Competition Policy and the EU-Mercosur Trade Negotiations

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Abstract

This paper discusses the possible approaches for cooperation between the European Union and Mercosur in the area of competition Policy. It reviews the European law enforcement at three stages: the policies implemented by the Commission, the cooperation agreement with the United States, and the activities carried out by the Member States. It reports the recent developments in Mercosur, such as the Fortaleza Protocol and the institutional changes in Argentina and Brazil during the nineties. Finally, it highlights the potential topics on the cooperation agenda, and shows that a competition policy agreement between the two trade blocs could generate important results both at the regional and multilateral levels.

1. Introduction

With the exception of the United States, competition policy is a relatively new subject everywhere. Some countries such as Canada, Australia and New Zealand have had antitrust laws since the turn of last century, but their role as public policy instruments became relevant just in recent decades. In most industrialized countries, these laws were enacted for the first time after the Second World War. However, in the United Kingdom, for instance, the annual workload of the Monopolies Commission until 1965 seldom included more than two investigations, while merger review procedures were introduced in the European Union only in 1990. Around the world, 31 countries had competition laws in 1989, and in 1997 about a half of the 136 members of the World Trade Organization were yet to pass such laws in their territories (see WTO, 1997).

In contrast with the infant stage of antitrust institutions in most countries, technical progress engendered a pervasive trend toward global competition during the second half of the twentieth century. Among other consequences of this paradox, a defining feature of the current multilateral trading system is the lack of mechanisms for checking global mergers, international cartels and anticompetitive practices of transnational corporations. According to the U.S. International Competition Policy Advisory Committee (ICPAC, 2000),

"in 1999 global mergers and acquisitions were at an all-time high, with approximately $3.4 trillion in activity announced worldwide" (p. 3) and "approximately twenty-five percent of the more than 625 criminal antitrust cases filed by the Department of Justice since fiscal year 1990 were international in scope." (p. 167) In 1998, the European Commission examined twenty merger cases in which the relevant geographic market covered the world economy.

The concern with this limitation of the multilateral trading system has been a priority issue for both the European Commission and the US government. The Commission considers that negotiations on a multilateral framework of competition rules should be launched as soon as possible. As part of a comprehensive WTO round, these negotiations should pursue two main objectives: [a] the rapid diffusion of antitrust laws within developing countries, while ensuring that these laws are based on the principles of efficiency, transparency, non-discrimination etc.; and [b] the establishment of cooperation mechanisms among trading partners for controlling anticompetitive practices with international dimension.

The U.S. authorities strongly disagree with this view, by arguing that any WTO negotiation would be premature without the previous creation of solid antitrust institutions in a significant number of countries. As Joel Klein, head of the DOJ Antitrust Division, pointed out: *"This is a bad idea. It is entirely too early to move in this direction, especially in an organization that has no real experience with antitrust enforcement. This is an area where, if we try to run before we have learned to walk, we will stumble and badly injure what we are all trying to promote -- sound antitrust enforcement. Any effective meaningful, enduring WTO negotiation must be built on experience and commitment, not on hopes and vague concepts."* (1999, p. 4)

Despite their divergences at the multilateral level, the Commission and the US government have developed a successful and innovative bilateral cooperation during the nineties, as discussed in section 2 of this paper. In 1991 they signed an agreement that was to create several consequences. Besides paving the way for other bilateral initiatives, it proved to be an effective mechanism for dealing with international antitrust cases, and generated a new flow of data that kept the subject of competition policy alive on the international agenda. But bilateral agreements have two evident limitations: they do not curb anticompetitive actions originating in third countries and they ignore the interests of the rest of the world. As Falvey and Lloyd (1999) have argued, there are instances in which the maximization of global welfare is not compatible with the short run interests of the nation in which the anticompetitive conduct originates, and this conflict requires multilateral cooperation to be solved. Therefore, all

the existing bilateral and regional arrangements on competition policy are, in fact, interim solutions that will be eventually complemented by a multilateral framework.

Like in other existing trade agreements, the discussion about competition rules is an inevitable component of the current EU-Mercosur trade negotiations. This paper reviews the recent developments on the enforcement of these rules in both trade blocs and suggests some possible approaches for cooperation. Section 2 examines the European experience during the nineties at three interrelated levels: regional, bilateral and national. The regional level refers to the policies carried by the Commission to ensure harmonized conditions of competition inside the common market; the bilateral level includes the cooperation activities generated by the agreement with the United States; and the national level describes the measures applied by the member States. Section 3 discusses the peculiarities of the Mercosur case, wherein only two members have competition laws and the regional provisions are not yet operational. Section 4 highlights the possibilities for cooperation and section 5 presents some concluding remarks.

2. The European experience

In a recent publication (EC, 1999), the European Commission compiled its formal decisions adopted over the period Dec. 1994 – Dec. 1998 on matters related to Articles 81, 82 and 86 of the EU Treaty.[1] Despite its 700 pages, the document describes just a small portion of the European experience in the competition policy area during that period, as it does not include the cases solved through informal procedures, the activities carried out by the national antitrust authorities, the merger cases, state aids and international cooperation. However, it provides two types of insightful data for the discussion in the present paper. First, it shows how the Commission works. As Cini and McGowan (1998) have noted: *"Decisions are important not simply because they complete the Commission's decision-making process, but also because they allow the policy to develop by clarifying and extending the law if the decision is appealed. Decisions, then are not just legal documents, they are also statements of principle and intent, spelling out the Commission's thinking in particular cases, highlighting trends in Commission thought, and acting as regulatory tools in a broad rule-setting and norm-creating sense."* (p. 109) Second, it contains enough evidence to explain why competition policy became a mandatory issue in contemporary trade agreements.

Table 1 classifies the decisions by type of subject: joint ventures (8 cases), cartels (6 cases), vertical restraints (7 cases), abuse of dominance (6 cases) and state monopolies (9 cases). There are at

least five noteworthy aspects in that table. The first is the overwhelming presence of telecommunications, which was the object of 12 decisions, highlighting the importance this sector has had as a policy issue since the early nineties. As seven decisions on state monopolies indicate, one of the Commission's priorities was to establish, in a pragmatic, yet rigorous, manner the complete liberalization of the telecommunications infrastructure and services inside the European market. Thus, additional implementation periods were granted to Greece, Ireland, Portugal, Luxembourg and Spain [2]; but at the same time Italy and Spain [3] were not allowed to create entry barriers in the provision of mobile phone services. The same stance was kept in the analysis of five joint venture cases, which were all approved, but under detailed conditions that monitored the balance between efficiency gains and the market power generated by each undertaking.

The second interesting aspect is that the world economy is the relevant geographic market in the majority of the joint ventures cases. In some cases, the partners were European corporations such as Lufthansa, Scandinavian Airlines, Dresdner Bank, Banque Nationale de Paris, France Télécom, Deutsche Telekom and others making strategic alliances to improve their global competitiveness. In other cases, the parent firms were foreign, most often from USA or Japan, and the European market was just a part of a global operation. The Commission had the same approach to both situations, always focusing the analysis on whether the joint venture would have any harmful impact on the conditions of competition in the European market.

The third aspect is the Commission's severity when punishing anti-competitive practices that provoke real or potential damages to the integration process. Heavy fines have been imposed not only on cartels, as in the cases of British sugar and pre-insulated pipes, but also on the frequent attempts by large firms to restrict the distribution of goods and services across national borders. Even Europeans icons such as BASF, Bayer, Asea Brown Bovery and Volkswagen were not exempted from these disciplinary measures; and it should be noted that the cases listed in table 1 are not exceptional. Indeed, the imposition of harsh penalties has been a Commission's routine since the early eighties. In 1994, for instance, three large cartels were dismantled with the corresponding fines of ECU 104 million on the suppliers of steel-beams, ECU 132 million on carton board producers and ECU 248 million on the cement industry (see Cini and McGowan, 1998, pp. 75-78).

Table 1
Competition Policy in the European Union: 1994-1998
Commission Decisions, Articles 81, 82 and 86

1. Joint Ventures (8 cases)

Case	Sector	Geographic Market
94/823 Fujitsu AMD	Semiconductors	World Economy
96/180 Lufthansa - SAS	Airlines	World Economy
96/454 BNP – Dresdner Bank	Banking	World Economy
96/456 Atlas	Telecommunications	Europe
96/457 Phoenix – Global One	Telecommunications	World Economy
97/39 Iridium	Telecommunications	World Economy
97/780 Unisource	Telecommunications	Europe
97/781 Uniworld	Telecommunications	Europe

2. Cartels and other price fixing practices (6 cases)

Case	Sector	Fines
95/188 COAPI (Spain)	Professional association	
95/551 SCK – FNK (Netherlands)	Crane hire trade	ECU 11.8 million
96/438 FENEX (Netherlands)	Professional association	ECU 1,000
97/84 Ferry operators	Freight services	ECU 645,000
99/60 Pre-Insulated Pipe Cartel	Steel pipes	ECU 92 million
99/210 British Sugar	Food industry	ECU 50.2 million

3. Vertical restraints (7 cases)

Case	Sector	Fines
95/373 PMI – DSV	Horse races TV transmissions	
95/477 BASF - Accinauto	Motor vehicle refinishing paints	ECU 2.7 million
96/478 ADALAT (Bayer AG)	Pharmaceuticals	ECU 3 million
97/123 Systemform GmbH	Office equipments	ECU 100,000
98/273 WV Audi	Auto Industry	ECU 102 million
98/531 Van den Bergh Foods	Food industry	

99/6 SICASOV (France)	Agriculture	

4. Abuse of dominance (6 cases)

Case	Sector	Fines
95/364 Zaventem - Belgium	Airport	
97/624 Irish Sugar	Food industry	ECU 8.8 million
97/745 Port of Genoa	Port	
98/190 Frankfurt airport	Airport	
98/513 AFS/ADP Paris	Airport	
98/538 AAMS (Italy)	Cigarettes distribution channels	ECU 6.6 million

5. State monopolies and monopoly rights (9 cases)

Case	Sector	Issue
95/489 GSM - Italy	Telecommunications	Entry barrier
97/114 Telecom Eireann	Telecommunications	Deregulation deadlines
97/181 GSM - Spain	Telecommunications	Entry barrier
97/310 Portuguese government	Telecommunications	Deregulation deadlines
97/568 Luxembourg government	Telecommunications	Deregulation deadlines
97/603 Spanish government	Telecommunications	Deregulation deadlines
97/606 VTM/VT4 (Belgium)	TV broadcasting	Entry barrier
97/607 Greek government	Telecommunications	Deregulation deadlines
97/744 Italian ports legislation	Ports	Entry barrier

Source: European Commission (1999), **Reports of Commission Decisions Relating to Competition**, 1994-1998.

The fourth aspect is that the Commission's actions may affect not only sectors with great visibility such as airlines, banking, pharmaceuticals, food, motor vehicles and telecommunications, but also arcane businesses such as crane hire, forwarding firms, racing associations and industrial property agents. The only common link among these cases is the determination to avoid any kind of artificial

market segmentation among the member countries. This policy priority is enforced through all possible ways, from warning national governments about their improper regulations and imposing conditions on mergers and joint ventures, to establishing deadlines for the ending of certain restrictions and punishing illegal undertakings.

The fifth aspect is that cases like the price fixing practices by Dutch firms that hire out mobile cranes (Decision 95/551) and the cartel operated by the Dutch forwarding agents for almost a century (Decision 96/438) provide strong support to the thesis that trade liberalization is not sufficient to enforce competitive behavior in small economies. As I have argued elsewhere (Tavares, 1998a), the factors that allow anti-competitive strategies are not related to the size of the economy but to certain features such as asymmetric information, entry barriers and market power. In the Netherlands, after decades of multilateral trade liberalization and deep regional economic integration, the cultural sources of these market imperfections are yet to fade.

Thus, the cases reported in table 1 illustrate the main sources of the problems to be addressed by competition policy within the context of a trade agreement. Such problems originate most often from technical progress, which periodically reshapes the competition process and creates new possibilities for attaining market power; and from rigidities dictated by geography and the peculiarities of existing technologies, which normally turn into entry barriers and natural monopolies. But they also may be fostered by cultural traditions supporting corporatism and by bureaucratic rules enacted by governments or civil society institutions.

Two important instruments used by the Commission to address these issues are the state aid policy and the merger review procedures. As many authors have already noted (Jatar, 1999; Lloyd and Vautier, 1999; Cini and McGowan, 1998; Tavares, 1998b; Buigues, Jacquemin and Sapir, 1995), state aid policy is a unique component of the EU's integration machinery. On the one hand, it supervises the amount of subsidies granted by governments either to protect national firms or to attract foreign investment, thus limiting unfair competition inside the common market; on the other hand, it recognizes that subsidies are powerful instruments to remove regional inequalities, which is a major goal pursued by the Commission. This dual standard implies a permanent tension between state aid policy and the other competition policy instruments. In some occasions, the same firm can be punished by one mechanism and rewarded by another, as in the case of Volkswagen AG, which in 1998 was fined ECU 102 million for its discriminatory practices in Italy (Decision 98/273), but received about ECU 1 billion as grants from national governments to

support the construction of new assembly plants in Germany, Portugal and Spain during the nineties (see Tavares, 1998b, p. 13).

As table 2 indicates, since the introduction of the merger control legislation in 1990, the number of cases reviewed annually has mushroomed from seven to 235 during the decade. Nowadays, this is one of the Commission's leading activities in terms of media exposure, due to high-profile cases such as Boeing/McDonnell Douglas, WordCom/MCI, Price Waterhouse/Coopers & Lybrand, and the recent decision, on 14 March 2000, to prohibit the acquisition by Volvo of its competitor Scania. Despite sporadic criticism by the media, merger review is certainly the easiest part of competition policy enforcement, as it does not include the prosecutorial tasks required by conduct cases, nor the ambiguities generated by state aid policy. Like in other OECD countries such as Australia, Canada, New Zealand and the United States, over 95 of cases notified to the Commission are settled during the preliminary stage of proceedings (see Cini and McGowan, 1998; Tavares, 1998a). Such low level of litigation does not imply that the policy is inoperative. Indeed, merger regulations play a crucial role in the integration process, by providing a set of stable and transparent guidelines that reduces the uncertainty of investment decisions while protecting the public interest.

Table 2
Enforcement of Competition Laws in the European Union: 1990-1998

Year	**Anti-Competitive Practices** Cases closed during the year		**Merger Regulation** Cases Notified
	Formal Decisions	Informal Procedures	
1990	13	864	7
1991	21	814	60
1992	34	1090	60
1993	14	734	58
1994	33	525	95
1995	14	419	110
1996	21	365	131
1997	27	490	172
1998	42	539	235

Source: European Commission, Competition Policy Reports.

informally after a brief investigation. Frequently, the case ends with a note called “comfort letter” in which the Commission explains its view on the issues involved. Although simple and effective, this procedure has been criticized for its lack of transparency: *“In EU competition policy, perhaps more than in any other European policy area, a shadowy area somewhere between law and politics has emerged. Here, courts and due process remain important but often find it difficult to come to terms with the gap between the more solid ground of legislation and case law, and the vaguer more malleable and flexible world of actual competition practice.”* (Cini and McGowan, 1998, p.112)

Table 3
EU-US Cooperation Agreement: Cases Notified, 1991-1998

Year	**Anti-Competitive Practices**		**Mergers**	
	EU	**US**	**EU**	**US**
1991	5	12	3	9
1992	26	40	11	31
1993	44	40	20	20
1994	29	35	18	20
1995	42	35	31	18
1996	48	38	35	27
1997	42	36	30	20
1998	52	46	43	39

Source: European Commission (1998), 28th Report on Competition Policy.

To enhance its ability for dealing with international mergers and restrictive practices by transnational corporations, the European Union signed a cooperation agreement with the United States in 1991. This agreement became a legal instrument only in 1995 by a joint decision of the European Council and the Commission, but it was implemented on an informal basis in the interim period. As table 3 reports, from 1991 to 1998 it originated 945 notifications between the Commission and the US antitrust authorities, covering 375 mergers and 570 conduct cases.

This agreement made popular the concept of *positive comity*, which does not have a formal definition, but implies that each country will consider the other’s national interest when enforcing its own competition laws. The Commission’s report on the application of the agreement describes some practical meanings of positive comity: *“In all cases of mutual interest it has become the norm to establish contacts at the outset in order to exchange views and, when*

appropriate, to coordinate enforcement activities. The two sides, where appropriate, seek to coordinate their respective approaches on the definition of relevant markets, on possible remedies in order to ensure that they do not conflict, as well as on points of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Cooperation under this heading has involved the synchronization of investigations and searches. This is designed to make fact-finding action more effective and helps prevent companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted."[4] (EC, 1998, pp. 339)

Despite being a partial instrument for controlling a problem that requires multilateral institutions, a bilateral antitrust agreement is one of the few existing mechanisms able to impose some discipline on the international dimension of current competition patterns. So far, the only effective alternative is the extraterritorial application of domestic laws, which often engenders difficult political controversies. For this reason, both the European Union and the United States have been active in using the bilateral solution. The US has agreements with Australia, Brazil, Canada, Germany, Israel and Japan; and the EU is about to sign with Canada, Mexico and Japan.

Besides the activities carried out by the Commission, competition policy is also implemented at the national level among European countries, as table 4 describes. During the nineties, a series of institutional changes were made by them in order to approach domestic rules to Community standards in the areas of regulatory mechanisms and antitrust law. In 1997-8, for instance, France, Greece and Luxembourg were the only countries where the legislation remained intact. In the others, the changes varied from partial amendments and new administrative procedures to the complete redesigning of the competition law and the regulatory environment. The first group of countries includes Belgium, Finland, Ireland, Portugal, Spain and Sweden. The second group, which introduced entirely new laws, includes Denmark, Germany, Netherlands and United Kingdom. Finally, new telecommunications authorities were created in Austria and Italy. Due to these changes, some disparities registered in table 4 have already been corrected. For instance, with the new German law introduced in 1999 the number of merger notifications is expected to decline from now on. However, the Danish law adopted in 1997 still does not include merger control.

Table 4

Enforcement of Competition Laws in European Countries:

Cases Handled by the National Authorities in 1997-1998

Country	**Anti-Competitive Practices**	**Mergers**
Austria	n.a.	242
Belgium	5	52
Denmark	50	161 (*)
Finland	13	6
France	115	478 (**)
Germany	n.a.	1,888 (***)
Greece	79	44
Ireland	181	233
Italy	74	344
The Netherlands	139	154
Portugal	53	32
Spain	110	31
Sweden	172	165
United Kingdom	96	425

(*) The Danish Competition Act has no rules on merger control.
(**) Only 7 cases were reviewed by the French Competition Council.
(***) This figure includes mergers, joint ventures and other forms of alliance.

Source: OECD, Annual Reports on Competition Policy.

3. Recent developments in Mercosur

Argentina has had an antitrust law since 1919 and Brazil since 1962, but competition policy became a relevant issue in these countries only in the nineties, in the context of the trade reforms and privatization programs implemented in the region since the late eighties. In 1994, the Law no. 8884 redesigned the Brazilian policy instruments and strengthened the powers of CADE (Conselho Administrativo de Defesa Economica) as the main antitrust authority, paving the way for the regulatory reforms carried out in the subsequent years in the areas of energy, oil and telecommunications. The Argentine law was amended in 1946 and 1980, but the real reform was to be made only in September 1999 through the Law no. 25156, which created the Competition Tribunal with the necessary instruments to play the role of regulator of last resort in the economy. With an enlarged scope of application, this law introduced important new provisions, such as merger control and the autonomy of the antitrust authority.

mid nineties their governments have been engaged in the debate about competition rules in two integration projects, the Free Trade Area of the Americas (FTAA) and Mercosur. After a preliminary phase that lasted from March 1996 to June 1998, the FTAA Working Group was transformed into a negotiating group whose main assignment is to prepare the competition chapter of the hemispheric agreement to be signed in 2005. Two explicit mandates of this group are to *"advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti-competitive business practices;"* and *"develop mechanisms to promote cooperation and exchange of information between competition authorities."* (San Jose Ministerial Declaration, March 1998; see http://www.ftaa-alca.org)

Therefore, the Latin American and Caribbean countries with no competition laws are expected to make a decision in the near future on how to meet the above mandates, which means either passing a national law or adopting a sub-regional mechanism able to address these issues.[5] In the case of Paraguay and Uruguay their sub-regional option is the Fortaleza protocol signed in December 1996 with the objective of setting up a common competition regime among Mercosur countries. However, one of the basic assumptions underlying that protocol is that the regional disciplines are to be enforced by national authorities, as the common regime does not include supra-national mechanisms. Thus, any use of the protocol's instruments as substitutes for domestic enforcement must be temporary, but it can be highly innovative, as discussed below.

The protocol's goals are very similar to those pursued by the European Commission. First, it provides mechanisms to control firms' anticompetitive practices within the Mercosur. Second, it calls for convergent domestic laws in order to ensure similar conditions of competition and independence among firms regarding the formation of prices and other market variables. Third, it provides an agenda for overseeing public policies that distort competition conditions and affect trade among the member countries, though it does not include explicit rules about state aids, and this gap can be crucial, as we saw in section 2. But like in the European Union, the Mercosur competition policy is expected to be an instrument for abolishing obstacles to the enlargement of the regional market.

Regarding its first goal, the Protocol seeks to prevent -- just like Articles 81 and 82 of the EU Treaty -- any concerted practice between competing firms as well as individual firm's abuse of dominant position with the aim of limiting competition in the Mercosur market. Its provisions apply to acts performed by any person, natural or legal, private or public, so long as such acts have extraterritorial effects. The list includes price fixing, imposition of

restraints, reduction or destruction of input and output, market division, restriction of market access, bid rigging, exclusionary practices, tying arrangements, refusal to deal, resale price maintenance, predatory practices, price discrimination and exclusive dealing.

The Protocol is enforced by the Mercosur Trade Commission (TC) and the Committee for the Defense of Competition (CDC).6 The TC performs adjudicative functions, whereas the CDC is responsible for the investigation and evaluation of cases, which are handled in three stages. Proceedings are initiated before the competition authority of each country at an interested party's request. After a preliminary determination of whether the practice has Mercosur implications, the competition agency may submit the case to the CDC for a second determination. Both evaluations must follow a rule of reason analysis in which a definition of the relevant market and evidence of the conduct and the economic effects must be provided. Then, the CDC must decide whether the practice violates the Protocol and recommend that sanctions and other measures be imposed. The CDC ruling is submitted to the TC for final adjudication by means of a directive. As part of these procedures, the protocol establishes provisions for preventive measures and undertakings of cessation. This mechanism allows the defendant to cease the investigated practice under certain obligations agreed upon with the CDC. The monitoring of these measures and the enforcement of the sanctions are the responsibilities of the national competition authorities.

When the protocol was signed Brazil was the only country that had the proper instruments to enforce the regional disciplines. Now, after the reform of the Argentine system, the disparities pointed out in table 5 will probably be reduced, as the national authorities start to apply convergent policies. But, more importantly, new opportunities have been created for an effective -- though interim and partial -- implementation of the protocol's objectives. First, instead of the cumbersome decision making process therein established, whereby a resolution made by the CDC can easily be overruled by the TC and transformed into a trade dispute, Argentina and Brazil could sign a bilateral agreement based on the more lean procedures of positive comity. Besides strengthening the competition authorities, an agreement of this type would bring about new elements into the Mercosur current agenda, by moving its focus from import/export figures and related mercantilist topics toward more fundamental subjects such as productive efficiency, consumer welfare and market distortions. Second, both countries could unilaterally include the interests of Paraguay and Uruguay when handling cases through the bilateral agreement. This procedure would generate a continuous record of the damages suffered by those countries for not having domestic competition laws, thus providing an additional stimulus for

a more rapid completion of the Fortaleza protocol.

Table 5
Enforcement of Competition Laws in Argentina and Brazil: 1996-1998

Country/Cases	1996	1997	1998
Argentina			
Anti-Competitive Practices	7	24	32
Brazil			
Anti-Competitive Practices	97	446	193
Mergers	19	46	144

Source: OAS (1998b).

This innovative approach toward positive comity would create a dual pattern of cooperation inside Mercosur for an interim period. On the one hand, Argentina and Brazil could start immediately joint efforts for dealing with cross-border competition cases; and the practical knowledge engendered by this experience would point out the best solutions for an eventual reform of the Fortaleza protocol after the introduction of competition laws in Paraguay and Uruguay. On the other hand, these two countries would be receiving a "tailor made" technical assistance for the drafting of their domestic laws, through the direct access to the jurisprudence produced by the agreement between Argentina and Brazil. At both levels this implies a complex and time consuming learning process, as the experience with the EU-US agreement has revealed, but its long-term results are obviously worthwhile.

4. Possible approaches for cooperation

The discussion in the preceding sections has provided a backdrop for addressing the competition policy chapter of an eventual EU-Mercosur trade agreement. Two caveats can be drawn from the evidence presented therein. First, beyond the facts that the Mercosur experience is more recent than the European and some members of the former trade block do not have national laws, the main contrast between these experiences is that competition policy is still far from playing a central role in the Mercosur integration process, despite the formal convergence between the goals of the Fortaleza protocol and the work done by the European Commission. To a great extent, this distortion is due to the environment of unfinished economic reforms that has marked the history of Mercosur since the signing of the Asuncion Treaty in March 1991. During the last fifteen years, the transition from import substitution strategies to open trading regimes

took diverging paths in Argentina and Brazil, regarding both the substance and timing of the policy measures adopted by each government. Consequently, there is an important list of topics on the bilateral agenda waiting for definitive solutions in the areas of monetary policy, tax systems, industrial promotion and regulation of public utilities.

Therefore, besides covering competition cases with international dimensions, the cooperation efforts between the European Commission and Mercosur authorities will imply a technical assistance program more diversified than the one included in the recent EU-Mexico trade agreement.7 Although that program will not address macroeconomic policy issues, it could provide important contributions regarding the role of competition policy in regulated industries and the use of industrial policy instruments, thus creating better conditions for macroeconomic harmonization inside Mercosur.

The second caveat is that although competition policy has turned into a regular component of free trade agreements, it cannot be negotiated through the conventional procedure of exchanging concessions that is commonly used for removing trade barriers. Indeed, the harmonization of competition rules depends upon a mutual assistance process focused on the enforcement capabilities of national agencies, and a crucial part of this process is accomplished unilaterally when a competition policy authority is prepared to act as the regulator of last resort in the economy. As Janow (1998) pointed out, the domestic character is a defining feature of antitrust law. So, international cooperation at any level (bilateral, regional, plurilateral or multilateral) is only feasible as a complement to not a substitute for unilateral action.

Thus, considering the present situation of competition policy instruments in both trade blocs, an eventual cooperation program in this area should include three components to be developed in two stages. In the first stage, the control of international mergers and anticompetitive practices affecting both regions could be started through a joint assistance agreement among the European Union, Argentina and Brazil. This agreement could be an expanded version of the proposal made in section 3 for implementing the Fortaleza protocol, i.e., the interests of Paraguay and Uruguay would be unilaterally considered during the analysis of all cases affecting their domestic markets, in order to generate substantive evidence showing the need of antitrust institutions in these countries.

A second component to be carried out during the first stage could be an institutional strengthening program focused on two subjects and two industries in which the European experience has been particularly rich, namely, the interplay between competition policy

and regulatory reform in telecommunications, and the monitoring of state aids in the automobile industry. As we have seen in section 2, there are at least three aspects of the European telecommunication policies that are worth sharing with the Mercosur authorities: [a] the division of labor between the antitrust authorities and the regulatory agencies; [b] the establishment of implementation periods for eliminating restrictions inside the common market; and [c] the monitoring of entry barriers in the different segments of the telecom industry.

The case of the auto industry is interesting because it illustrates a situation in which both trade blocs faced a similar problem and opted for different solutions. This industry is an international oligopoly that has a long tradition of influencing trade negotiations and national policies. Due to the industry's size and production linkages, the investment decisions made by the assembly firms often generate macroeconomic consequences that affect not only employment and GDP growth rates, but also the balance of payments conditions and the national rhythm of technical progress. Since these economic figures can be easily transformed into political power, the auto industry has been able to extract privileges from governments worldwide for many decades.

The amount of subsidies granted by national governments to the auto industry is a time-honored issue on the European policy agenda. From 1977 to 1987, for instance, the producers of motor vehicles received about ECU 26 billion from public funds for supporting their activities inside the common market (cf. ***Official Journal***, C 279, Sept. 15, 1997). In the early eighties, the Commission tried to impose some discipline on these grants by installing a monitoring system based on ex-post notifications, but this initiative was short lived, due to the opposition orchestrated by France, Germany, Italy and United Kingdom, the leading manufacturing centers in the Community. Finally, an agreement was reached in 1989 with the approval of the *"Community framework on State aid to the motor vehicle industry"* (see ***OJ***, C 123, May 18, 1989) that defined the following rules: [a] all projects related to the assembly and manufacture of motor vehicles and engines with a cost exceeding ECU 12 million [8] are subject to prior notification to the Commission; [b] the objectives pursued by the aid in question may include rescue and restructuring, regional development, innovation, pre-competitive R&D, environment and energy saving, and vocational training; [c] the Member States are requested to provide the Commission with an annual report containing all forms of support granted to the auto industry; [d] the assistance received from the European Investment Bank should obey the framework's guidelines; [e] based on the preceding information, the Commission verify the compatibility of the subsidies received by the auto industry with the competition rules of

the Treaty.[9]

In the case of Mercosur, the adoption of common policies for the auto industry has been postponed several times, and the present deadline is 2005. During the nineties this industry was marginally affected by the trade reforms in Argentina and Brazil, but has secured great part of the privileges enjoyed during the period of import substitution policies, such as high tariffs, import quotas, tax incentives and the like. As a result, it has turned into a continual source of trade disputes both inside Mercosur and at the multilateral level. The interim protocol agreed for the period 2000-2005 includes an assorted set of tariffs on vehicles and parts, rules of origin and some export performance targets, but not a single discipline on subsidies. Indeed, the current stage of Mercosur policy instruments for this industry is similar to the European situation in the early eighties, and closing this gap would be an important step for the success of a trade agreement between the two blocs.

A second phase of the EU-Mercosur cooperation program would be started after the introduction of competition laws in Paraguay and Uruguay. At that moment, the initial agreement with Argentina and Brazil could be reformulated, not only to allow the full participation of Paraguay and Uruguay, but also other Latin American countries that already have competition policy institutions. Under these circumstances, new topics could be included on the trade negotiating agenda, such as, for instance, the relationship between competition policy and antidumping measures. As Hoekman and Mavroidis have argued, *"The obvious solution to the problem of antidumping, one that has been suggested at regular intervals by economists and trade lawyers for over 20 years, is to make antidumping enforcement more consistent with competition law enforcement. That is, the focus of attention should become the effect of dumping on competition in the importing country's market, rather than its impact on the competitors that happen to be located in that market."* (1994, p. 26) It should be noted, however, that the simple existence of competition policy institutions in all member countries is not a sufficient condition for abolishing antidumping measures within a free trade area; it just paves the way for the convergent approach suggested by Hoekman and Mavroidis. As the European integration process has illustrated, the complete removal of antidumping and countervailing duties becomes politically feasible only after the harmonization of all mechanisms that affect the domestic conditions of competition, including monetary and fiscal policies.

5. Conclusion

As we have seen in this paper, competition policy is a subject in

which there is no room for the tedious controversy on regionalism versus multilateralism. While playing a crucial role in the attainment of regional integration goals, cooperation efforts on antitrust enforcement provide building up contributions to the gradual establishment of a multilateral framework. The EU-Mercosur case has all the elements to become an innovative experiment in this area, as discussed in section 4.

But the enforcement of competition rules is not a panacea. Very often the interplay between technical progress and competition strategies engenders challenging situations for the antitrust authorities wherein the reasons for intervening are as solid as those for doing nothing. Moreover, given the complexity of certain cases, there is no guarantee that the authorities will apply the correct instruments in due time. Prime Minister Giuliano Amato, a former head of the Italian Antitrust Authority, has defined this problem as the joint dilemma of antitrust law and liberal democracy: "In a democratic society, [...], there are two bounds that should never be crossed: one beyond which the illegitimated power of individuals arises, the other beyond which legitimate public power becomes illegitimate. Where do these two bounds lie? This is the real nub of the dilemma. [...] It is a fact that within liberal society itself one of the key divisions of political identity (and hence identification) is between these two sides: the side that fears private power more, and in order to fight it is ready to give more room to the power of government; and the side that fears the expansion of government power more, and is therefore more prepared to tolerate private power." (1997, pp. 3-4)

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1. As of May 1, 1999, due to the Amsterdam Treaty, many provisions of the EU Treaty were renumbered. Thus, the formerly notorious Articles 85 (on restrictive practices), 86 (on market dominance) and 90 (on state monopolies) have turned into 81, 82 and 86, respectively.

<a name="2-tx" href="#2">2. Cf. Decisions 97/114, 97/310, 97/568, 97/603 and 97/607.

3. Cf. Decisions 95/489 and 97/181.

4. These cooperation efforts are still in a preliminary stage, as some legal and operational problems are yet to be solved: *"Until now, despite excellent cooperation with the US in merger cases, DGIV has experienced difficulties regarding cooperation in cartel cases, primarily because of confidentiality rules. DGIV receives no advance notice of settlements in 'guilty plea' cases, our leniency policies are not sufficiently coordinated and we have difficulties in planning joint investigations."* (EC, 1998, p. 341)

5. Presently, only 12 of the 34 potential members of the FTAA have competition laws: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Jamaica, Mexico, Panama, Peru, Venezuela and United States. Moreover, regional trade agreements usually have provisions on competition issues, including the Andean Community, CARICOM and Mercosur, though these provisions are not yet operational (See Tavares and Tineo, 1999). For a comparative description of the national laws, see OAS (1998a), which also includes an inventory of the current sub-regional provisions among FTAA countries. For a collection of official reports on the recent developments and enforcement of competition policy in the Western Hemisphere, see OAS (1998b).

6. Both bodies are composed of representatives from each member country. However, in the case of the CDC, countries' representatives must come from the respective competition agencies.

7. The EU-Mexico technical cooperation program signed in March 2000 includes staff training, seminars, joint studies on competition subjects, dissemination activities through the Internet and other channels, and data bases on jurisprudence (cf. EU-Mexico Free Trade

Agreement, Annex XV, art. 9).

8. In 1996 this figure was increased to ECU 17 million.

9. For a discussion on the implementation of this framework and its long-term results, see Tavares, 1998b).