regard. What is needed is a clear executive directive, and regulations setting forth the process for SDE and CADE review. CADE’s authority to participate in designing the privatization and concessioning process needs to be made explicit and its power to base determinations on the likely effects on market structure needs to be clarified.

(i) Contestability. Contestability of markets was unfortunately not explicitly set out as one of the factors to be considered under Article 54 of the Competition Law. Although implicitly considered in the Colgate case, it would be useful to CADE to issue regulations clarifying that contestability is a factor that it will consider in appropriate cases.

TRADE POLICY

Application Within MERCOSUR. It is unfortunate that the new anti-dumping trade policy legislation introduced last year failed to distinguish between imports from MERCOSUR and non-MERCOSUR countries. The next step should be to exclude MERCOSUR countries from application of the law and rely on the internal MERCOSUR legal framework (e.g., competition policy) to handle abuses that cross borders. The logical final objective should be a common MERCOSUR trade policy regime consistent with WTO, administered either by MERCOSUR or by agencies in each individual country. The latter would be more consistent with the general MERCOSUR approach to date.

INTELLECTUAL PROPERTY POLICY

(a) Passage of the new Industrial Property Law in May 1996 marked a historic turnaround in Brazilian intellectual property policy. It should go a long way towards making Brazil a more attractive place for foreign investors and ultimately lead to a more technologically advanced and competitive Brazilian economy.

(b) On at least one point, Article 68’s provision for compulsory licenses in cases where a patent holder practices abuse of economic power, there appears to be some overlap and potential for conflict with the Competition Law. To avoid conflicting jurisprudence in an area that is more properly a matter of competition policy than intellectual property policy, deletion of this provision should probably be included in further amendments to the Industrial Property Law.
BANKRUPTCY POLICY

(a) Brazil's bankruptcy laws clearly need to be overhauled. A totally revised system needs to be put in place whose provisions are directed at fostering economically efficient workouts and whose procedures can be administered effectively. The process of consultation and drafting of a new law needs to be initiated at the soonest possible moment. Lack of an effective exit policy will encourage misallocation of resources, hinder restructuring of the Brazilian economy, create needlessly increased borrowing costs for enterprises and hurt competitiveness.

(b) Brazilian policymakers should carefully examine the recent Argentine bankruptcy reform and seek where possible to have parallel or at least easily coordinated provisions of law. In the absence of similar regimes and provision for coordination of proceedings, integration of enterprises across the Argentine-Brazilian border will eventually lead to forum shopping and delays in reaching effective restructurings of troubled companies.
V. PARAGUAY

ECONOMIC BACKGROUND

Paraguay’s economy is still in the early phases of a period of restructuring and realignment of production, distribution and trade. During the 1980s, growth and living standards declined as a result of the economic contraction experienced by its wealthier and more industrialized trading partners (Brazil and Argentina). These negative effects were undoubtedly compounded by the government’s misguided efforts to sustain growth levels through an expansionary credit policy and an ill-conceived import substitution strategy involving the construction of uneconomical cement and steel plants.

The economic imbalances and volatility occasioned by the policies just noted generated disincentives to investment and probably contributed to lack of competition and competitiveness in the Paraguayan economy. But perhaps more damaging were the growing and direct involvement of the state in the economy and the increasing concentration of economic power in the presidency during the final decades of the Stroessner regime. The military regime’s ability and willingness to grant effective monopolies in all key areas of the economy (notably heavy industry, processing of traditional agricultural products and distribution) practically eliminated real competition in these sectors. In fact, by the 1980s, the old regime was politically dependent for its continued survival on the rents it was able to assure its remaining supporters in both the public and private sectors.49

The economic reforms initiated by the new democratic regime and Paraguay’s accession to MERCOSUR have dramatically changed the setting for future economic development and the prospects for a more competitive environment. How these fundamental changes will play out is difficult to predict at this point. The economic and financial reforms undertaken thus far promise a certain degree of macroeconomic stability which should encourage investment in domestic and export industries. However, the state remains a key player in the economy through state-owned electricity, telecommunications, steel, oil refining, cement, alcohol and transport (river, rail and air) companies. Over-regulation, lack of transparency and doubts about the willingness of bureaucrats and the judiciary to apply the rules and enforce agreements in an unbiased manner are commonly cited as impediments to a more rapid private sector response to the new economic regime.50

Even before the entry into force of the Treaty of Asuncion, Paraguay was heavily dependent on trade with its neighbors- imports and exports represented roughly one-third

49 See Paraguay: The Role of the State (Report No. 15044-PA), Latin American and the Caribbean Region, The World Bank, April 26, 1996, for a discussion of Paraguay prior to 1989 and the paradigm of the “predatory state”.

of GDP. Because of the limited range of its domestic production and Paraguay's small size (its GDP is less than 2% of Brazil's), trade continues to be largely represented by exports of traditional agricultural goods and imports of manufactured and semi-manufactured goods (including consumer goods). Given the Paraguayan consumer's long-time familiarity with Brazilian and Argentine products and trademarks, this situation makes it appear unlikely within the MERCOSUR context that Paraguayan producers will be able to exercise much anti-competitive market power in tradable goods in the absence of exercising some sort of control over distribution. Indeed, except for the remaining state-owned monopolies, it is in the area of distribution that the greatest concerns about anti-competitive behavior are likely to arise. Given the country's poor infrastructure, bureaucratism and the practical difficulties (and limited incentives) of foreign products to establish independent distribution channels within Paraguay, one of the main preoccupations in the years to come is likely to be the anti-competitive effects of concentration in importation and internal distribution of goods. Indeed, the draft Paraguayan competition law described later in this chapter includes as a separately delineated per se violation the sale of a product within the Paraguayan market at a price above that charged in the export market.

COMPETITION POLICY

Paraguay has never enacted antitrust legislation. Since the latter half of 1995 there has been a flurry of economic law modernization initiatives in Paraguay. A team of advisors to the Wasmosy administration also working on a number of other economic law reform efforts prepared a draft competition law in early 1996. The preparation of the draft MERCOSUR protocol on competition seems to have been the impetus for movement on this front in Paraguay. The draft provides for the establishment of a quasi-independent competition commission, prohibits both horizontal ("per se") and vertical ("rule of reason") violations and provides for commission review of mergers of companies that result in 20% or more market share.

The advisors' draft was circulated for discussion purposes within the government in March 1996. Careful review of the draft reveals a number of important issues that Paraguay (and other relatively small developing countries) will have to address in establishing an appropriate legal/regulatory framework for competition policy. Although the draft law has doubtless undergone many changes since this past spring, no definitive legislation has yet been introduced in the Paraguayan congress.

The draft law was clearly modeled in structure and content on the draft MERCOSUR protocol (which in turn relies heavily on the Brazilian law). It establishes a semi-independent competition commission, linked to the Ministry of Industry and Commerce. Both per se horizontal combinations and vertical arrangements that amount to an abuse of dominant position are outlawed. The draft law's provisions would apply to both publicly and privately-owned enterprises, however there is no provision for private rights of action - all cases must be initiated by the competition commission. The draft law would provide for pre-review by the competition commission of concentrations resulting in a twenty
percent or more share of the relevant market. The potential for abuse of dominant position in the area of distribution receives special attention in a number of places in the draft law. The draft law would prohibit charging a higher price domestically than in the export market.

Some of the salient details of the draft law raise questions about the best legal framework for competition policy in developing economies:

- Although the draft explicitly provides that the law would apply to both public and private entities, there is no direct provision for a review of privatization transactions or participation of the competition authority in the structuring of privatization transactions.

- The definition of the relevant market in the draft omits to provide (in contrast to the Brazilian law) that such market could extend beyond the national borders to include all or part of MERCOSUR.

- Paraguay does not have a comprehensive consumer protection law. It would appear wise to include such legislation within the package of economic legislation being considered by administrative advisors and to endeavor to coordinate efforts in both areas.

- Although the country has no previous experience with this type of law, the draft is fairly broad in scope, providing for the whole gamut of competition law violations. This may cause public confusion and uncertainty, without a realistic expectation that the law can be effectively applied by an experienced commission with adequate resources.

- The draft law provides for judicial review. However, the Paraguayan judiciary has no experience in this area (or for that matter economic law in general). Some consideration should clearly be given to specialized courts (perhaps with jurisdiction over other economic law cases) as well or for specially-trained judges.

- As noted above, the draft does not provide for private rights or action, apparently out of concern that, given the total absence of public and judicial familiarity with competition law, there would be too much opportunity for it to be misused to harass competitors.

The initial issue raised by the draft is the question of what is the most appropriate structure for an enforcement agency in the context of an economy as small as Paraguay’s with a government with limited resources and no experience with independent government agencies. To many observers it appears unlikely that in a system characterized by high levels of concentration of economic and political power, an independent commission will be able to count on the resources necessary to carry out its responsibilities. At the same
time, if the enforcement agency remains a dependency of a ministry with close ties to major industries, as proposed in the draft, it will be difficult to avoid "capture" by precisely those it is charged with regulating. If the only practical option in the Paraguayan political context is an agency linked to a powerful ministry, as appears likely, the best approach would seem to be to place the agency in a ministry less subject to undue influence from industry, perhaps Justice or Finance.

FOREIGN INVESTMENT POLICY

Foreign investors in Paraguay encounter a legal framework that provides for one of the most open regimes in Latin America. Legislation passed early in this decade and now in effect establishes, on paper, a very even playing field for domestic and foreign investors. Under Paraguayan law there are no requirements for governmental approval of foreign investments in any economic sector or geographic region. There are no restrictions on land or natural resource ownership by foreigners. Law 117/91 provides that foreign investors and companies in which they invest are entitled to the same guaranties and rights granted nationals. In order not to place nationals at a disadvantage, the law also grants Paraguayans equal rights to enjoy any benefits accorded foreign investors under bilateral or multilateral agreements.

Law 117/91 explicitly provides that disputes under agreements between foreign investors and Paraguayan nationals (including state-owned companies and public law entities) may be submitted to Paraguayan or international arbitral bodies. Awards under decisions rendered by such bodies are enforceable in Paraguayan courts.\(^5\) The law provides that associations between foreign and domestic investors (including state-owned entities and entities subject to public law) may take a variety of forms, including that of joint venture (riesgo compartido). Under Paraguayan law, joint ventures are treated as provided for in the contracts between or among the investors, rather than as if they created a legal person governed by statutory provisions applicable to corporations.

Law 117/91 provides that the Paraguayan government may not guarantee the domestic or foreign borrowings of domestic or foreign private sector borrowers. Nor may the state grant protectionist privileges to enterprises engaged in production, domestic or international trade or financial intermediation.

Except for foreign investments qualified under Law 60/90 (described below), distributions of profits, dividends and interest payments to non-residents are subject to a general withholding tax of 10%. (The basic tax rate applicable to distributions received by Paraguayan residents is 30%.) However, distribution to non-residents are only taxed when they are in fact repatriated. Distributions reinvested in plant and equipment, directed

\(^5\) This provision is particularly noteworthy since Paraguay has not adopted the UNCITRAL rules for recognition of foreign arbitral awards. Paraguay is a signatory of the Panama Convention and the Paraguayan legislature has ratified such accession. However, although Paraguay signed the New York Convention, it has never been ratified by Congress.
to improvements or repair of fixed assets or that are applied to development of the rural sector are not subject to tax.

The Economic Development Promotion Law (Law 60/90) provides a set of tax and other benefits to approved investments of domestic as well as foreign investors. Investors must present the details of the proposed investment project for review by the Investment Council (Consejo de Inversiones), a dependency of the Ministry of Industry and Commerce with representation from the Ministry of Finance, the Ministry of Agriculture and Livestock, the Central Bank and the Secretariat of Planning and Economic and Social Development. The benefits provided for approved investments under Law 60/90 include, inter alia: (a) a 95% reduction of the corporate income tax for five years (extendible to up to ten years); (b) exemptions from import duties on inputs; and (c) further reductions in corporate income taxes on reinvested profits under certain circumstances. In the case of foreign investments, the 10% withholding tax (explained above) may be waived for the first five years.

Despite this open environment, foreign investment in Paraguay has been modest and indeed has decreased in recent years. In 1993, foreign direct investment amounted to only US $69.6 million, representing a 40.5% decline from 1992. Among the reasons cited for the lack of interest on the part of foreign investors are numerous practical obstacles, including less than transparent business practices, significant corruption in government agencies and uncertainty of enforceability of contracts due to a lack of confidence in the judiciary. With respect to Law 60/90 investments, potential investors complain of cumbersome application procedures, uncertainty about the criteria for approval of investments under Law 60/90 and uncertainty about the amount of incentives that are likely to be granted by the Investment Council. It has also been suggested that the time limitations on some of the benefits under the law make the benefits valueless in cases where little in the way of repatriated profits is to be expected in the early start-up years. Additionally, bureaucratic complexities associated with forming and maintaining Paraguayan corporations and burdensome immigration requirements may also act as disincentives to potential foreign investors in Paraguay.

INTELLECTUAL PROPERTY POLICY

Paraguay is a signatory of the Berne, Paris, and Geneva Conventions. However, the country’s legal regime for the protection of intellectual property rights is old and particularly deficient in its coverage of modern technologies. Registration is cumbersome, More importantly, enforcement is very poor, the enforcement authorities are apparently ill-prepared and there is little confidence in the judiciary’s ability to decide cases properly. However, efforts seem to be underway to improve the judiciary and intellectual property protection is expected to be the topic of some of the new economic legislation to be introduced in the Paraguayan Congress this year.

The existing copyright law was passed in 1951 and amended in 1985. Although it does provide the legal basis for curtailing certain forms of piracy, it does not clearly cover data bases, rental rights or software. In addition, there are exceptions for educational and
scientific purposes that can be construed very broadly. Parallel importation is not illegal. In practice, copyright violations are rampant in Paraguay. Cable retransmission and other misappropriations of audiovisual works have proliferated.

The patent law of 1925 suffers from even greater limitations. In practice, the patent office (which has historically relied heavily on the Brazilian patent office) has resisted the acceptance of patent applications in fields of inventions not explicitly covered by the law. In particular, plant varieties and life forms may not receive patents. The duration of patent protection is limited to 15 years. Paraguayan law does not explicitly provide for protection of trade secrets.

The application of the trademark law is clearly deficient, with speculative filings quite common. Legal challenges to such filings have proven difficult to sustain in the courts. Filings abroad do not give the trademark holder any preference with regard to registration of the trademark in Paraguay.

Under existing Paraguayan law, holders of industrial property rights must register with both the relevant registry and the courts in order to secure legal enforceability of such rights. This double registration requirement is criticized as unnecessarily confusing, costly and time-consuming. Although trademark administration appears adequate, there are numerous complaints about the industrial property registry. The existing system is technologically primitive and occasionally subject to political pressure. Part of the problem is apparently due to underfinancing of the registry. The relatively low registration fees are not retained by the registry but paid over to the treasury. The budget allocated to maintenance of the industrial property registry is inadequate to provide for anything more than the most primitive computerization. Copyright registration is practically nonexistent. There is no copyright office (although one is provided for by law) and the national library which serves as copyright depository, is in utter disarray.

Enforcement by the authorities is reportedly quite lax. In cases where raids are undertaken, there is concern that violators are often tipped off.

The judicial system in Paraguay is not generally well regarded for its competence (particularly in technical areas) or its independence from political and other outside influence. Judges have been historically underprepared, inexperienced in intellectual property issues and underpaid. The penalties for violations have been inadequate to compensate the victim or deter future violations. In the past two years steps have been taken to increase judicial salaries, train judges and improve judicial administration. However, the results of these efforts have not yet become apparent.

**BANKRUPTCY POLICY**

Practitioners in Paraguay, like those in Brazil and Uruguay continue to complain about antiquated bankruptcy legislation. The Bankruptcy Law (Ley de Quiebras, Ley No. 154, promulgated March 29, 1963) provides for both temporary suspension of payment pending reorganization (concordato) and possible liquidation. But as under the old
Argentine law (discussed above), slow procedures, statutory preferences for certain types of debts and uncertainty about the ability of the court and the bankruptcy trustee (*sindico*) to administer properly the bankruptcy proceedings, permit the Bankruptcy Law's concordato provisions to be used almost exclusively by debtors to protect themselves from creditor collection efforts.

The Bankruptcy Law permits troubled debtors to suspend payments pending the convocation of creditors and the consideration of a debtor's proposal for restructuring. Such a proposal may then be negotiated between the borrower and its creditors. The final proposal must be approved by two-thirds of the creditors present (who must represent at least seventy-five percent of the value of outstanding debts). However, the freedom of parties to reach viable and permanent agreements is limited by caps on the amount of debt reductions that can be agreed upon.

In the event that the debtor and its creditors fail to reach a permissible agreement, the law provides for the liquidation of the assets of the company under the administration of the trustee. The rules for such liquidation are complex, time-consuming and subject to misinterpretation. They do not provide for sale of the entity as a going concern. Additionally, the law provides a long list of special preferences for application of the proceeds of a liquidation, including the costs and fees of the court and trustee. Practitioners report that the persons who are appointed to serve as trustees have little incentive to handle liquidations in an efficient manner and are often open to improper influence. Accordingly, experienced creditors have little appetite for liquidations and are likely to reach agreements with troubled debtors either under concordato, or preferably completely outside the legal system. Often such agreements ultimately prove unworkable and the debtor must return to the creditors for further renegotiation.

As in the case of the Uruguayan law, Paraguay's Bankruptcy Law provides (in Article 8) that a declaration of bankruptcy issued in a foreign jurisdiction will not affect the rights of creditors in Paraguay and that in the case of the bankruptcy of a Paraguayan debtor, foreign creditors may be paid only after satisfaction in full of all claims of domestic creditors. However, as in Brazil and Uruguay, there does not seem to be any serious efforts at promoting reform, either within the government or in the private sector.

**CONCLUSIONS AND RECOMMENDATIONS**

Paraguay is clearly due for a major overhaul of its laws governing economic conduct. The political and economic reforms of recent years and the country’s entry into MERCOSUR reflect a fundamentally different economic set of circumstances that requires a legislative response. Fortunately, policy makers have been at work for over a year examining possible legal frameworks for competition, consumer protection, bankruptcy and intellectual property policy, as well as in other areas. The first and most important recommendation is that those drafting and considering economic law initiatives consider them as a package that should create an internally consistent framework appropriate to govern the behavior of economic actors in the Paraguayan economy at this stage in its development. Examination of the areas of economic law and policy *seriatim* or in
isolation will increase the risk that unanticipated and unresolved conflicts among the policies will crop up. Rather, those involved in the legislative process should examine international best practice in the light of Paraguayan realities, explicitly address the conflicts that may arise among the pieces of legislation, and make conscious decisions about the inevitable trade-offs. The package of measures that will ultimately be adopted would then have a better chance of working well together in the Paraguayan context.

More specifically in the areas addressed in this chapter, are the following recommendations:

(a) **Competition Policy.** Policy makers need to be realistic about the prospects of a competition agency that is independent or linked to the Ministry of Industry and Commerce. In the former case, there is every likelihood that the independent commission will not have sufficient resources or political clout to carry out its mandate. However, linkage to the Ministry of Commerce may lead to “capture” by those who it should be examining. Accordingly, the best approach may be to make the competition authority a dependency of the Ministry of Justice or the Ministry of Finance.

(b) The drafters of the Competition Law (and other economic legislation) need to take into account the reality of MERCOSUR and Paraguay’s place in it. The definition of “relevant market” should provide for the possibility that the relevant market for a product is all or a portion of MERCOSUR. Given Paraguay’s small size, policy makers should to the extent possible seek to cooperate with, and piggyback on, those agencies in Argentina and Brazil that are pursuing policies consistent with domestic goals.

**Intellectual Property Policy.** Paraguay needs a major overhaul of its legislation dealing with intellectual property matters (patents, trade secrets, marks, copyright, mask works, etc.), in addition to improving its administration and enforcement capacity to in conformity with the TRIPS Agreement by January 1, 2000.

**Bankruptcy Policy.** Paraguay must have a modernized bankruptcy code and a workable system to administer it to replace its antiquated and unworkable Bankruptcy Law. Certainly, bankruptcy reform will involve the expense of significant political capital, given the relative advantages accorded debtors under the current system. But the costs to the economy of continuing without change (both in terms of misallocation of resources and greater risk for lenders) are very high. In drafting such a new law, policy makers should look carefully at the recent changes to the bankruptcy framework in Argentina. In any foreseeable future, coordination of bankruptcy proceedings in two or more MERCOSUR (as well as other) countries will be essential. Any new bankruptcy code would do Paraguayan credit markets a disservice if it did not establish the equal treatment of foreign and domestic creditors.

**Other.** In the areas of competition policy, consumer protection and intellectual property policy, decision makers need to be conscious of the limitations of public agencies in
administering new laws in areas that were previously unpoliced. In many cases, it may be wise to focus the efforts of agencies on the areas where there is the greatest realistic hope of a successful outcome. This can be accomplished either by limiting the legal authority of agencies until they have demonstrated ability in carrying out their core functions, or by clear directives from the executive on where resources and personnel should be allocated.

Similarly, to the extent that determinations in individual cases can be legally delegated to competent and impartial private sector actors (as in bankruptcy arbitration), or to specialized courts, this should be done to increase efficiency and public confidence. Of course, underlying all of this should be a focus on adequate preparation and continual training of judges in new areas of economic law.
VI. URUGUAY

THE ECONOMY

Uruguay is a small country, with a population of less than 3.5 million people and an economy of only US$9.5 billion in output. The country has a high literacy level, a stable government structure with a long tradition of democracy (except for a military government in the late 1970's and early 80's), and a temperate climate with abundant rainfall, ideally suited for livestock farming. Its location commands access to large neighboring markets across the Rio de la Plata and its port serves as a major regional gateway to the markets of North America and Europe.

The principal activities of the Uruguayan economy are concentrated in services (banking and tourism) and agriculture, particularly livestock farming and crops, such as barley and wheat. The private sector produces some 72% of GDP, and dominates ownership in many sectors, including agriculture, manufacturing and services. The Uruguayan public sector is not heavily involved in manufacturing or mining, but owns and controls vital sectors such as electricity, gas, cement, alcohol, water, petroleum refining, air transport, railroads, roads, ports, a large part of the financial services sector and telecommunications. The private sector share in the total investment in the economy is about 63%, most of which is in the productive sectors and is financed through retained earnings. The private sector also accounts for 73% of total employment, relatively low by international standards.

The private sector is heavily oriented towards services, especially the tourism industry. The average size of a firm is approximately 10-15 employees. This small size results from the protectionist regime that encourage production for the small domestic market as well as firms' conscious efforts to avoid the burden of the great regulatory environment. Another characteristic of the Uruguayan private sector is a very distinctive ethos: forty years of protectionism have conditioned most firms to a non-competitive climate. Uruguayan firms and entrepreneurs are usually described as conservative, risk averse and non-innovative. Firms in Uruguay generally use outmoded technology and remain conservative in responding to reforms and new incentives.

A conspicuous feature of the Uruguayan economy is the pervasive character of government regulations. Government regulations affect the entry and exit of firms, require licenses to remain in operation, provide public ownership and price determination of crucial raw materials such as petroleum, power and communications, and foster high taxation, particularly social security taxes.

Uruguay's economy is essentially dollarized, with 70% of financial assets held in dollars. The country had 44 financial entities in 1982, including 22 private banks, 2 official banks and 20 financial houses. The private financial sector is primarily foreign-owned. Foreign ownership increased in 1982 following a new banking regulation which authorized tax-free offshore banking. In the public sector there are now two public banks and two formerly private banks now under public sector bank management. Credit to the private sector,
both in pesos and dollars has decreased over time, with most credit being provided by public sector banks (71% in 1992). Private banks in general, and foreign banks in particular, are very reluctant to lend to private sector business enterprises for a number of reasons.

The private sector relies heavily on inputs from the public sector, such as electricity, fuel, gas and water. In addition, public enterprises must buy their raw materials from the public sector. Almost all of the Uruguayan infrastructure is publicly owned. Consequently, all private enterprises use public facilities of some type, even if an enterprise does not buy any direct inputs from the public sector. Accordingly, public sector pricing policies have a strong impact on the private sector cost structure because of the lack of alternative sources. The tight oligopolistic structure prevailing in Uruguay is an effective barrier to competition. In many sectors, a single producer or a small group dominates the industry and protection barriers give them considerable market power. Explicit or tacit collusion among the few firms that control each sector appears to be pervasive. The distribution sector is essentially a cartel. Furthermore, the wholesale-retail level also appears to have no competition and domestic prices of most commodities are extremely high.

Uruguay has used a wide variety of instruments other than tariffs to regulate imports directly. These include import quotas, reference and minimum prices, import surcharges, local content requirements, state trading and government procurement practices. Exports are regulated by export taxes, surcharges and levies, minimum export prices, duty drawbacks, special credits for capital goods, and free trade zones. There have been two major trade liberalization episodes in the past: one in 1959 and the other in 1974-1978. In both episodes, Uruguay took a gradual approach to trade liberalization, introducing selective trade instruments for export promotion. Also, trade liberalization was either limited or reversed in the wake of macroeconomic balances. Furthermore, these trade reforms and supportive policies did not change the basic incentive structure. These changes were also not maintained over time to encourage the private sector to expand investment and production of nontraditional exportables.

Since 1989, the Uruguayan government has commenced another regime of trade reform. These reforms have four main components, including tariff reduction; changes in the scope of non-tariff barriers; deregulation and simplification of administrative procedures; and participation in MERCOSUR.

The private sector also perceives the regulatory environment as a formidable constraint on its operations. These regulations include tax regulation, labor regulations and implicit labor taxes, licensing requirements, and municipal regulation.

PLACE OF TREATY AND INTEGRATION IN THE URUGUAYAN LEGAL SYSTEM

As noted above, the Uruguayan Constitution indicates that the national government has the exclusive right to establish laws that will apply in the national territory. The Constitution also provides that the Uruguayan state is to seek economic and social
integration with other Latin American states. Thus, Uruguay may incorporate
MERCOSUR norms into its national legal system through legislative action. Such norms
adopted into the national legal system would have the same hierarchical status in the
Uruguayan legal system as any other statute passed by the Uruguayan legislature. The
Uruguayan Constitution also provides that the Uruguayan government should propose the
inclusion of clauses dealing with arbitration or alternative dispute resolution in any treaties
or other agreements established between the Uruguayan government and foreigners.

COMPETITION POLICY

As noted above, the Uruguayan economy is characterized by a tight oligopolistic
structure, significant barriers to entry, and a complete lack of competition in most sectors.
Furthermore, neither the private nor the public sector views competition as a positive
development.

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

MERCOSUR proposes an integration model that will eventually completely open the
economies of its member states. Given Uruguay's proximity to Argentina and the recent
surge of Brazilian investment in the area, it is probable that Uruguay's oligopolistic
economy will be forced open from outside by investments from these two countries.
Without an internal competition law, small Uruguayan firms may not be able to compete
with larger and better financed firms from its MERCOSUR neighbors. The new
MERCOSUR Competition Protocol is meant to be an addition, not a substitute, to
domestic competition law. Since Uruguay has no domestic competition law, the effect of
the new MERCOSUR Competition Protocol on the Uruguayan economy will be very
different from that of the other MERCOSUR member states except for Paraguay. Thus,
the absence of any competition legislation has strong implications for the development of
Uruguay's economy. A modern competition law, with effective enforcement mechanisms,
is sorely needed.

CONSUMER PROTECTION POLICY

Uruguay has a number of statutes dealing with consumer protection. These include:
Decree 25/968 of January 25, 1968 (regulating purveyors of necessities); Decree 80/968
of February 1, 1968 (requiring the display of price lists in locations where food is sold);
Decrees 264/977 of May 12, 1977 and 432/979 of September 5, 1979 (requiring the
listing of sales prices and terms by merchants); Decree 264/982 of July 28, 1982
(forbidding misleading labeling or advertising); Decree 338/982 of September 22, 1982
(labeling and inspection requirements for foodstuffs); Decree-Law 15.361 of December
24, 1982 (regulating tobacco advertisements); Decree 141/992 of April 2, 1992
(regulating product labeling); and Law 16.226 of October 21, 1991 (misleading
advertising). These statutes share one characteristic in common: the penalties and enforcement mechanisms provided therein are ineffective. Furthermore, there is no public agency within the Uruguayan government which has the responsibility for consumer information and protection. There are also no private sector groups which meet this need.

Clearly, Uruguay needs to codify, simplify and modernize its consumer protection legislation. Great care should be taken to ensure that adequate enforcement mechanisms and penalties for violations should be included in such legislation. Furthermore, this legislation should establish a government agency charged with monitoring the retail markets, providing information to consumers, and enforcement.

ANTI-DUMPING AND COUNTERVAILING MEASURES

Uruguay has ratified and adopted the WTO Anti-Dumping Code and the Uruguay Round Anti-dumping Agreement.

Unlike the case of Argentina, Uruguay has no national legislation or regulation setting forth any procedures by means of which an Uruguayan producer whose business has been damaged by dumped imports can seek a remedy. Uruguay also has no equivalent to the Argentine National Foreign Commerce Commission, or other organization charged with evaluating dumping petitions and making recommendations on remedies.

INTELLECTUAL PROPERTY PROTECTION

Adoption of TRIPs Agreement. Like Argentina, Uruguay has adopted the WTO/TRIPs agreement. Under this agreement, Uruguay has until January 1, 2000 to comply with most of its provisions and has a further five years to comply with the provisions regarding pharmaceutical inventions.

Present Patent Law. Uruguay's present patent protection statute is Law 10.089 of December 12, 1941 ("existing law"). Its regulations were published in an unnumbered decree dated September 4, 1942.

The existing law provides for patent protection for inventions and designs based on novelty criteria, covering both process and product patents. Certain subject matters, including pharmaceuticals, are excluded from patent protection, either by existing law or administrative regulation. By administrative decision, the patent office denies patent protection for higher life forms, even though the patent law does not expressly preclude such protection and this situation has led to litigation.

The existing law provides for patent protection for up to fifteen years (no extensions). Uruguay's patent law has a provision whereby a patent lapses if it is not worked within three years from the date of issuance, or if there is more than a three year interruption in working the patent. In these circumstances, a compulsory license granted by the statute allows extensive use of the patent. The conditions for the grant of a compulsory license are very broad.
The existing law does not adequately protect trade secrets. A provision in the statute does establish partial protection for trade secrets under limited circumstances, and at least one case has been litigated under this provision. Vague articles in the law of unfair competition offer theoretical but unrealistic and unused help.

In the past, extensive administrative delays have characterized all proceedings in the Directorate of Industrial Property. This institution had no tenured civil servant cadre within its staff and the work ethic of these employees seemed to make that backlog problem worse. Efforts at clearing this backlog in the past did not seem to be very successful. Partly as a result of an Inter-American Development Bank program to improve public administration of this institution, its backlog has been cleared and the intellectual property registration agency is now reported to function in a timely and efficient manner.

**Trademark Law.** Uruguay's trademark law is Law 9.956 of October 4, 1940, with regulations sets forth in an unnumbered decree of November 29, 1940 and Decree 649/967 of September 28, 1967. This legislation makes extremely easy the registration of any trademark, including trademarks originated and used by others. There is no requirement that a trademark be used by its registrant, either before registration or afterwards. Service marks are authorized to be registered and the Nice Agreement's classification system is used.

A large number of speculative registration of trademarks originated by others has plagued the Uruguayan system. The Directorate of Intellectual Property has been somewhat reluctant in either canceling such registrations sua sponte or in following court orders requiring such cancellation. Thus, the holder of an international trademark which has been registered by another is forced to litigation to protect its rights, and this process can be extremely time consuming, expensive and somewhat ineffective.

**Copyright Law.** Uruguay's copyright law dates from 1937 and has been amended several times by decree. The copyright law covers writings of any nature or length, dramatic works, drawings, paintings and works of sculpture, printed matter, plans and maps, plastic works, photographs, engravings and phonograms, and all scientific, literary, artistic productions (including computer software) regardless of medium. The statute sets forth a number of formal requirements for obtaining copyright protection, in contravention of the Berne Convention. The educational exemption is extremely broad and sound recordings receive less protection than other forms of expression. Rental rights are not protected and compulsory licensing is broad.

**Enforcement.** Enforcement of Uruguay's intellectual property laws is problematic. Injunctive relief for violations is available and can be effective. However, delayed judicial proceedings are common. Some judges have little or no training nor experience in business or technology, which diminishes their effectiveness in intellectual property matters. Although penalties contained in the existing legislation are sufficiently severe, judges tend to lack appreciation for intangible property and impose relatively light sanctions for industrial property infringement.
FOREIGN INVESTMENT REGULATION

Uruguay's foreign investment legislation consists of Decree-Law 14.179 of March 28, 1974 and Decree 808/74 of October 10, 1974. This legislation creates a permissive regime for foreign investors to adhere to. For foreign investors opting to be subject to this legislation, the Uruguayan government guarantees the right to remit dividends and repatriate capital under the following conditions: (a) three years must lapse before capital can be repatriated; (b) profits not remitted within two years are considered capitalized; (c) firms whose capital originating from abroad constitutes more than 50% of their capital may not avail themselves of domestic loans with repayment periods of over one year; (d) the Minister of Economy and Finance must approve the previous investment recommendation of the Foreign Investment Advisory Unit; (e) investment in electric power, hydrocarbons, petrochemicals, atomic energy, strategic minerals, agriculture and livestock, meat packing, radio, press, television, financial brokerage, railway and telecommunications require the authorization of the Executive in the Council of Ministers, supported by corroborating evidence of its desirability; and (f) investments must be registered with the Central Bank. The evidence is that this legislation is not currently being enforced. Thus, the legal system does not act as a barrier against foreign investment, even though these laws remain on the books. What the current law does is to provide confusion to foreign investors regarding the applicability of those restrictive rules. Accordingly, the current law makes the promotion of direct foreign investment difficult by contradicting the image projected abroad of a broad and liberal investment framework.

Uruguay should enact an effective and binding law that provides clear norms, minimal restrictions compatible with efficiency, protection to industrial and intellectual property rights, and provisions and insurance against expropriation, as well as a level playing field for domestic producers. Uruguay should consider the current Argentine Foreign Investment Law and Regulations as a legislative model.

BANKRUPTCY LAW


The current legislation is quite archaic and cumbersome and contains a number of different procedures that an individual debtor can engage in. An insolvent debtor can engage in a private insolvency agreement ("or concordato extrajudicial"). In this proceeding, the debtor comes to a private agreement with the majority of his creditors and requests that this agreement be recorded. Dissenting creditors have limited rights to object to the recording of the agreement and, in such a case, a hearing will be held by a commercial judge. At the conclusion of this hearing, the judge may enter an order calling for the recording of the agreement or may reject it. If the agreement is recorded, creditors are barred from making further claims against the debtor during its implementation period.
An insolvent debtor can also commence a judicial insolvency proceeding. This proceeding involves the filing of an insolvency petition in court. The judge then appoints an auditor for the debtor and calls for a creditors' meeting. The creditors will present their claims to the auditor, who will transmit them to the court. The debtor will present a payment proposal for consideration by the creditors. This proposal will be considered by the creditors at the creditors' meeting, which is presided by the judge. The creditors will then vote under the judge's supervision. If the creditors approve the proposal, the judge will register the agreement and will order its implementation. Should the proposal be rejected, the court may order another meeting of creditors, where the process will be repeated. If no agreement is possible, the judge may order that a bankruptcy proceeding be commenced. The debtor may not dispose of any of its assets while the proceedings are pending.

An agreement may be annulled or invalidated by petition filed with the court. Grounds for invalidation or annulment include fraud, misrepresentation of assets or liability, or tortuous actions by the debtor or third parties relating to the creditors' vote.

A bankruptcy proceeding can be commenced by a merchant who has ceased to pay his current obligations. Failure to meet one current obligation is sufficient grounds for bankruptcy. A bankruptcy proceeding is commenced by the filing of a petition with a court of competent jurisdiction. The debtor commences the proceeding by filing a bankruptcy declaration, which is considered by the judge. Once the proceeding is commenced, the judge will appoint a receiver, who will take possession of the debtor's estate, make an inventory and determine the debtor's assets and liabilities. Creditors file their claims with the receiver. The judge will then convene a creditors' meeting, at which a list of the claims will be considered. The debtor and the creditors may enter into an agreement regarding payment of the claims and this agreement must be confirmed by the judge. In the absence of an agreement, the judge makes a determination of what is to be paid to each creditor from the assets of the debtor. A bankruptcy proceeding annuls all contracts and transactions. The main actor in bankruptcy proceedings is the judge, with the creditors and receivers playing a secondary role.

Another characteristic of the current legislation is its failure to recognize or give effect to any insolvency or bankruptcy proceedings commenced abroad.

The bankruptcy system created by the current legislation is not effective and hinders, rather than facilitates, a firm's exit from economic activity. The bankruptcy courts are extremely slow and judicial proceedings involve a very lengthy and time consuming process, often lasting from four to five years. By the time the process concludes and the court orders the transfer of assets, there is little of value to transfer. Another major problem with this system is the abuse of the private insolvency proceeding ("concordato extrajudicial"). As noted above, this agreement occurs between the debtor and some of its creditors and provides the debtor with a moratorium to carry on its economic activities without having to respond further to creditors' demands. Often, one such agreement follows another to the point where bankruptcy becomes a moot point and creditors are left
without compensation. Uruguay needs to repeal this legislation and enact modern legislation.

CONCLUSIONS AND RECOMMENDATIONS

The Uruguayan public sector owns and controls vital sectors such as electricity, gas, cement, alcohol, water, petroleum refining, air transport, railroads, roads, ports, a large part of the financial sector and telecommunications, which constitute approximately 37% of the economy. Government regulation is pervasive and affects the entry and exit of firms, requires licenses to remain in operation, provides public ownership and price determination of crucial raw materials, and fosters high taxation, particularly social security taxes.

The private sector relies heavily on inputs from the public sector, such as electricity, fuel, gas and water. It is characterized by a tight oligopolistic structure which constitutes an effective barrier to competition. In many sectors, a single producer or a small group dominates the industry and protection barriers give them considerable market power. Explicit or tacit collusion among the few firms that control each sector appears to be pervasive. The distribution sector is essentially a cartel. Furthermore, the wholesale-retail level also appears to have no competition and domestic prices of most commodities are extremely high. This situation, which is reflected in the legislation discussed above, creates roadblocks for the modernization of the Uruguayan economy and the implementation of a system of free competition in Uruguay.

COMPETITION AND CONSUMER PROTECTION POLICY

(a) Uruguay presently has no legislation or regulation dealing with competition policy. The absence of this legislation in an oligopolistic economy such as Uruguay's has strong negative implications for its development. Uruguay should pass a competition law promptly.

(b) Any competition law enacted by Uruguay should include appropriate and effective enforcement mechanisms, including the creation of an independent agency charged with the monitoring of competition and the enforcement of competition norms.

(c) Consumer Protection Policy. Uruguay's consumer legislation should be codified, simplified and modernized.

(d) Any consumer protection legislation enacted by Uruguay should include adequate enforcement mechanisms and appropriate penalties for violations and should establish a government agency charged with monitoring the retail markets, providing information to consumers, and enforcement.
INTELLECTUAL PROPERTY POLICY

(a) Uruguay needs a modern system of intellectual property legislation. The Uruguayan government must pass new Patent, Copyright and Trademark laws.

(b) The new Patent Law should extend the period for patent protection to twenty years from date of filing, in accordance with international norms.

(c) The new legislation should provide for the professionalization of the Directorate of Intellectual Property, making sure that this agency has sufficient equipment, personnel and funds to meet adequately its obligations in an expeditious and efficient manner. The personnel of this office should receive civil service status and should receive frequent and adequate training in their fields.

(d) The new Copyright Act should be forward looking, and provide for copyright protection to new forms of expression, such as works produced in the Internet.

(e) The new Trademark Law should be structured so that the speculative registration of trademarks originated by others is prohibited. Procedures should be included in this statute to enable the Directorate of Intellectual Property to cancel those speculative registrations in an efficient and effective manner.

(f) Judges with responsibility for intellectual property law litigation should receive sufficient training so that they can effectively enforce the intellectual property statutes.

FOREIGN INVESTMENT POLICY

Uruguay's current foreign investment law is outmoded and little used. The current legislation should be repealed. Uruguay should enact an effective and binding law that provides clear norms, minimal restrictions on investment compatible with efficiency, protection to industrial and intellectual property rights, and provisions and insurance against expropriation, as well as a level playing field for domestic producers.

BANKRUPTCY POLICY

(a) The bankruptcy system created by the current Uruguayan legislation is not effective and hinders, rather than facilitates, a firm's exit from economic activity. Uruguay needs to repeal this legislation and enact legislation creating a modern bankruptcy system which facilitates a firm's exit from economic activity and ensures that such a firm's creditors receive some
compensation. The new Argentine bankruptcy statute provides a useful legislative model and should be carefully considered.

(b) The current Uruguayan administration has made great strides in judicial administration. It should ensure that the courts dealing with bankruptcy matters have sufficient personnel, equipment and training so that they can perform efficiently.
VII. MERCOSUR HARMONIZATION EFFORTS

COMPETITION POLICY

On December 14, 1994, the MERCOSUR Council, in its Decision 21/94, approved a document entitled "Basic Elements of the Defense of Competition in MERCOSUR" ("Basic Elements"). This document was intended to harmonize the member states' national laws in the area of competition and to create a scope for coordinated action by the member states to prevent anticompetitive practices. Decision 21/94 also requested the member states to submit detailed information concerning the compatibility of their national current or proposed competition law with the basic elements. This information was to serve as the starting point in the drafting process of a protocol on the defense of competition in MERCOSUR.

The Basic Elements had four principal concepts. First, all concerted agreements and practices entered into by enterprises whose purpose or effect is to impede, restrict or distort competition or the free access to the market in the production, processing, distribution and marketing of goods and services throughout all or part of MERCOSUR are prohibited. Examples of these practices include direct or indirect price fixing; imposing limitations or controls in production, distribution, investment or technological innovation; division of market or limitation of access to raw materials; concerted actions in public bidding; adoption, with regard to third parties, of unfair contractual conditions which place them at a competitive disadvantage; conditioning the execution of contracts to other agreements regarding matters which do not relate to their subject matter; and pressuring suppliers or clients not to engage in certain behavior or retaliating against them. Second, the abuse of a dominant position within all or part of MERCOSUR is also prohibited. Examples of these abuses include: imposition of unfair prices or contractual conditions; unjustified restrictions in production, distribution or access to technology which result in prejudice to other firms or to consumers; imposition of unfair contractual conditions upon third parties which places them at a competitive disadvantage; conditioning the execution of contracts to other agreements which do not relate to their subject matter; refusals to deal; conditioning of transactions to unfair or unjust commercial uses or practices or to refusals to utilizing goods or services produced by third parties; or selling goods at an artificially low price. Third, all business mergers or combinations which involve firms having a participation of more than 20% of the relevant market and which might produce anticompetitive effects in all or part of MERCOSUR must be examined by the authorities of the appropriate member state. Lastly, the member states must mutually cooperate, either directly or within the MERCOSUR Commerce Commission, in the creation and enforcement of common norms or procedures in the area of competition law. This can include information exchange, consultation, technical cooperation or other means.

Directive 21/94 also provides that, until a final agreement on the matter is reached by the member states, a member state that considers itself affected by a violation of free
94

competition may present a claim to another state party through the MERCOSUR Commerce Commission. The member state where the alleged violator is located shall then initiate, within 30 days, an investigation of the matter in accordance with its national law. If such an investigation does not result in legal proceedings against the alleged offender, or if the affected party believes that, despite the actions of the member state with jurisdiction over the alleged offender, the anti-competitive conduct continues, the complaining state party may resort to the dispute resolution procedures set forth in the Brasilia and Ouro Preto Protocols.

At its second meeting on May 22-24, 1995, Technical Committee No. 5-Competition Laws- of the MERCOSUR Commerce Commission approved a draft Protocol for the Defense of Competition within MERCOSUR("draft protocol"). The draft protocol first, in a verbatim adoption from the Basic Elements, prohibited all concerted agreements and practices entered into by enterprises and whose purpose or effect is to impede, restrict or distort competition or the free access to the market in the production, processing, distribution and marketing of goods and services throughout all or part of MERCOSUR and adopts the examples of these practices set forth in the Basic Elements. Secondly, again in a verbatim adoption of the language of the Basic Elements, the protocol forbade the abuse of a dominant position and adopted the examples of these practices set forth in the Basic Elements.

Article 5 of the protocol required the authorities of the member states to examine merger or business combinations which involve firms having a participation of more than 20% of the relevant market and which might produce anticompetitive effects in all or part of MERCOSUR. In a departure from the Basic Elements, however, Article 5 indicated that business combinations that involved firms having a participation of more than 20% of the relevant market may be authorized if they have as their objective to increase production, improve quality or foster efficiency or technological or economic development and that such benefits are passed on to consumers, provided that such concentration did not result in the elimination in a substantial part of the MERCOSUR market.

Article 8 of the Protocol incorporated, again verbatim, the dispute resolution system that was set forth in the Basic Elements. Article 9 indicated that the MERCOSUR Commerce Commission shall monitor the protocol's application by the member states. Lastly, the Protocol indicated that it shall become effective thirty days after the deposit of the second instrument of ratification by a member state.

The draft Protocol followed rather closely the language of Articles 85 and 86 of the European Union's Treaty of Rome. These articles, in language very similar to that of the Protocol, prohibit agreements and concerted practices having as their object or effect the prevention, restriction or distortion of competition within the common market and abuses of dominant position. In a similar fashion, European Council Regulation 4064/89 requires that certain takeovers and mergers (or "concentrations" in the language of the Regulation) must be reported to the European Commission before they are effected. The Regulation, basing itself on the authority of Article 86, allowed the Commission to forbid
those concentrations if they resulted in an abuse of dominant position which would significantly impede competition in the common market or a significant part of it.

European competition law does have one crucial component, however: it applies only in cases where the agreements, concerted practices or abuse of a dominant position may affect trade between the member states. Similarly, only concentrations having a "community dimension" (defined in Regulation 4064/89 as a concentration among firms whose worldwide turnover exceeds at least 250 million ECU or where each of the firms involved achieves more than two thirds of its aggregate turnover in the Community within one member state), unless exempted, are subject to regulation by the Commission. The exemptions mentioned above include cases involving operations whose object or effect is merely to coordinate the competitive behavior of independent undertaking, where a credit or financial institution acquires control of another undertaking essentially for the purpose of investment, where control is acquired by a liquidator or receiver in the context of a liquidation or where a change in control is effected by a financial holding company which is not involved in the management of the undertakings, but simply manages its own investment portfolio. In short, European competition law applies only to practices which affect competition within the larger community, and not to those practices which affect competition in only one member state. This means that practices which affect competition in one member state are still subject to the national competition law regimes of the member states of the European Union. Thus, the European and national competition law systems of the European Union coexist with each other.

The draft Protocol did not appear to make that distinction. It was unclear whether the draft protocol sought (a) to harmonize the law of the member states by making certain types of practices prohibited, or (b) to make certain types of practices prohibited only if (in the language of the Protocol) they affect competition "in all or part of MERCOSUR." This distinction is critical because two of the MERCOSUR member states (Paraguay and Uruguay) have no competition law regimes as yet and those of the other two member states (Argentina and Brazil) are not compatible with each other. One critical area of dissonance in the existing competition regimes is in the area of pre-merger notification, review and evaluation. While Brazil has such a concept in its competition statute, Argentina does not. It is much easier to halt a business combination which will have anticompetitive effects prior to its completion than to undo a combination that has already taken place. Furthermore (taking the European Union experience as a guide) because of the nature of the national economies, there may be practices and business concentrations which may have very different competitive effects in one or another state but, when taken as a whole, may have a detrimental effect on the economic system of the entire region. These combinations and practices may not be able to be policed adequately by one or another national competition authority. This problem may be solved in two ways: either by harmonization of national competition law and enforcement mechanisms and through cooperation agreements among the various enforcement institutions in the region or through the creation of a MERCOSUR level institution charged with the regulation and enforcement of competition law at a community level, with the national competition enforcement authorities remaining responsible for the regulation of competition at a
national level. Given the nature of MERCOSUR, it appeared that the former solution was the only one that would be acceptable to the member states.

However, some of the ambiguity has been lifted by the Common Market Council’s approval in December 1996 of Decision 18/96 covering a final Protocol for the Defense of Competition within Mercosur. The Protocol does not become effective until it has been incorporated into each member’s legal system in accordance with national legislation, while common norms to control anti-competitive acts and agreements are expected to be completed within two years.

The Protocol has three main features:

(a) all concerted agreements whose purpose or effect is to impede, restrict or distort competition or the free access to the market or that abuse a dominant position in the relevant market of goods and services within Mercosur and that affect trade between the member states are against the Protocol.

(b) The Mercosur Commerce Commission and the Technical Committee on Competition Policy will enforce through the power of injunctions, consent decrees, fines etc., implemented by national agencies the norms set in the Protocol supplemented by the dispute resolutions systems of the Brasilia Protocol. However, because all Mercosur institutions operate by consensus, this does not represent a movement towards supranational authority since one national authority can effectively exert veto power over Committee decisions.

(c) The national competition agencies would adopt measures to enhance cooperation with each other to implement the protocol.

This Protocol represents a significant improvement over its predecessor in that it now delineates a role for Mercosur institutions to administer competition acts and agreements that affect more than one state, but leave the implementation of those decisions to the national bodies in addition to acts and agreements that are purely national in scope. There is also an implicit objective towards harmonization given the broad principles enunciated in the Protocol, the need to prepare common norms and the objectives of cooperation at the national level. Left less clear, however, is the treatment of merger and acquisitions except for an oblique reference in Article 7 to agreements that result in economic concentration. Given the dichotomy between Argentinean and Brazilian law in this matter, this issue should be addressed explicitly.

**CONSUMER PROTECTION POLICY**

Many regulatory measures whose justification is given as consumer protection are in reality mechanisms designed to protect domestic producers of particular goods from foreign competition or to require foreign competitors to purchase local components or
services in order to sell their goods in the local economy. The existence of these measures hampers competition at the national and regional levels. Furthermore, the existence of inconsistent bona fide consumer protection measures in the region makes it more difficult and expensive for firms to compete regionally and limits the choice of products available at a reasonable price to consumers in the region. There is therefore a direct correlation between consumer protection regulation and competition policy. Accordingly, the MERCOSUR Common Market Group adopted five resolutions in December 1996 on consumer rights, safety and health, advertising and guarantees.

ANTI-DUMPING AND COUNTERVAILING MEASURES

MERCOSUR has not yet adopted any harmonization measures in the area of anti-dumping and countervailing duties except to review Mercosur anti-dumping measures amongst members by December 31, 2000. Representatives of the member states and of the MERCOSUR institutions have indicated that the member states agree that such harmonization is desirable and harmonization efforts in this area are underway. To date, no agreements have been reached, on either a general concept of regulation or on specific approaches thereto. At this point, Argentina and Brazil have formalized anti-dumping and countervailing duty regulations and Paraguay and Uruguay have not. Agreement in this area is sorely needed. Free competition of firms within the MERCOSUR area may be jeopardized by application of inconsistent norms against third parties by the member states. Furthermore, and again in order to stimulate competition and to ensure that consumers in the region have access, MERCOSUR should adopt a common external anti-dumping and countervailing duty system. Such a system should be compatible with the international norms set forth by the World Trade Organization Anti-Dumping Code and could follow the models of other regional trading blocks, such as the European Union and Australia and New Zealand.

INTELLECTUAL PROPERTY PROTECTION POLICY

All of the MERCOSUR countries are signatories to the Paris, Berne, and Geneva treaties in addition to the WTO-TRIPS agreement which requires that they adhere to its provisions by January 1, 2000.

In August 1995, the four countries signed a protocol for the common treatment of trademarks and indications of origin which is now pending ratification in each of the countries and was prepared under the auspices of MERCOSUR’s working group No. 7. A tentative agreement has also been reached in the area of copyright and related rights which would meet TRIPS standards. However, no progress has been made in the area of patents or trade secrets, though particularly in the area of patents, major reforms have taken place at the national level (e.g., Brazil).

52 In the case of Argentina, this includes an effective innovation of having an independent commission determine injury using rigorous criteria.
A further issue to consider is the potentially high administrative costs of national patent offices that require a large technical staff. Consideration could be given to building up a MERCOSUR patent office for the four countries (and other subsequent members) and/or use the provisions of the Patent Cooperation Treaty (PCT), of which Brazil is a signatory. In the latter case, investors would file an “international” patent in their home country or with the International Bureau of WIPO that is then vetted/searched by one of the nine designated technically qualified offices, thereby conserving scarce local technical capacity.

FOREIGN INVESTMENT REGULATION

MERCOSUR has adopted two harmonization measures regarding foreign investment: the Colonia Protocol for the Promotion and Reciprocal Protection of Investment in MERCOSUR (Intrazone) ("Colonia Protocol") and the Protocol Regarding Promotion and Protection of Investments from Countries not Part of MERCOSUR ("Third Party Countries Protocol"). Both protocols are discussed below.

The Colonia Protocol first defines the terms "investment," "investor," and "profits" in a very broad manner. Excluded from the term "investor" are nationals of a MERCOSUR member state who are permanently domiciled in a non-MERCOSUR country. The Protocol then provides that all member states will permit and treat investment, and all activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable. All member states shall at all times accord investment fair and equitable treatment, and no member state shall in any way impair, by arbitrary or discriminatory measures, the management, use, enjoyment or disposal of investments.

The Colonia Protocol also indicates that investments shall not be expropriated or nationalized, either directly or indirectly, except for a public purpose, in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; be paid without delay; and include interest from the date of expropriation. Investors who suffer losses in the territory of a member state due to war, armed conflict, national emergency, insurrection or mutiny shall receive compensation therefor on a basis no less favorable than that accorded to nationals of that member state or nationals of third countries.

Article 5 of the Protocol provides that each member state shall permit all transfers related to an investment to be made freely in and out of its territory in a freely usable currency at the prevailing rate of exchange on the date of transfer.

Article 6 of the Protocol provides that, when a member state or one of its agencies makes a payment to an investor pursuant to a guaranty or insurance to cover non-commercial risks that was entered into pursuant to an investment, the member state in whose territory the investment was made will recognize the validity of subrogation rights in favor of the
member state who made the payment with regard to any rights the investor may have to obtain from the other member state.

Article 7 provides that, in case any future legislation or treaty of or among one or more of the member states or obligations arising out of international law, grant investment more favorable treatment than that established in the Protocol, those future norms will prevail over the Protocol to the degree that they are more favorable.

Disputes among member states regarding the interpretation of the Protocol shall according to Article 8 of the Protocol, be resolved in accordance with the dispute resolution procedures of the Brasilia Protocol. According to Article 9, investment disputes between a national of one member state and the government of a second member state arising out of an investment agreement or authorization granted to that national or an alleged breach of any right conferred by the Protocol should first be resolved through consultation and negotiation. If the investment dispute cannot be resolved in this manner, the national may seek a resolution in the courts or administrative agencies of the member state involved in the dispute; in accordance with the permanent system for dispute resolution that may in the future be established under the treaty of Asuncion; to ICSID in accordance with the ICSID Convention if the country involved in the dispute is a party thereto; or to ad hoc arbitration. The Protocol then specifies a number of procedural matters regarding the submission of such investment disputes for resolution.

The Third Party Countries Protocol obligates all member states to grant investments realized by investors from third party countries a treatment no more favorable than that established therein. The Protocol then provides that the treatment to be agreed upon in any agreements between a member state and a third party country will cover a number of topics set forth in the text of the Protocol. Article 2 then reproduces verbatim the provisions of the Colonia Protocol regarding definitions, promotion and protection of investments, expropriations and compensation therefor, transfers, and subrogation (Articles 1-6 of the Colonia Protocol).

Disputes between a member state and a third party country relating to the interpretation and application of any agreement between them shall be, if possible, resolved by diplomatic means. If said dispute cannot be resolved in this fashion within a reasonable time, it shall be submitted to international arbitration. Investment disputes arising between an investor from a third party state and a third party state shall be resolved, as possible, through consultation and negotiation. If said dispute cannot be resolved in this fashion within a reasonable time, it may be submitted by the investor to either the courts of the member state in which the investment was made or to international arbitration (either ad hoc or institutional).

The norms contained in any agreements made between a member state and a third party state may be applied to investments made after their effective date, but may not be applied to any controversy, claim or dispute that originated prior to said effective date. Agreements made under the Protocol shall have a validity of at least ten years. In the case
of any investment made prior to the expiration date of an agreement, the member state may agree to apply these norms for up to fifteen years.

Article 3 of the Third Party Countries Protocol provides that member states shall exchange information regarding future negotiations that they may engage in regarding agreements for the reciprocal promotion and protection of investment with third party countries, and they will consult with each other regarding any substantial modification to the general treatment set forth in the Protocol.

These two protocols, which enshrine the concepts of freedom of investment and equality of treatment throughout the MERCOSUR region, represent a major step forward. By allowing firms, regardless of their nationality, the freedom to compete in the markets within the region, the MERCOSUR member states have maximized the potential for economic development and consumer satisfaction in the region.

**BANKRUPTCY POLICY**

MERCOSUR has not yet adopted any harmonization measures in the area of bankruptcy policy nor has it reached any agreements on either a general concept regarding the harmonization of insolvency law or on specific approaches thereto. At this point, Argentina has new insolvency legislation, and Brazil, Paraguay and Uruguay do not.

At the national level, the existence of a vibrant system of free competition depends upon legislation and systems which regulate efficiently and effectively the exit of insolvent firms from the market while protecting the interests of creditors, consumers and debtors.

Cross border insolvencies involving firms doing business in more than one country have become an increasingly common phenomenon in recent years. These insolvencies typically involve obligations, creditors, property and other parties located in more than one country. Frequently, foreign creditors may find that local bankruptcy policy may make it very hard or impossible for them to assert a claim in local insolvency proceedings. Local bankruptcy courts will often not recognize claims asserted or orders entered in proceedings held abroad. Furthermore, local creditors may find themselves barred from access to property of the debtor located abroad, and this lack of access may have a significant effect on their ability to recover. On the other hand, different substantive standards set forth in the regulatory system of each jurisdiction may significantly affect the rights of the parties involved in the insolvency. Certain issues that only arise in cross border insolvencies may not be covered by any national regulatory system. These systemic inconsistencies in the regulation of the exit of insolvent multinational firms from the global economy significantly affect competition among firms. Clearly, harmonization of substantive and procedural standards and institutions in the area of insolvency is essential for the protection of firms, creditors and consumers in the international marketplace.

In the MERCOSUR area, the Montevideo Treaty of 1940 sought to create some reciprocal recognition of insolvency proceedings. In a more detailed fashion, Article 4 of the Argentine Insolvency Law of 1995 seeks to deal with certain issues that arise in
cross-border insolvencies. For example, the institution of a foreign insolvency proceeding is now cause for the opening of similar proceedings in Argentina. Orders entered in foreign insolvency proceedings will not be recognized if they adversely affect the security interests or rights of Argentine creditors scheduled to be paid in Argentina. Furthermore, foreign creditors may file claims in an Argentine insolvency proceeding only if their country of origin would recognize similar claims by an Argentine creditor against a local debtor. These provisions do not address many of the substantive and procedural issues that arise in an international insolvency. Furthermore, the provisions of Article 4 of the Argentine law are troubling to the degree that they seek to protect the interests of Argentine creditors of a multinational enterprise to the detriment of other creditors located elsewhere.

In order for the planned MERCOSUR single market to become a reality, the national legislation of the member states should first be compatible with each other. This national legislation should harmonize substantive rights and procedural systems so that foreigners with an interest in a local insolvency proceeding are not discriminated against. The MERCOSUR member states should ensure that their enforcement institutions enter into cooperative agreements with each other in order to ensure the efficient and effective enforcement of insolvency law within the region. Furthermore, MERCOSUR should consider the creation of either legislation or procedural systems or claims facilities which deal with the unique problems of cross border insolvencies within the MERCOSUR region. Furthermore, MERCOSUR should also consider creating either legislation or procedural systems or claim facilities which deal with cross border insolvencies involving non-MERCOSUR states. Such a system would protect the interests of firms, creditors and consumers in situations involving cross-border insolvencies.

CONCLUSIONS AND RECOMMENDATIONS

As noted above, MERCOSUR has, in a remarkably short period of time, commenced an admirable set of efforts to legalize and strengthen competition law and regulation within its member states. The achievement of so much in such a short time period is remarkable and speaks very highly of the desire of the member states to work together in this area and of the efficiency and effectiveness of those who work in MERCOSUR. Much work still needs to be done, however, as noted below.

Competition Policy

The new Protocol on the Defense of Competition within Mercosur (December 1996) represents a substantial improvement over its predecessor in accepting the need for some authority (existing Mercosur institutions) to administer competition cases that have “effects” in more than one member country while still using national agencies for implementation of decisions (e.g., injunctions, fines, consent decrees, etc.). This, of course, assumes that the Technical Committee on Competition Policy will be sufficiently strengthened in terms of staff to play this role effectively and recognizes that it can only operate by consensus thereby barring any “supranational” authority. It will also be important to establish common norms at the national level across Mercosur to facilitate
harmonization of basic legislative principles. Finally, the new Protocol deals only obliquely with the question of mergers and acquisitions, a key concern since Argentina’s law does not provide for it while Paraguay and Uruguay have no competition laws whatsoever.

Consumer Protection

The Mercosur Common Market Group recently adopted (December 1996) five resolutions on consumer protection harmonization covering concepts, basic consumer rights, safety and health, advertising and guarantees which should provide an effective framework to begin to harmonize the disparate consumer protection laws of national members.

Anti-Dumping and Countervailing Duty Policy

(i) MERCOSUR should adopt harmonization measures in the area of anti-dumping and countervailing duties. Free competition of firms within the MERCOSUR area may be jeopardized by application of inconsistent norms by its member states. Furthermore, MERCOSUR should adopt a common external anti-dumping and countervailing duty system. Such a system should be compatible with the international norms set forth by the World Trade Organization.

(ii) MERCOSUR and its member states need to determine the appropriate coverage of any community law it adopts in the area of anti-dumping and countervailing duties and its appropriate relationship to national law.

Intellectual Property Policy

The 1995 protocol on harmonization of norms with respect to marks and indications of origin should be expanded to cover patents, trade secrets, copyright and other high-tech categories (e.g. mask works), particularly since all MERCOSUR countries are signatories to the WTO-TRIPs agreement as well as the Paris, Berne, and Geneva treaties. Consideration could also be given to creating a MERCOSUR regional patent office or availing of the research capacity provided under the PCT.

Foreign Investment Policy

The two MERCOSUR harmonization measures in the area of foreign investment law, the Colonia Protocol and the Third Party Countries Protocol, create an excellent system which will ensure free competition within the region.

Bankruptcy Policy

(i) MERCOSUR should adopt harmonization measures in the area of bankruptcy and insolvency law.
(ii) The MERCOSUR member states which do not have modern insolvency statutes (Brazil, Paraguay and Uruguay) should modernize their systems. These new standards and systems should be consistent with each other and provide for consistent standards and enforcement mechanisms and institutions.

(iii) The MERCOSUR member states should ensure that their enforcement institutions enter into cooperative agreements with each other in order to ensure the efficient and effective enforcement of insolvency law within the region.

(iv) MERCOSUR should create either legislation or procedural systems which deal with intra-MERCOSUR cross border insolvencies. Such a system would protect the interests of creditors and consumers in situations involving the insolvency of an enterprise engaged in operations in more than one MERCOSUR state.

(v) MERCOSUR should create either legislation or procedural systems which deal with cross border insolvencies involving non-MERCOSUR states. Such a system would protect the interests of creditors and consumers in situations involving the insolvency of an enterprise engaged in cross border operations.

(vi) MERCOSUR and its member states need to determine the appropriate relationship between any community insolvency law and the national insolvency law.
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