COUNTRY REVIEW OF ARGENTINA

The Inter-American Development Bank and the Organisation for Economic Co-operation and Development co-operate in competition law and policy to promote increased economic growth, employment and economic efficiency and a higher average standard of living in the medium to long term. There is increasing consensus that sound competition law and policy are essential to achieving these goals.

"Peer review" is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of all OECD countries and their partners to submit their laws and policies to substantive questioning by other members. This process provides valuable insights to the reviewed country and promotes transparency and mutual understanding for the benefit of all.

The benefits of this process are particularly clear in the area of competition law and policy. As a result of the activities of the Competition Committee, OECD countries that once had real conflicts on competition issues have become partners in seeking to halt harmful international anticompetitive practices. The Committee has also become an important forum for assessing and demonstrating the usefulness of applying competition policy principles to economic and other regulatory systems.

IDB/OECD co-operation in competition law and policy centers on annual meetings of the Latin American Competition Forum. LACF meetings include substantive roundtable discussions and peer reviews of national laws and institutions. The peer reviews have examined Brazil, Chile, Peru and now Argentina. The IDB is pleased to participate and finance this work, as part of its efforts to promote a better business climate for investment in the counties of Latin America and the Caribbean.

We want to thank the Government of Argentina for volunteering to be peer reviewed at the fourth LACF meeting, held in San Salvador, El Salvador, on 11-12 July, 2006. It was encouraging to hear Argentina's Delegation confirm at the meeting that the report's recommendations were helpful and to hear from Delegates of other countries that this review has improved their understanding of Argentina's competition law and policy. Finally, we want to thank Mr. John Clark, the author of the report, and the many competition officials whose written and oral contributions to the Forum have been so important to its success.

1. Foundations and Context

1.1 Economic context

Argentina is South America's third largest country in terms of population – about 40 million, well behind Brazil and just behind Colombia. Its economy, in terms of GDP, is the second largest on the continent and 35th in the world. Situated at the southern end of South America, Argentina is also the continent's second largest country in area (eighth in the world). The country's borders encompass great diversity in latitudes; the climate in the north is subtropical, in the south, sub Antarctic. Argentina possesses rich natural resources and enjoys beneficial conditions for agriculture; much of its agricultural output is exported. It has a diversified industrial base and a high literacy rate, although a significant part of its population –34% in 2005 – remains below the poverty line. Argentina is a federal republic; there are 23 provinces and a federal district, which effectively is the city of Buenos Aires. Buenos Aires is by far the country's largest city and one of the largest in the world. About 45% of the country's total population live in the city and in surrounding Buenos Aires Province.

Argentina's political and economic history in the period following World War II has been especially turbulent. Juan Peron served as president from 1946 until 1955, when he was ousted by a military coup. There followed a succession of military and civilian governments (including a brief return by Peron), culminating in the notoriously repressive military regime beginning in 1976. In 1983 the country returned to a constitutional government. The 1980s, however, were marked by hyperinflation. In 1991 the government addressed the inflation problem by imposing "convertibility" – pegging the Argentine peso one-to-one to the U.S. dollar. Convertibility had its intended effect; inflation was tamed. This result, combined with other aggressive economic reforms, including an ambitious privatisation programme, brought about a period of economic growth and relative prosperity, lasting most of the decade.

By 2000, however, the economy was once again out of balance. Public and private debt had exploded; the economy fell into recession and unemployment grew. While convertibility had controlled inflation, it had its own costs, making exports and debt service increasingly expensive. In December 2001 Argentina defaulted on $88 billion in debt, the largest sovereign debt default in history. In January 2002 the government abandoned convertibility, and the value of the peso plunged to as low as 3.9 to the dollar. This period was marked by social unrest and a succession of national presidents. The economy soon began to recover, however. Led by strong exports, it grew robustly by 8-9% in each of the years 2003-05. Unemployment dropped from 21% in 2002 to 10% at the end of 2005. The peso strengthened to its current level of 3:1.[1]

Inflation also returned, however. Since 2001, cumulative inflation has been about 70%, much of it occurring in 2002. Inflation was about 12% in 2005, however, and in that year the government began taking extraordinary measures to control it. It began entering into agreements with private sector participants limiting their ability to raise prices. The agreements are formal. They are not legally enforceable, but the parties are under considerable political pressure to observe their terms. They are made in some cases with the leading participants in a given sector, in others with the relevant business associations. In general the participants agree that they will not increase prices for a period of time, usually a period of months, with the important exception that they can pass on increases in their costs. As of early 2006 there were agreements in several sectors, including: supermarkets (covering 200 products), milk products, books, vegetable oils, cement, soda, private education, meat producers, transportation fuel, shoes, sugar, pharmaceuticals, other food products, paper and petrochemicals. These agreements have implications for national competition policy, which are discussed further below.

1.2 The competition law

Argentina's first competition law was enacted in 1923. Its first two articles closely resembled sections 1 and 2 of the United States Sherman Act. That law was replaced by another in 1946. Its first article prohibited generally the creation or maintenance of a monopoly, and the second article enumerated several types of conduct that were considered to be within the scope of Article 1, including various concerted practices. The law was enforced by the Ministry of Trade. Both of the first two laws were penal in character, punishable by criminal sanctions. Perhaps because of this, the laws were seldom enforced. In the 48 years from 1933 to 1980 a total of four cases resulted in sanctions under these laws.

Argentina's modern era of competition law enforcement began in 1980 with the enactment of Law 22,262. Its two substantive articles were based on Articles 85 and 86 of the Treaty of Rome. The law did not provide separately for merger control; technically, mergers were subject to its conduct provisions, but in practice this was not done. For the first time the enforcement of the law was by administrative process; available sanctions included fines and administrative orders. The law created Argentina's first competition law enforcement agency, the National Commission for the Defence of Competition (CNDC). The CNDC's role was only advisory, however. After a full investigation of the conduct at issue the CNDC submitted recommendations to a government ministry (initially it was the Secretariat of State for Commerce and International Economic Negotiations), which then rendered the final decision. The ministry's decision could be appealed to the courts. Enforcement of the law was sporadic through the 1980s, but the pace had quickened by the mid-1990s, as the market-oriented reforms introduced earlier in the decade took hold.

Argentina's current competition law, Law no. 25,156 for the Defence of Competition, was enacted in 1999.[2] The two most important innovations in the new law were the introduction of formal merger control and the creation of a new, independent law enforcement body, the Tribunal for the Defence of Competition (Tribunal).[3] The law provided that the Tribunal, a fully independent body comprising seven members, would be appointed by the country's president after a competitive process conducted by a specially appointed jury.[4]

Unfortunately, the Tribunal has never been constituted. An unusual, hybridized process exists: the substantive provisions of the 1999 law, including merger control, are fully applicable, but they are enforced by the CNDC. The procedures and powers afforded the Tribunal by the law are exercised by the CNDC, with the important exception that the CNDC continues as an advisory body only, within a government ministry. Its decisions must be ratified by a secretariat within the Ministry of Economy and Production. Until 2003 that secretariat was called the Secretariat for Competition, Deregulation and Consumers Defense; currently its title is the Secretariat for Technical Coordination. This situation creates both substantive and administrative uncertainty, which is discussed more fully in Section 3 below.

2. Substantive Issues: Content and Application of the Competition Law

2.1 Conduct

Sections 1 and 2 of Article I of law 25,156 set out the standards governing anticompetitive conduct under the law. The two sections are not separately organised according to agreements and concerted actions on the one hand and abuse of dominance on the other. Section 1 contains a general prohibition of anticompetitive conduct, specifically:

Acts and behaviours related to the production or trade of goods and services that have as their object or effect to limit, to restrict or to distort competition or constituting abuse of a dominant position in a market, in a manner such that may result in harm to the general economic interest are prohibited … .

The operative standard in section 1 is actual or potential harm to the "general economic interest." The CNDC states that it applies this standard as mostly equivalent to consumer welfare. It cites two sources for this interpretation: Merger Guidelines adopted in 2001[5] (the merger control provision in the law, Article III Section 7, contains the same legal standard), and a 2002 decision by the Supreme Court of Argentina, the country's highest court, in an abuse of dominance case.[6] Other factors such as producer welfare,[7] "fairness" and economic growth are said not to be primary objectives of the competition law, although economic benefits such as these are the inevitable results of efficiency enhancements brought about by the application of the consumer welfare standard.[8]

Section 2 lists specific practices that are unlawful if their effect is that proscribed by Section 1. The list is not exhaustive, however. Conduct not listed in Section 2 can violate the law if it has the requisite anticompetitive object or effect. Section 2 practices include:

- horizontal agreements: fixing prices or output, allocating markets, rigging bids, exchanging information and restricting innovation;
- vertical practices: tying and exclusive dealing; resale price maintenance is not specifically prohibited, but it is considered to be a violation of Section 1;
- single firm conduct: obstructing entry or excluding persons from a market, discrimination, refusing without justification to accept orders or to do business "under the conditions prevailing in the relevant market," and predatory pricing.

2.1.1 Horizontal agreements

As noted above, the CNDC became more active in the mid and late 1990s, but this was not reflected in cartel cases. There were several cases that involved horizontal restraints in the health care sector. There existed dominant associations of health care providers in several regions in the country. These associations effectively controlled entry into their markets by means of exclusive arrangements. In a series of cases the CNDC recommended, and the Secretariat approved, the elimination or modification of the exclusivity and in some cases the imposition of fines.[9] There were other cases involving joint price setting by associations of health care providers. This series of cases caused the CNDC to conduct an in-depth study of the Argentine health care market and to issue a set of guidelines applying to competition in the industry. The guidelines provide a competitive analysis of various practices found to exist in the industry and they set out safe harbours – generally below 25% of a relevant market – within which certain collective activities by both providers and purchasers are presumptively permissible.[10]

In the five year period 2001-2005 there were a total of just 12 non-health care horizontal cases resolved (resolution includes a recommendation by the CNDC and a final decision by the Secretariat for Technical Coordination). Of these, four resulted in sanctions. One case in which a violation was not found, decided in 2001, involved simultaneous reductions by three international air carriers in the commissions that they paid to travel agents. While the respondents engaged in parallel conduct, there was no independent evidence of agreement, and the respondents' actions were not considered as inconsistent with independent action.

Two price fixing agreements were sanctioned in 2003. One involved an agreement by four distributors of liquid petroleum gas in the city of San Carlos de Bariloche during a brief period in 1998. The evidence in the case was mostly circumstantial. The four respondents were fined a total of USD 150 000. In the second, several producers of sand used in construction in the city of Parana formed a cooperative through which they jointly sold their production during the period 1999-2001. The evidence disclosed that the price of sand had dropped significantly prior to the formation of the cooperative, and the purpose of the arrangement was to restore the price to former levels. The Commission ordered that the joint price setting be terminated and fined the sand producers a total of USD 450 000. (Virtually all of the CNDC's recommendations have been accepted by the Secretariat in recent years. Henceforth in this report a reference to a decision by the Commission means that it was also approved by the Secretariat.)

In July 2005 two important cartel cases were handed down, one involving cement and the other, liquid oxygen used for medical purposes.

Box 1. Cartels

The Cement Case

Six cement companies were alleged to have engaged in a nationwide market allocation scheme for a period of almost 20 years. The investigation began in 1999, when a news article describing cartel activity in the sector was published in a periodical. The source of the information was allegedly a former employee of one of the cement companies. Because the source was not positively identified the information in the article could not be fully used, but the publication sparked an investigation, which ultimately generated sufficient evidence of the conduct.

Most of the evidence was circumstantial. The agreement was coordinated by the industry business association, the Association of Portland Cement Manufacturers – AFCP. Its members exchanged detailed, company-specific and current information on production, shipments and sales. Documents obtained from the association's files – the CNDC conducted a dawn raid on the AFCP but not on any of its members – indicated that the members considered the information to be highly important to them. There were references to the information as a "tool" that was useless if produced "out of time," when it would lose its "value." There were occasional meetings of representatives of the four companies – the dawn raid generated evidence that these meetings took place, but not of the content of the discussions.

On three occasions The AFCP conducted audits of the information submitted by the companies. These audits coincided in time with alleged agreements by the companies on market shares. There was evidence that on one occasion the cartel punished a producer who was not observing the agreement: the cartel members collectively "invaded" the territory in which the cheating company was operating – in distant Patagonia – causing it to lose market share. Later they withdrew from that market. There was also some evidence of local price fixing agreements in the industry.

Five of the six producers were fined a total of USD 106 million – a record fine under the current competition law.

Liquid Oxygen

The investigation, begun in 2001, was prompted by complaints from hospitals that they were unable to secure contracts for liquid oxygen from competing suppliers. Usually they received bids only from their incumbent supplier; otherwise, when competing bids were submitted the incumbent was usually the low bidder. The complaints caused the Secretariat for Competition, Deregulation and Consumers Defense (the predecessor to the Secretariat for Technical Coordination) to instruct the CNDC to begin an investigation.

The market for this product was highly concentrated, and entry was difficult. There were effectively only four suppliers. The CNDC conducted dawn raids on the four companies, which were highly effective, producing strong documentary and electronic evidence of customer allocation and price fixing for a five year period. The four respondents were fined a total of USD 24.3 million.

The competition law provides the competition agency with sufficient investigative tools for anti-cartel work. As noted in the case descriptions above, it can conduct dawn raids. The agency must first receive court approval to conduct a raid. Dawn raids were executed to great effect in the oxygen case. Approval was obtained from three different courts, necessitated by the different locations of the four companies. The raids were conducted simultaneously, using close coordination. Information technology experts accompanied the investigators, and were able to secure highly relevant electronic evidence. The agency can also compel officials to attend hearings and provide evidence, and these procedures were also used in the oxygen case. It should be noted, however, that both cases took a long time to complete – six years in the case of cement and more than three in the case of oxygen.[11] Moreover, both cases are now on appeal in the courts.

The competition law provides for the imposition of fines of up to AR$ 150 million (currently about USD 50 million) for conduct violations.[12] In the case of recidivism the fines can be doubled. The factors to be taken into account in calculating the fines include the losses incurred by the victims of the conduct and the gains from the conduct realised by the respondents. The fines imposed in the two recent cases were large by historical standards, but except for the leader of the cement cartel they did not approach the maximum. It should also be noted that inflation has eroded the significance of the 150 million peso maximum, to the point that an upward adjustment (which would require an amendment of the law) may be in order. Finally, the law permits the imposition of fines on natural persons for conduct violations, subject to the same maximum, but no such fines were imposed in the recent cases.

There is no per se rule in Argentina. It must be shown that all violations have the requisite harm to the "general economic interest." Agency officials do not view the lack of a per se rule as an impediment to their anti-cartel effort, however.

There is a suspicion, confirmed unofficially by participants in the private sector, that cartel activity is rife in Argentina. If this is so, it may be in part because the business community is not fully aware that such conduct is unlawful and that it could lead to the imposition of strong sanctions. In this sense, some of the cartel conduct, if indeed it exists, is "naïve."[13] There may also be doubts about the competition authority's commitment to an anti-cartel effort. The recent cement and oxygen cases are very important in this regard, if they send the right signals to businesspeople and to the public. But these decisions have been viewed with scepticism in some quarters; they have been interpreted by some as merely a part of the government's anti-inflation effort. The decisions do not translate, in the eyes of these observers, into a genuine effort on the part of the enforcement agency to prosecute and sanction cartel conduct as a serious infringement in its own right. Follow-up cartel prosecutions by the authorities are obviously necessary to correct this impression, to the extent it exists.

It has been difficult for the Commission to develop an effective anti-cartel programme. Dawn raids, the most effective tool, have been used in only a few cases. The perception is that they are difficult to carry out, and resource consuming as well. There is no leniency programme in place and there had not been, as of early 2006, any significant movement to create one. The high staff turnover rate, discussed more fully below, results in a lack of institutional memory, which is especially important in the anti-cartel effort. Cartel investigations require highly specialised and sophisticated techniques, which usually can be developed only through experience.

2.1.2 Vertical restraints

Vertical restraints are encompassed within Sections 1 and 2 of the competition law, as noted above. The CNDC lists only three vertical cases as having been resolved in the 2001-05 period, none of which resulted in sanctions. Many of the CNDC's dominance cases involved vertical practices, however, and those are discussed in the next section.

2.1.3 Abuse of Dominance

Article II, Sections 4 and 5, define "dominant position." The definition is consistent with those found in other competition laws. Section 4 provides the general definition of dominance: when an enterprise is the only supplier or buyer in a market, when it is "not exposed to substantial competition" or when "because of vertical or horizontal degree of integration" the enterprise is able to exclude a competitor or participant from the market. The reference to "horizontal" integration is interpreted to refer to a situation in which multiple enterprises have a single owner or group of owners. Section 5 sets out three relevant factors in determining dominance: the degree of substitution for the relevant product or service by other products or services from domestic or foreign sources; the extent to which there are regulatory barriers in the relevant market; and the extent to which an enterprise can unilaterally set prices or restrict output. There is no reference in the law to a presumption of dominance based upon a certain market share, which exists in some other countries.

As noted above, Section 1 of the competition law specifically prohibits "abuse of a dominant position," and Section 2 describes some vertical and exclusionary practices that could violate Section 1. There is no specific prohibition of exploitative practices by dominant firms, but it is clear that such conduct can be addressed under the competition law.

The bulk of the CNDC's conduct cases are classified as dominance cases. The agency lists a total of 95 dominance cases resolved in the 2001-05 period, with five resulting in sanctions. As discussed below, the competition law permits private parties to lodge complaints with the Commission, which the Commission is obliged to consider. Most of these complaints involve allegations of abuse of dominance, but most of these do not rise to the level of a violation of the law.

Some of the complaints involve allegations of predatory pricing. The CNDC properly applies restrictive standards to the predation analysis. One of the most important predation cases considered by the Commission was the *Impsat* case, decided in 2004.[14] The complainant, a provider of data transmission services, alleged that one of the incumbent land line services was pricing its competitive services below cost. The principal issue was the measurement of the relevant cost, and specifically the extent to which the costs of operating the incumbent's land line network should be attributed to the cost of the data transmission service.[15] The Commission took a conservative view of the relevant costs, excluding those network costs associated with the provision of basic telephone service. It concluded that the incumbent's prices were not predatory.

Other dominance cases have arisen in the cable television sector. There is competition in cable television services in several geographic markets in Argentina. There is also some degree of vertical integration between cable operators and television content providers, giving rise to allegations of discrimination by vertically integrated cable operators against their non-integrated rivals in the provision of television content.[16]

One of the CNDC's most prominent cases in the cable TV sector, initiated *ex officio* by the Commission and decided in 2001, involved resale price maintenance in the broadcasting of soccer football matches.[17] Two sports television networks, each having rights to televise national football matches, entered into contracts with cable television providers in the Federal Capital and greater Buenos Aires areas, which fixed the prices that the cable operators charged to their customers for receiving these matches. The cable operators apparently met jointly with the networks and agreed to these terms. The CNDC rejected the defences offered by the respondents, which included both the networks and the cable operators, finding that their conduct had the effect of eliminating competition in the televising of football matches. The Commission ordered the cessation of the conduct and imposed fines of USD 529 289 upon the networks (the maximum allowable under the pre-1999

competition law, which applied in this case) and lesser amounts on the cable operators. A court of appeals overturned the decision, however, and the case is now before the Supreme Court.[18]

The most important dominance case decided by the CNDC to date was the *YPF* case.

Box 2. Abuse of Dominance

Yacimientos Petroliferos Fiscales (YPF)[19]

The case, decided in 1999, was initiated *ex officio* by the CNDC after conducting an in-depth study of the market for liquid petroleum gas (LPG). The investigation was prompted by steady increases in the price of LPG, an essential source of energy for many residences, in the mid-1990s. The relevant market was determined to be the bulk supply of LPG nationwide. The supply of LPG was then effectively fixed, as it was a byproduct of the production of natural gas. YPF was the former state-owned petrochemical firm.[20] It was found to be dominant in all phases of LPG production and supply, including natural gas production, refining, storage and transportation. Entry was considered to be difficult, and imports were not then a constraint on domestic producers.

The conduct that was the subject of the case was YPF's practice of exporting what was considered to be a disproportionate amount of its production at prices that were lower than its domestic prices. Moreover, its export contracts prohibited the re-importing of the product. The CNDC concluded that this conduct was harmful to the general economic interest and therefore unlawful. The Commission ordered YPF to cease its price discrimination as between the domestic and export markets and also to eliminate the prohibition of re-imports in its export contracts. Under the law that applied to the case, YPF could be fined an amount equal to 120% of the gain that resulted from its unlawful conduct. The CNDC determined that the unlawful gain during the relevant period was USD 91 370 000, resulting in a fine of USD 109 644 000.

The CNDC's decision, which was accepted by the Secretariat for Industry, Commerce and Mining, was upheld by the Supreme Court of Argentina.[21]

The YPF decision is a clear instance of a case based on exploitative abuse of dominance. It has been criticized in some quarters for that reason, as many experts consider that exploitative abuse cases are ill advised, in that it is difficult to determine when a price is "exploitative," and equally difficult to fashion an appropriate remedy for the conduct.[22] The case is defended by others, however, as one that is based on a narrow set of facts – involving price discrimination – which, it is claimed, could be the subject of an effective remedial order. There does not appear to have been another case sanctioning exploitative abuse of dominance,[23] although the Argentine government has been involved in price setting in a more direct way in recent times, as discussed below.

2.1.4 Procedures in conduct cases

The procedures that apply in conduct cases are set forth in Article IV, Sections 26-45 of the competition law. A conduct investigation can begin either as a result of a complaint lodged with the Commission or *ex officio* by the Commission. The Commission may also open an investigation at the request of the Secretariat, which is another form of *ex officio* proceeding, as discussed in part 3.3 below. Most conduct investigations, however, are begun by complaint. All complaints must be considered by the Commission.

The law sets forth the information that must be included with the complaint. If the Commission determines that the complaint involves a relevant issue under the competition law it notifies the subject of the complaint that it has been filed, and the subject has 10 days to respond. (All time periods under the law are stated in terms of working days.) Upon receipt of the response the Commission may decide that the answers given are satisfactory or that the evidence in the complaint is clearly

insufficient to support a violation; in either event the complaint is archived. Many complaints proceed beyond this stage, however.

Each case is assigned to a single commissioner, who directs the investigation. At least one lawyer and one economist are assigned to each case. As discussed above, the CNDC has a broad range of investigative powers. Evidentiary hearings are fairly common. The hearings are usually conducted before the commissioner to whom the case is assigned. The respondent is notified of the hearing and may ask questions of the witness. The law, as modified by decree, provides that the investigation must be completed within 180 days from the date of the resolution that opens the proceeding. If the subject is accused of violating the law it has an additional 15 days to offer evidence in its behalf. The process of offering evidence must be completed within 90 days. The subject then has 6 days to present closing arguments, and the CNDC must then issue a decision within 60 days.

At the conclusion of the investigation the staff lawyer or economist prepares a report under the supervision of the investigative commissioner. The report is signed by the commissioner and initialled by the chief economist and chief lawyer, and submitted to the full Commission. Commission meetings are not public. A decision by the Commission requires a majority of three commissioners (there are five members of the Commission, including the president). After reaching a decision a recommendation is prepared and submitted to the Secretariat for Technical Coordination.

The Commission has the power in a conduct case to issue preliminary orders preventing potentially harmful conduct during the decision-making process. Section 35 of the competition law provides:

The Tribunal may at any stage in the proceedings request compliance with conditions set forth by said Tribunal or order that the detrimental behaviour be either discontinued or abstained from. Where serious detriment to the competition policy is likely to be caused, the Tribunal may adopt such measures as are deemed under the circumstances to [be] most convenient for the prevention thereof.

The CNDC has been active in issuing such orders. In the four year period 2001-04 it issued Section 35 orders in 26 cases. These orders can be appealed to the courts, and many are, but the order is not suspended during the appeal.

A private complainant who initiates a case has full rights of participation in the proceedings, including the right to appeal from a decision of the Commission. The law also provides for the participation of other interested private parties in the proceedings. The practice of the CNDC is to limit this third party participation to the ability to monitor the proceedings and to provide evidence.[24] To date this has occurred in only a few cases.

Commission statistics show a much higher number of conduct cases begun each year than are completed. Following are data for cases opened and solved in the period 2001-05

Table 1. Cases opened and resolved 2001-2005

	2001	2002	2003	2004	2005
Cases Opened	116	120	79	77	84
Cases Resolved	21	33	20	29	49
Cases Sanctioned or Compromised	3	5	3	2	7

Thus, although there are prescribed periods for completing cases, many stay open for a much longer time. There are several reasons for this. First and foremost is the lack of resources at the Commission's disposal for handling its caseload, which is discussed in Section 3 below. A second important reason is that mergers have priority in time over conduct cases; the Commission's heavy merger caseload has caused its conduct cases to languish. Also, for two periods in 2003 and 2004 there were only three commissioners, including the president, serving on the Commission. This inevitably contributed to the backlog. In 2005, however, the Commission was able to resolve more cases than in previous years, and it is continuing to make efforts to reduce its backlog.

Another factor contributing to the slow resolution of conduct cases, however, could be that the procedures for dealing with these cases may be inefficient. The Commission is required to consider all complaints submitted by private persons. It has some discretion to decide not to proceed with complaints that are clearly outside the scope of the competition law, or that do not provide the information required by law. In the period 2002-04 about 44% of all conduct cases that were resolved were summarily disposed of in this manner. In all other cases, however, a formal report and recommendation for the Secretariat for Technical Coordination are prepared by the Commission. This work obviously takes time and consumes resources. Since the great majority of cases do not result in sanctions or orders, the question presented is whether it should be necessary for the Commission and the Secretariat to resolve these cases in which no action is taken in such a formal manner.

The same issue exists regarding the Commission's merger cases, most of which do not present competitive concerns. There are valid reasons for such formality, the principal one being the benefits of transparency in a country where scepticism about honesty in government persists. Those issues are discussed further below in the section on mergers.

2.1.5 Unfair competition and consumer protection

Most conduct considered to be unfair competition is subject to a separate law, the Commercial Loyalty Law no. 22,802. The CNDC does not enforce Law 22,802. The Secretariat for Technical Coordination does have responsibility for the law, however, and the agency to which enforcement responsibilities are currently delegated is the National Bureau of Interior Trade. Law 22,802 governs, among other things, accuracy in product labelling, false and misleading advertising, denomination of country of origin, and promotions employing prizes or games of chance. In 2005 there were a total of 505 interventions for presumed violations of the law.

The same situation applies to consumer protection. It is governed by a separate law, the Consumer Defence Law no. 24,240. It too is the responsibility of the Secretariat for Technical Coordination, with initial enforcement activities conducted by the National Bureau of Interior Trade. The law contains detailed provisions applying to many types of conduct in the marketplace, such as insufficient provision of information, breach of contract, lack of delivery, defective guarantees, insufficient technical service, unsatisfactory repair, failure to provide cost estimates, requirements for the provision of information with the supply of credit, and more. Sanctions for violating the law include both remedial orders and fines. In 2005 there were a total of 355 cases sanctioned under the law.

Cases under both unfair competition and consumer protection laws may begin with private complaints to provincial consumer offices. Those with merit are forwarded with recommendations to the Secretariat for Technical Coordination. On occasion the Secretariat may perceive a possible violation of the competition law and refer the matter to the CNDC. Most often such cases involve allegations of predatory pricing. The CNDC resolved 14 such cases in 2001-05, none resulting in the imposition of sanctions.

2.2 Mergers

Formal merger control was introduced with the enactment of Law 25,156 in 1999.[25] Article III, Sections 6-16 of the law deal with merger control. The substantive standard is found in Section 7:

> Economic concentrations the object or effect of which is to reduce, restrict or distort competition, in a manner which may be prejudicial to the general economic interest are hereby prohibited.

2.2.1 Notification

Section 8 of the law imposes notification requirements.[26] Transactions must be notified to the CNDC when the total turnover in Argentina of the participating firms exceeds AR$ 200 000 000 [USD 67 000 000].[27] Currently there are no notification fees. Section 10 of the law lists some exemptions to the notification requirement imposed by Section 8. They are:

- the acquisition of firms in which the purchaser already holds over 50% of the shares;
- the acquisition of bonds, debentures, shares with no voting rights or certificates of indebtedness;
- the acquisition of a domestic firm by a foreign firm that does not own any shares or assets of another domestic firm;
- acquisitions of liquidated companies;
- acquisitions of operations or assets in Argentina whose value do not exceed AR$ 20 000 000 [USD 6 700 000], unless there have been more than one such acquisition in the preceding 12 months and their total value exceeds that amount, or the value of the total of such acquisitions in the preceding 36 months exceeds AR$ 60 000 000 [USD 20 000 000]. The transactions subject to the 12 month and 36 month accumulations must have occurred in the same market.

The last exemption, which effectively creates a "size of the transaction" threshold of AR$ 20 million, was added by decree in 2001.[28] This was an important addition. Without it, every acquisition, however small, by a large company triggered the AR$ 200 million size of the parties test. The result was a large number of notifications, well over 100 per year in 1999 and 2000. This crippled the CNDC's ability to prosecute conduct cases, because it had to deal with so many mergers. The effect of the 2001 amendment was dramatic. The number of notifications dropped from 97 in 2001 to 27 in 2002. (The decline was not due solely to the amendment, however. Argentina's economic crisis occurred at the same time, which affected merger activity in the country, and there was a simultaneous downturn in merger activity worldwide.) The number of notifications has risen in every year since, however, totalling 65 in 2005. It seems that again the Commission's enforcement of the conduct provisions of the law is being constrained by its merger review obligations. It may be that the AR$ 20 million threshold, established in 2001, is now too low, having been eroded by inflation.

The CNDC has created a process by which merging parties can seek advance consultations as to whether they must notify. The private sector considers this process to be a useful one, and that it is effectively administered by the Commission. One complaint heard from the private sector is that applications for a consultation can no longer be made on a hypothetical basis; the actual transaction must be disclosed. Some parties do not wish to do so, for both business and strategic reasons. There have been approximately 220 consultation procedures since 1999.

Section 8 requires that the notification must be made within one week from the earliest of: "the conclusion of the [merger] agreement, the publication of the acquisition or exchange offer or the acquisition of a controlling share." The "trigger date" that marks the beginning of the one week period has been further defined by decree to mean: the date of the conclusion of a definitive merger agreement, as defined by a separate law; in the case of the transfer of a going concern, the date of the perfection of the transfer as defined by a separate law; in the case of the acquisition of stock or property, the closing date as provided in the sales agreement; or in other cases on the date of perfection of the transaction as defined by law.[29] Failure to notify as required is punishable by a fine of up to AR$ 1 000 000 [USD 333 000] per day for each day in which the party is in delay.

It is apparent from the language of Section 8 that depending on which of the trigger dates applies, the parties to a merger may have consummated before they notify. In any case, there is no explicit requirement in the law that the parties refrain from consummating after they notify. On the other hand, Section 8 provides that "the acts [interpreted as meaning the implementation of the transaction] shall be effective upon the parties or in respect of third parties after the provisions of section 13 and 14 hereof have been fulfilled, as appropriate." Sections 13 and 14 set out procedures for approval of the merger by the competition authority. Thus, technically a merger, even if consummated, has no legal effect until approved.

The business community has interpreted these somewhat inconsistent provisions in the law as creating a "close at your risk" regime. Some transactions are consummated in advance of approval. (As discussed below, approval usually takes a minimum of three to four months.) These are usually the "easy" ones – those about which there is little doubt that approval is forthcoming. Parties to a transaction that is competitively problematic may be advised not to consummate before approval, or if there are business reasons why formal consummation cannot be postponed (for example, because the merger is part of an international transaction subject to a tender offer abroad), they may close but delay implementation of the combination until after approval.

As discussed above in part 2.1.4, Section 35 of the competition law authorises the Commission to issue preliminary orders in the course of a case or investigation "… where serious detriment to competition … is likely to be caused …." Heretofore this remedy has been applied only in conduct cases. It could have obvious uses in merger cases as well; the Commission could enhance its ability to achieve an effective remedy by issuing an order in a problematic case forbidding consummation pending its review, or if consummation has taken place, forbidding integration of the parties' businesses ("hold separate"). The Commission discussed this possibility in 2002, in the airports merger described below, but it concluded that it did not have the legal authority to apply this measure in merger cases.

In any event, there have been few transactions that have been completely disapproved by the authorities. Most cases in which there are competitive problems are resolved by divestitures. It is not clear that this phenomenon is a result of there not being a formal premerger notification regime. CNDC officials do not feel that the current procedures place them at a disadvantage in obtaining an effective remedy in the relatively few transactions that are found to be anticompetitive.[30]

One case in which a consummated merger was prohibited involved the acquisition of an airline company controlling as much as 40% of airline services nationwide by the operator (under concession agreements) of many of the domestic and international airports in Argentina.[31] The authorities disapproved the transaction on the basis of a vertical analysis: the airports operator had monopoly power at the airport level, which it could use in a variety of ways to disadvantage or exclude airlines competing with the acquired company. The transaction had already been consummated, however. The issue facing the competition authority was whether the merger should be unwound, because pursuant

to Section 8 it had no effect, or whether the airports operator would be required to divest the airline. The Secretariat required divestiture of shares, permitting the airport operator to hold only a minority interest in the airline, and a commitment that the airport operator would take no part in the management of the airline. Later the airport operator sold all of its interest in the airline.[32]

Finally, the competition authority can control mergers that are not subject to the notification requirements, but they must be processed as conduct violations. The agency can either impose conditions on such an anticompetitive merger or prohibit it absolutely.

2.2.2 Merger review procedures

Sections 13 and 14 of the competition law establish the procedures for merger review. These provisions have been augmented by a regulation issued in 2001.[33] Section 13 of the law requires the "Tribunal" (which does not exist) to decide in 45 working days (nine calendar weeks) whether to approve or deny the transaction, or to approve it subject to conditions. Section 14 provides that if there is no such decision within the prescribed period the merger is considered "implicitly approved." These provisions have been interpreted as applying the 45 day period to the decision by the Secretariat for Technical Coordination, upon recommendation by the CNDC.

The implementing regulation further develops the review procedures, creating three stages in the process. The initial notification must be provided on a form denoted as Form 1. That form requires information about: the parties to the transaction the merger agreement; the products and services offered by the parties, and products that are substitutes for them; conditions of entry into the provision of these products or services; the geographic markets in Argentina served by the parties; whether any of the parties are the subjects of an investigation of possible anticompetitive conduct in Argentina or elsewhere; and whether the proposed merger is the subject of an investigation in another country. The regulation further provides that the approving authority, which is interpreted as the CNDC, must, within 15 days of notification, recommend approval, denial or approval with conditions, or in the alternative, issue Form F2.

Form F2 requires the submission of much more detailed information about the merger and the markets in which the parties compete. If the CNCD issues Form 2 it must, within 35 days of notification, either reach a decision on the merger as above or issue Form 3, which requires even more detailed information. While Forms 1 and 2 are standard forms, Form 3 is drafted by the Commission uniquely in each case. If Form 3 is issued, the Commission and the Secretariat have 45 days (all of the periods are expressed in terms of working days) from the date of notification to reach a final decision. In 2005 there were final decisions in 46 mergers. Of these, Forms F2 were issued in nine; no Forms F3 were issued. 2005 was something of an aberration, however; in most years two or three forms F3 are issued.

The issuance of Forms 2 and 3 have the effect of suspending the running of the relevant periods until the information is supplied. Further, if the Commission decides that the information supplied with any of the forms is incomplete it can notify the parties of the deficiencies and the periods are suspended until the missing information is supplied. Finally, the regulation provides that the Commission can, in "exceptional circumstances," issue a request for information not requested in any of the forms. The request has the effect of further suspending the relevant periods. This authority to issue exceptional requests for information is almost never exercised, however.

It should be noted that the 15 and 35 day periods created by the regulation are internal to the organisation; there is no implicit approval of a transaction if these deadlines are not observed, but the agency strives to do so. It is not uncommon, however, that the CNDC notifies the parties that their

Form F1 is not complete, which has the effect of suspending the 15 day period until the missing information is supplied. There may be even more than one such notification in a case. Further, the practice is always to issue a formal decision on a merger through the Secretariat. No merger to date has been approved implicitly. Thus, in every case the CNDC prepares a written analysis of the transaction and a recommendation for the Secretariat. This process has the effect of lengthening the review period and it consumes important resources in the Commission. It is estimated that the average "easy" case in which there are no serious competitive issues takes 3-4 months to complete. More serious cases may take 6 months, and the most serious a year or more.

An obvious means for shortening the review period for easy cases and concurrently conserving resources is to create a procedure for summary approval, eliminating the need for detailed analysis and a formal report in every case. The same issue exists in conduct cases, as discussed above. There is scepticism about such a summary procedure, however, both within and without the CNDC. Argentina has an unfortunate history of corruption in government, and for this reason many consider it necessary that all decisions under the competition law be fully transparent. Argentine law requires that administrative decisions be reasoned and well grounded. This may require a formal, written decision in every case. Finally, as discussed further below, there is a risk of third party intervention in merger cases, and this risk could be heightened if there were no formal decision in a case.

2.2.3 Merger cases

The following table shows the merger activity within the CNDC in the period 2001-05.

Table 2. Merger Cases

	Matters Opened	Approved	Approved with Conditions	Rejected	Total Final Decisions
2001	97	98	3	1	102
2002	27	24	1	1	26
2003	44	33	4	1	38
2004	49	41	4	-	45
2005	65	44	2	-	46

The data show that on average 5 to 10% of all notified mergers are the subject of some remedial action, a level of activity that is consistent with that in many other countries.

In 2001 the CNDC published a set of merger guidelines.[34] The guidelines employ accepted concepts in merger review, and are consistent with those issued by other countries. Relevant product and geographic markets are to be determined by considering demand substitutability. Market participants are identified by their ability to begin easily and quickly to supply the relevant product. The market shares of participants are calculated in a traditional manner, and market concentration is expressed by using the Herfindahl-Hirschmann index. Entry is an important consideration in the analysis, and traditional methodologies are used to evaluate conditions of entry. Imports are given their proper place in the analysis. A methodology for analysing claims of efficiency gains, which again is consistent with international practice, is set forth. There are short sections dealing with vertical and conglomerate mergers. In the former, increases in entry barriers are identified as the principal anticompetitive effect, and in the latter it is noted that most conglomerate mergers do not adversely affect competition, save for the possible elimination of potential competition.

The Commission has considered several significant mergers under the 1999 law. One was the airports case described above. Some of the others that were found to be anticompetitive are described below.

Box 3. Mergers

Telefonica/Bellsouth[35]

In 2005 Telefonica S.A., a multinational telecommunications company based in Spain and operating throughout Latin America, acquired the Latin American operations of Bellsouth. In Argentina, Telefonica was a significant provider of fixed line and mobile telephony services, both local and long distance, and also provided data transmission and Internet access services. Bellsouth provided some fixed line service in Argentina and was a significant competitor in mobile telephony and related services.

All mergers, including those in regulated sectors, are subject to the competition law. In most cases the sector regulators also have authority over mergers in their sector, however, and they too can prohibit mergers for appropriate reasons. In this case, there was close co-operation between the CNDC and the National Communications Commission, the telecoms regulator. The two agencies agreed on the analysis of the transaction and on the remedies to be applied.

The Commission determined that the merger would have little effect in fixed line services because of Bellsouth's relatively small position in that sector, and concerns in the data transmission and long distance markets were alleviated by the prospect of new entry. One concern that was identified, however, was the provision of fixed lines to public telephone service licensees. The remedy applied to this concern was a requirement that the merged entity provide this service on a nondiscriminatory basis.

The transaction did result in an increase in concentration in the mobile telephony market, but it was determined that the effect on competition would not be significant because: there remained significant competition from other strong players; the two merging parties were not close competitors in markets characterised by differentiation; and Argentine law limited mobile telephony operators to ownership of 50 Mhz radio spectrum. The merged entity would exceed that limit, and the merger was conditioned upon the sale of radio spectrum by the merged entity. The Commission also noted that the merger presented certain concerns related to Argentina's system of "calling party pays" in mobile telephony. In calls from a fixed line telephone to a mobile telephone the mobile operator enjoyed certain monopoly power. A regulation that would control abuse of that power had been suspended, and the Commission required the parties to abstain from certain exclusionary practices until such time as the regulation became effective.

Grupo Bimbo/Fargo[36]

This merger, approved with conditions in 2004, was the core of an international transaction in which Grupo Bimbo, one of the largest international baking operations in the world, acquired Fargo, another bakery products manufacturer. Fargo had been in receivership. The CNDC analysed the effects of the merger in Argentina in two markets: industrial black and white bread and the baker's shop market. In the former, the resulting company would have a market share of 79% after the merger and in the latter, 62%. The CNDC found that there were significant entry barriers into these markets, which included the well established brands of the two firms, which would be costly to duplicate, and the large excess production capacity that would be held by the resulting firm. The Commission concluded that the merger would have significant anticompetitive effects, and while the parties contended that the transaction would produce efficiencies, the Commission decided, pursuant to the consumer welfare standard that applies to in the efficiency analysis under the law, that the savings would not be passed on to consumers.

A part of the acquisition had already been consummated abroad, however, and the Commission declined to require the transaction to be unwound. It did require the divestiture of one baking plant operated by the parties together with a brand name and a distribution system. Further, the Commission required that the parties could not complete that part of the transaction that had not been consummated nor could they integrate their operations in Argentina until the divestiture was accomplished.

Ambev/Quilmes

This brewing industry merger, approved with conditions in 2003, was one of the most controversial mergers in recent history in Argentina. The transaction involved the acquisition by Ambev, headquartered in Brazil and one of the largest brewers in the world, of Quilmes, the largest brewer in Argentina (Quilmes also had operations in Bolivia, Paraguay and Uruguay).[37] Quilmes had a market share in Argentina of about 65% and Ambev's was about 15%, resulting in a combined market share of about 80%. This increase in concentration was of obvious concern, and the CNDC also concluded that entry barriers in the relevant markets were high. Entry barriers included the significant brand loyalty in the industry, the need for an effective distribution system, which was difficult to create, and significant excess capacity held by the parties.

The parties claimed that the merger would produce significant efficiencies, some of which the CNDC found credible. The Commission found the merger to be anticompetitive, but did not disapprove it completely, permitting it to go forward with conditions. It required the divestiture of two brewing facilities and four brand names, and also required certain distribution commitments. The market share represented by the brands to be divested was approximately equal to the increase in concentration that would result from the proposed merger. The Commission also required that the divestiture be made to a new entrant, not to an existing competitor. The parties were given a period of one year to complete the divestiture.

There are some who feel that it would have been better to disapprove the merger entirely. In any case, because of an intervention by a third party, the divestiture had not occurred as of early 2006. Another Argentine brewer sought to acquire the assets to be divested but it was not permitted to, because of the requirement that they be sold to a new entrant. That party went to court to challenge the CNDC decision. Initially the court of first instance issued an order suspending the divestiture process until its decision was final. It then denied the third party's petition, but the petitioner appealed. A court of appeals sustained the decision of the court of first instance, but again the third party appealed to the Supreme Court. The injunction against completing the divestiture remained in effect. In April 2006 the Supreme Court rejected the appeal, deciding the case in favour of the CNDC, and the one year divestiture period again began running.[38]

Postal Services[39]

This decision, handed down in 2001, involved the proposed merger of the two largest companies providing postal services in Argentina, one of which was a former state owned enterprise. The parties competed nationwide in several postal services, including basic letter delivery, telegraphic services, monetary transfers, business services, small package delivery, high security delivery and international courier services. There were smaller competitors in some of these services, but the merging firms had the largest and most comprehensive networks. They were the first and second choices for most consumers for these services. The Commission concluded that the increases in concentration in these several markets were unacceptably high and that it was difficult to enter these markets, in part because of significant economies of scope. The Commission attempted to estimate the costs to consumers that could result from the merger, and concluded that they could range from AR$ 18 to 55 million per year. The Commission rejected the efficiency claims made by the parties, saying that the estimates were not quantified and were too imprecise.

Postal services in Argentina were partially regulated, but the only services for which prices were set were letters, telegrams and small monetary transfers. Section 16 of the competition law provides that when a merger occurs in a regulated industry the sectoral regulator must provide a report to the competition authority on the competitive effects of the transaction. In this case the National Communications Commission provided such a report noting the anticompetitive effects of the proposed transaction.

The proposed merger was disapproved.

There is a procedural issue that has adversely affected at least two of the Commission's merger cases and that has the potential to disrupt the process in the future.[40] It has to do with the ability of third parties to challenge the Commission's decision in court. The intervention by a third party in the Ambev/Quilmes beer case described above prevented for a period of years the accomplishment of the divestiture that the Commission ordered. A similar result has occurred in a merger of two supermarket chains. In that case a third party competitor intervened in a federal court located in Mendoza province, seeking to halt the CNDC's review of the transaction, citing two grounds: first, that the CNDC lacked a quorum when the

investigation was begun, and second, that the CNDC could not legally act on a merger under the 1999 law because the law purported to create another competition agency, the Competition Tribunal, which, nevertheless, has never been constituted. The lower court agreed with the intervenor on the quorum issue, but held that the CNDC was empowered to act on cases until the Tribunal was created. In May 2006 a court of appeals upheld the lower court on the quorum issue, directing the Commission to begin the case again (there has been a quorum at the Commission since July 2004). It also agreed with the lower court that the CNDC could act under the 1999 law, but said that it should have all of the powers given to the Tribunal by that law, notably the power to render decisions independently of the Secretariat. The case is now on appeal in the Supreme Court.[41]

3. Institutional Issues

3.1 The enforcement toolkit

The competition law gives the competition authority the powers that it needs to enforce the law. Section 24 provides the agency with standard investigative powers, including powers to conduct market surveys; to hold hearings and take testimony; to examine books and documents; and to conduct dawn raids upon authorisation by a court. It also authorises the agency to engage in competition advocacy; to draft its internal rules; to prosecute actions in court; to participate with other relevant offices in the government in the negotiation of international agreements relating to competition policy; and to enter into consent agreements in cases.

Article VII, sections 46-51 create sanctions for violations of the law. They include powers to issue orders terminating unlawful practices and, if necessary, requiring actions to eliminate the effects thereof; to impose fines on both artificial and natural persons for conduct violations (described in part 2.1.1 above); in the case of abuse of dominance to request a court to dissolve or restructure the dominant firm; to fine persons up to AR$ 1 million [USD 333 000] per day for failure to observe one of its orders or to provide timely merger notification; and to fine persons up to AR$ 500 [USD 167] per day for obstruction of an investigation.

3.2 Financial and personal resources

The following table shows the budget, in pesos and U.S. dollars, and the person years expended in the CNDC for the period 2001-05.

Table 3. Resources

	Budget AR$	Budget USD	Person years
2001	2 617 000	2 617 000	48
2002	2 497 202	713 572	41
2003	2 295 724	704 677	42
2004	2 161 697	745 412	48
2005	2 141 023	738 525	53

The sharp decline in the U.S. dollar amount in 2002 was the result of the elimination of convertibility and the fall in the value of the peso. The dollar increases in the years thereafter reflect a strengthening of the peso. The peso data are more relevant, however, as most of the budget is used to purchase services provided locally. The peso data are revealing. Between 2001 and 2005 there was an

absolute decline of 18%. A possible offsetting factor, which cannot be quantified, is that from time to time some expenses of the Commission are absorbed from the Secretariat's budget. But further, there was cumulative inflation since 2001 of about 70%, even while the budget was declining in absolute terms. In real terms the decline can only be described as punishing.

It is clear that the Commission suffers from a lack of financial resources, the impact of which falls upon its personnel. As of early 2006 the five members of the Commission included three economists and two lawyers. On the professional staff there were 22 economists and 11 lawyers. There were eight administrative personnel and three part time non-professional assistants, giving a total of 49 employees. There is a further division of the staff, however, between those who serve on a contract status and those who are permanent employees. From year to year there is about an equal number of each. The contracts are usually for short terms, as short as three months, although they can be and usually are renewed. The salaries of the contract personnel are generally higher than those of the employees, but otherwise the contractors have no benefits. In any case, salaries are effectively frozen. The result is a high staff turnover, especially among contract personnel. It is not uncommon for employees to leave the Commission even for other jobs in government, where salaries are higher. In the past few years many highly qualified people have left the Commission for better paying jobs elsewhere, and it has proved difficult to replace them.

The situation for commissioners is much the same. Commissioner salaries have been frozen since 1992. The result is that fewer qualified people are interested in accepting an appointment to the Commission.

The low salaries and high turnover have obvious negative effects on the work of the Commission. At any given time most of the staff is inexperienced. The result is a lack of institutional memory, which affects efficiency, if not the substance of the Commission's work. Despite this, the CNDC generally receives high marks from those in the private sector who deal with it. The staff is recognised as a hardworking group of professionals, who act professionally. Their output is considered good. For example, the amount of time that a typical merger review takes is not considered overly long by Argentine standards. More often than not, the Commission's decision on a merger is not the last to occur in the course of necessary government approvals of such transactions. In terms of substance, the quality of the Commission's decisions, especially in mergers, is also respected. It cannot be doubted, however, that the Commission is severely constrained by its budget.

3.3 Independence: the CNDC and the Tribunal

As noted above, there are five members of the CNDC, a president and four commissioners. The four commissioners are appointed by the national president for terms of four years. Two must be lawyers and two economists. Commissioners must be at least 30 years old and have had at least four years of relevant profession experience. They are relatively secure in their positions, and can be removed only for misconduct, the commission of a crime or similar acts. The president of the Commission is not appointed for a specified term. He or she serves at the pleasure of the national president. Typically the election of a new national president or the appointment of a new Minister of Economy results in the appointment of a new Commission president. A majority of three of the five commissioners must agree on a decision. The Commission's decision, however, has no legal effect of its own, and must be approved by the Secretariat for Technical Coordination.

For several years after the enactment of the 1980 competition law that created the CNDC the Commission operated as a part of a government ministry and exercised little independence. That changed in the mid-1990s with the appointment of a series of more activist, qualified Commission presidents. In the last half of the 1990s the Commission was active, generally well staffed and

rendered several important decisions. The political and financial crises beginning in 2001 brought further change, however. Rapid turnover in national presidents and in economy ministers in 2001-02 resulted in a series of short term Commission presidents. Stability returned in the second half of 2002 with the appointment of a Commission president who served until January 2006.

The current organisational structure virtually guarantees that the CNDC will be subject to some political influence. The perception exists, however, that there is more influence of that kind exerted on the Commission currently than there was in the late 1990s. Of course, throughout the period all of the Commission's decisions had to be approved and implemented by the Secretariat in the Ministry of Production, or in later years, the Ministry of Economy and Production. In practice, the Secretariat almost never overrules the Commission, but in important merger cases there may be informal discussions between the two bodies in advance of the Commission's decision, through which a consensus is reached.

Perhaps equally important, the Ministry and the Secretariat can have an active role in decisions to begin an investigation. This practice has become more common in recent years, as the government's battle against inflation has intensified. If the ministry observes what it considers to be unwarranted price increases in a sector the Secretariat may order the Commission to undertake an investigation and report its findings. This practice has been going on for some time, but recently it has become more formal. In 2004-05 the Commission was ordered to undertake investigations of markets in liquid petroleum gas (LPG), steel rebar used in construction, granulated urea, worker's compensation insurance, plastic and plastic containers and most recently, the wholesale beef market. These investigations consume some of the Commission's scarce resources. It is also true that sometimes they generate cases. The YPF case described above resulted from such an industry-wide inquiry.

Finally, the CNDC is dependant upon the ministry for its budget, and it has relatively little discretion as to how to spend the budget that it has. Most decisions of this type must be approved by the ministry.

The 1999 law provided for the creation of the National Tribunal for the Defence of Competition.[42] The Tribunal would be within the Ministry of Economy but it would have independent decision making and enforcement powers. The Tribunal would be "self financing," and have a separate budget. The law permits the Tribunal to "fix the fees to be paid by interested parties for the proceedings brought before the said Tribunal."[43] The Tribunal is to have seven members, who will be appointed for a term of six years. At least two members must be lawyers and two economists, each having more than five years of experience in their field. Commissioners will be selected by a competitive jury process; the jury will be composed of top officials from government ministries, from both national legislative chambers, the president of the National Court of Appeals for Commercial Matters and the presidents of the National Academies of Law and Economic Sciences.

In 2001 two important decrees affecting the new law were promulgated. One, noted above, created a new size of the transaction threshold for merger notifications.[44] A second was more comprehensive, creating, among other things, new procedures for conduct and merger investigations.[45] One of its most important provisions gave the Secretariat a role in the Tribunal's conduct cases. The Secretariat would no longer be the approving authority, but the decree afforded it the status of a party in the Tribunal's cases: it could take the necessary steps to begin a case; it had evidence gathering powers; and it could appeal to the courts from a decision of the Tribunal.

But as discussed above, the Tribunal has never been constituted. The political and economic crises at the turn of the century closely followed the enactment of the 1999 law. There was a succession of governments during this period, and creating an independent competition tribunal was

overshadowed by the more pressing priorities of managing the massive public debt default and the end of convertibility, righting the economy and again dealing with inflation. The status quo continued into 2005, when there was an effort to revive the Tribunal process. A proposed amendment to the competition law which would have led to the creation of the Tribunal was introduced in the Parliament, but it also would have permitted the executive to override a merger decision of the Tribunal in matters affecting the national interest. In late 2005 the amendment was almost enacted, but there was a failure to reach agreement in the Parliament on the issue of whether there could be appeal to the courts of such an executive decision. Soon thereafter the Minister of Economy resigned, and the initiative lost impetus. There seems to be a general feeling that the creation of a fully independent Tribunal, as provided in the current law, is unlikely for political reasons.

3.4 A competition culture and price agreements

Like in many countries in which competition law enforcement is relatively new, a competition culture has been slow to develop in Argentina, but there are signs that it is occurring. There is a small but growing competition/antitrust legal community. Most large law firms have an antitrust practice, which was spurred by the creation of merger control in the 1999 law. Influential members of this private sector group include former officials of the CNDC. One of them began an on-line discussion group called ForoCompetencia, whose members come from throughout Latin America and beyond.[46] The site is a place for lively discussion of competition policy issues affecting the region. Locally in Buenos Aires, a group of interested competition policy experts from both private and public sectors meets informally from time to time to discuss current developments in the field. These experts publish articles and commentary on competition policy in local journals.

The CNDC contributes to the competition culture by maintaining a web site containing information about the agency and its decisions.[47] The site includes information about the agency, relevant laws and regulations, annual reports and selected decisions of the agency. All decisions of the Commission are available for public inspection at the CNDC's offices. In September 2005 the CNDC sponsored a conference on competition policy in Buenos Aires, featuring speakers from Argentina and abroad.[48] The academic community recognises the discipline of competition policy. Courses on the topic are taught in law and business schools, but it has not yet become a subject that students choose to specialise in.

For the most part, however, the public at large does not participate in this modest competition culture. More likely than not, its perception of the competition law and of the competition authorities is as weapons against inflation. Moreover, as described in part 1.1 above, the government recently introduced a new tool in its battle against inflation: agreements with private sector participants limiting their ability to raise prices. The CNDC has no role in the agreements, but the Secretariat for Technical Coordination is assigned the task of monitoring relevant costs. The terms of the agreements permit the parties to pass on their increases in costs.

These agreements of course apply only to price increases and not to price decreases, and so they do not completely supplant market forces. Whatever their value against inflation, however, they are not consistent with a market economy or with competition law enforcement. They could contribute to informal agreements not to lower prices, and inevitably they would complicate the efforts of the competition authority to enforce the anti-cartel provisions of the law.

Finally, in a few sectors not characterised by natural monopoly there is formal price regulation. One is in liquid petroleum gas. While natural gas is plentiful in Argentina, many residents do not have access to the distribution network. For them an important source of energy is LPG, which is refined from petroleum and natural gas. Because this fuel is so important, its price is regulated pursuant to law

26 020, enacted in 2005, which granted regulatory oversight for LPG to the National Secretary of Energy. The Secretary has the power to delegate to the natural gas regulator, Enargas, the technical tasks associated with this regulation. A second is civil air transportation, discussed further below in part 4.5. Rates for passenger air travel must be set within (fairly wide) bands, established by a government ministry.

3.5 Appeals of competition cases

Section 52 of the competition law provides that decisions of the CNDC imposing fines, issuing remedial orders, denying a merger and dismissing a complaint, as well as interlocutory orders, can be appealed to courts in the federal system. Other appeals authorised by the Argentine Criminal Procedural Code are also possible. The standard for the second type of appeal is that a decision of the CNDC must have resulted in an irreparable situation, in Spanish, "gravamen irreparable." The lodging of an appeal has the effect of suspending the payment of any fines that the Commission has assessed, but it does not suspend other sanctions or orders imposed by the Commission. There is an expedited process for appeals from an interlocutory order.

Under the constitution all federal appeals courts have jurisdiction to hear competition cases. Sometimes appeals are heard by courts located in the provinces, outside Buenos Aires (the controversial supermarkets merger case, described above, originated in a federal court in Mendoza province). It turns out, however, that most competition cases are appealed to the Federal Civil and Commercial Court of Appeals in Buenos Aires. This is a quasi-specialised court, whose jurisdiction is indicated by its title. To date this court has heard approximately 100 competition appeals of both types described above. Less complex cases are usually resolved within two or three months; more complex cases take longer, however.[49] The judges on the Civil and Commercial Court do not consider themselves specialists in competition cases, as their portfolio is much broader. Most of the cases that they hear come from courts of first instance; competition cases, on the other hand, originate in the CNDC. The judges on the court profess respect for the CNDC, and they are interested in broadening their exposure to competition law and policy.

Decisions of the courts of appeals can be appealed to the national Supreme Court. The jurisdictional requirements for Supreme Court appeals are strict. Only a handful of competition cases have been appealed to this highest tribunal. Two of those were the YPF dominance case and the Ambev/Quilmes merger case described above. The CNDC's record in court generally has been good. Relatively few cases have been overturned on the merits. More frequently, however, courts, especially regional courts, have reduced the fines that the Commission has imposed.

Argentina does not employ a common law legal system. Judicial decisions do not have the same binding precedential effect that they do in common law countries, but a decision by a higher court, especially the Supreme Court, may have some practical effect on other cases. Recently the courts have considered two potentially important issues in merger cases: the ability of third parties to intervene in CNDC cases (Ambev/Quilmes), and the ability of the CNDC to decide cases under the 1999 law without the Tribunal having been constituted (supermarkets). It is the CNDC's position that a decision in one case does not apply to others. It applies this view to the supermarkets case, and it continues to decide cases in its usual fashion.

3.6 Exemptions and exclusions, and acts of provincial governments

There are no explicit exemptions or exclusions from the competition law for business conduct of any type. Section 3 of the law provides:

All natural or artificial, public or private, profit or non-profit persons, performing economic activities in whole or part of the national territory and those performing economic activities outside the country, to the extent their acts, activities or agreements affect the national market, are subject to the provisions of this law.

Section 59 of the law is even more explicit about jurisdictional exclusivity:

Any jurisdictional powers concerning the subject matter and purpose of this law conferred on other governmental agencies are hereby revoked.

There are no exemptions or special rules that apply to small and medium sized businesses.

Of course, some sectors, especially those in which natural monopolies exist, are subject to regulation in various forms, and there are inevitably accommodations between the competition law and regulation in these instances, but these sectors are also subject to the competition law. The competition/regulatory interface is discussed below. But further, it is apparent that other private actions sanctioned or required by government can also escape the coverage of the competition law. The most obvious example of this is the recent round of price agreements, which absent government participation would clearly violate the competition law.

As noted above, Argentina is a federal republic. Its 23 provincial governments have a high degree of autonomy in some aspects of government.[50] Article 121 of the national constitution, adopted in 1994, provides that "provinces conserve all the power not delegated by this Constitution to the Federal Government." There are no provincial competition laws, however. Article 42 of the constitution provides that there shall be federal legislation guaranteeing the right to free markets, leaving no room for provincial competition laws to coexist with it. Provincial and local governments are also subject to the competition law to the extent that they engage in commercial activities.[51] Apparently these governments do not usually participate in commercial activity, however, and there have been no cases under the current law against provincial entities.

The provinces still have regulatory authority in some sectors, however. They exert regulatory authority over local transportation, water and other natural resources, among others. They also had regulatory authority over the professions, and the result was little competition in these fields; horizontal arrangements among professionals were either imposed or condoned by provincial governments. Beginning in the early 1990s, however, the national government began entering into agreements with provincial governments, called "Federal Agreements," in which the provinces agreed to relinquish regulation of the professions. Those professions affected included architects, engineers, surveyors, notaries, veterinarians, sociologists, lawyers, accountants, biochemists, geologists, stock brokers, stock markets and auctioneers (health care workers apparently were never part of this regulatory scheme). Where these agreements apply, the professions are subject to the competition law. Not all of the provinces entered into these agreements, however. By the end of the 1990s 15 of the 23 had done so.

3.7 International aspects of enforcement

Section 3 of the competition law, quoted above, applies the traditional "effects test" to conduct that occurs abroad: conduct that affects Argentine markets is subject to the law. In most other respects, foreign entities are not treated differently under the competition law from domestic ones. Competition analysis under the law fully takes into account the impact of imports. Argentine law does recognise that certain economic activities are of special importance to the country's national interests. A statute provides:

[T]he policies of the National State will preserve especially:

a) anthropological, historical, artistic and cultural patrimony;

b) companies dedicated to science, technology and research that are fundamental for domestic development;

c) activities and industries of special importance for national defence;

d) the electromagnetic spectrum and the media.

The same law limits foreign ownership of media companies to 30% of voting shares, with the exception that the percentage can be reciprocally higher as to entities from countries that permit greater degrees of foreign ownership in media companies.[52]

In 2003 Argentina and Brazil concluded a co-operation agreement, which provides for the usual means of co-operation in competition law enforcement matters, including notifications, information sharing subject to confidentiality requirements, positive and negative comity and consultations. This is the only bilateral co-operation agreement to which Argentina currently is a party. There has been little formal co-operation between the Argentine and Brazilian agencies under the agreement, but the two sometimes co-operate informally on specific matters, by means of email or telephone communications.

Argentina is a member of Mercosur, a common market comprising Argentina, Brazil, Paraguay and Uruguay. In 1996 the members signed an ambitious agreement on competition policy, popularly known as the Fortaleza Protocol. It would create a supranational body, the Committee for the Defense of Competition, which would have enforcement powers in matters referred to it by the national competition agencies of the member countries. In 2002 and 2003 the parties agreed to a complementary regulation to the Protocol and to a co-operation agreement, respectively. The Protocol is not in effect, however. It has been ratified only by Brazil and Paraguay, and there does not seem to be much impetus for ratifying it in Argentina and Uruguay.

The CNDC is active, to the extent that its resources permit, in several international forums on competition policy, including the OECD, the OECD/IDB Latin American Competition Forum, ICN, UNCTAD, ALCA and the Iberoamerican Competition Forum. A description of these activities can be found on the CNDC's web site.

4. Competition Policy in Regulated Sectors[53]

Until the early 1990s most of the assets in Argentina's infrastructure industries were state owned. In 1989, however, an ambitious privatisation programme was set in motion. The assets in the several sectors were reorganised into viable business units and then sold. By 1994 most of the privatisation was accomplished. Some of the buyers, especially in electricity and telecommunications, were large foreign entities. Sector regulators were created. The regulatory schemes for electricity and natural gas were established by law, while the others were created by decree. Some of those are described further below.

In the years immediately following privatisation there was little interaction between the sector regulators and the CNDC, and the CNDC seldom intervened in those sectors under the competition law that existed then. That changed with the enactment of the 1999 law. As noted above, that law explicitly made all sectors subject to it. Section 16 is a special provision that applies to mergers in regulated sectors. In the event that such a merger is proposed, the CNDC

… shall require from said government agency a report and considered opinion on the economic concentration proposal concerning its impact on competition in the respective market or on its compliance with the relevant regulatory framework.

The Commission then proceeds to review the merger under the competition law. In most regulated sectors the regulator also has authority to deny a proposed merger on grounds other than competition. While co-operation between the CNCD and sectoral regulators seems to be working well in the case of mergers,[54] there has been less interaction among the agencies in conduct cases. The regulated sector in which the Commission has been most active in conduct cases in recent years is telecommunications, and much of this activity has been in cable television, as noted above.

As with almost every aspect of the Argentine economy, the 2001-02 financial crisis had a significant effect on the infrastructure sectors. The privatisation contracts and concession agreements with private investors in these sectors had been negotiated in dollar terms during the convertibility period. In January 2002 convertibility was ended by Public Emergency and Exchange Regime Reform Law no. 25,561 and the value of the peso fell to as low as 3.9 to the dollar. The same law provided that all "public service" contracts would henceforth be expressed in pesos ("pesification") at the rate of 1 to 1 to the dollar. The law also authorised the national Executive to renegotiate public service contracts, taking into account such factors as the competitiveness of the economy, quality of service, the interests of users and of the providers and the security of the systems.

The result was to freeze the tariffs under these contracts at pre-2002 levels. They remain there for residential and individual customers; some increases in tariffs for business and industrial users have been granted. In 2003 a decree established a new agency that would assume the contract renegotiation responsibility, the Unit for the Renegotiation and Analysis of Utility Contracts (UNIREN). Some agreements have been renegotiated, but many remain unresolved. Many of the international investors initiated cases in international dispute resolution forums, notably the International Center for the Settlement of Investment Disputes (ICSID). Some of these cases have been resolved as a result of the contract renegotiations, but others remain open. In some cases international investors, for example Électricité de France and Endessa (Spain) in the electricity sector, have been replaced by Argentine companies. One result of these extraordinary measures limiting increases in tariffs has been to discourage investment in these sectors, in which investment is now badly needed.

Below are brief descriptions of the structure and regulatory regimes in selected infrastructure sectors.

4.1 Electricity

Electricity generation in Argentina is almost equally divided between hydroelectric and thermal (natural gas), with a small nuclear component. Argentina followed Chile as one of the first countries to privatise this sector. The 1992 Electricity Act privatised the three principal state-owned electric utilities, which had been vertically integrated, into three distinct sectors, generation, transmission and distribution. Generation is competitive, with about 70 generators currently operating. Transmission and distribution are regulated private monopolies (in a few provinces the distributors are still state-owned). The Act created an independent sector regulator, the Ente Nacional Regulador de la Electricad (ENRE) and a wholesale market, administered by an independent operator. Vertical integration in the industry is strictly limited. The three transmission companies may not purchase or sell power. Generators and distributors may not own majority interests in transmission companies. There are also limits on horizontal integration in generation and distribution.

4.2 Natural gas[55]

Argentina has significant natural gas reserves. Like electricity, this sector was privatised in 1992 by statute. The former state-owned transportation and distribution monopoly was split into two high-pressure transmission companies, one operating in the north of the country and one in the south, and eight distribution companies. A ninth distributor has since been added. The price of gas at the wellhead was deregulated and a new regulator, Ente Nacional Regulador del Gas (Enargas) was created and given authority over transmission and distribution tariffs. As in electricity, these rates were regulated by means of price caps until the government intervention in 2002, described above.

The former state-owned oil and gas production company, YPF, was privatised and its exclusive rights to exploration and production were eliminated. YPF was also required to sell about a third of its oil and gas reserves. It currently controls about 50% of natural gas production. There are many smaller producers.

4.3 Telecommunications

In 1990 the state-owned telecommunications monopoly, Entel, was reorganised into two companies, Argentine Telecom, providing local land line service in the northern half of the country and Telefonica de Argentina serving the south, and privatised. A third company, Telintar, a joint venture of Telecom and Telefonica, was created to provide long distance service. A sector regulator, the Comisión Nacional de Comunicaciones (CNC) was also created by decree. It was originally intended that this duopoly would operate exclusively for five years, which was later extended to eight, and in 1998 a two-year transition period was introduced.

In 2000 all telecom sectors were liberalised. Local loop tariffs continue to be regulated, though prices will be freed when there is “effective competition” in a service area, which is defined as when the incumbent has a revenues of less than 80% of the total. In 1994 a single operator was designated to provide mobile telephony services, but in 1996 that market was liberalised. As of 2004 there were four firms competing in mobile telephony, and several were providing long distance and data transmission services. More recently there has been some consolidation in mobile telephony and data transmission (see the description of the Telefonica/Bell South merger above).

4.4 Banking

The banking sector suffered terribly in the 2001-02 crisis. A run on deposits in late 2001 caused the government to impose a series of measures restricting withdrawals and foreign transfers, collectively called the “corralito,” which effectively shut down the system. After the end of convertibility the government established a provisional “official” rate for the peso at 1.4 to the dollar. Bank loans, however, were assigned a lower rate: 1 to 1. This had the effect of rendering many banks technically insolvent, since their assets (loans) were valued at a lower rate than their liabilities (deposits). Many foreign banks, which until the crisis had been among the largest banks in the country, exited the market.

Like the rest of the economy, the banking sector made a rather quick recovery after 2002. Today there are about 70 banks operating in the country. The two largest account for about 35% of total deposits and the eight largest about 74%. The sector is only partially privatised. There are 11 government-owned banks, most of them owned by provincial or municipal governments. The two largest banks, the Banco de la Nacion Argentina and the Banco de la Provincia de Buenos Aires are, respectively, federal and provincially-owned banks. Foreign banks have returned to Argentina. There are currently about 16 operating in the country, but they are not among the largest.

The CNDC has had few cases or investigations in the banking sector; it has reviewed some mergers in other parts of the financial sector. No cases in recent years in the financial sector have resulted in the imposition of sanctions. There is little interaction between the Commission and Central Bank (a situation not unique to Argentina), which exercises close supervision over the industry on "providential" issues.

4.5 Airlines and airports

The former state owned airline, Aerolineas Argentinas, was privatised in 1989 and in 1992 civil aviation was deregulated, though in practice competition was not introduced until 1994 with the authorisation for two new airlines to begin business. Aerolineas Argentinas continued as the dominant domestic airline into the 2001-02 crisis, when it nearly went bankrupt. It survived the crisis, however, and today it is again Argentina's dominant domestic carrier. Its principal domestic rival is LAN Argentina, a subsidiary of LAN Chile. There are a few other, smaller carriers serving domestic routes. Aerolineas Argentinas and several international carriers serve international routes from Buenos Aires.

Domestic airline prices were re-regulated in 2002, however. Currently the Secretary of Transportation in the Ministry of Economy and Production establishes pricing bands, in which the maximum prices are about 190% of the minimums, within which the carriers must establish their prices. Certain other discounts from the minimums are possible.

The National Airports System Regulatory Organism (ORSNA) was created in 1997 as the airports regulatory authority. There is a national system of 54 airports and aerodromes in Argentina. Thirty-three are operated under concession, the remainder directly by ORSNA. ORSNA supervises the concessionaires, and is otherwise responsible, in conjunction with the Argentine Air Force, for the operation, maintenance and safety of the airports.

4.6 Ports

Argentina's port system was also restructured in the early 1990s. The ports were transferred to the provinces, which could either operate or concession them. The Port of Buenos Aires is by far the largest in Argentina, accounting for more than 90% of container traffic in the country. Buenos Aires was divided into two ports, Dock Sud, which was transferred to the province of Buenos Aires, and Puerto Nuevo, which remained a federal facility. There were six terminals at Puerto Nuevo, concessions for which were offered for bid. Originally a concessionaire could operate only one terminal at Puerto Nuevo, but that limit has been eliminated. Still, this reorganisation had the salutary effect of introducing competition between ports, and in the case of Buenos Aires, within a port.

The CNDC has considered two mergers in this sector. In 2001 it reviewed a vertical merger in which Maersk Sea Land, a large international shipping company, proposed to purchase the concession for one of the terminals at Puerto Nuevo.[56] The possible anticompetitive effect was one of foreclosure; Maersk might have been able to exclude its shipping competitors from access to the important port at Buenos Aires. The Commission concluded that it would not have sufficient market share to do that, however. Its terminal had only 8% of the total capacity at Puerto Nuevo, and it would also face competition from Dock Sud, also in Buenos Aires.

In 2003 the CNDC encountered a more difficult, horizontal transaction, in which the operator of terminals 1 and 2 at Puerto Nuevo proposed to acquire the operator of terminal 3.[57] The HHIs in the relevant service markets (container handling and operational capacity) were 2,572 and 2,128, respectively, and the merger would increase them by 490 and 312. The Commission determined that the merger would not have significant anticompetitive effects, however, for the following reasons:

terminal 3 was not as attractive a facility as some of it competitors, including terminals 1, 2 and 5, Dock Sud and another port located nearby; some of the remaining competitors had a substantial amount of excess capacity which could be used to discipline an attempted unilateral price increase by the merged firm; shippers expressed no concern about the merger; and there continued to be some price regulation pursuant to the emergency measures that were implemented after the 2001-02 crisis. Further, there were plausible claims of efficiencies that would result from the merger.

5. Competition Advocacy

Article 24 of the competition law authorises the competition authority to conduct competition advocacy. It can: "promote the study and investigation of competition;" "give [its] opinion on competition … in respect to laws, regulations … and administrative acts;" and "issue general or sectoral recommendations about competition modalities in markets." The CNDC's limited resources and its merger review responsibilities, especially in recent years, prevent it from engaging in competition advocacy in regulated sectors in an ongoing fashion, however. Of course, when it conducts one of its industry-wide studies its report and recommendations are effectively a form of competition advocacy. In addition it has from time to time provided useful input into decisions by regulators or other government bodies. Two of these involved the auto fuels market, described in the box below.

6. Conclusions and Recommendations

Competition policy in Argentina has an excellent foundation: the 1999 competition law. The law articulates the right standards in the three substantive areas of competition law enforcement – restrictive agreements, abuse of dominance and mergers; it creates an independent, professional enforcement authority and provides it with the legal and administrative tools that it needs for the job. Competition policy has benefited from another fundamental advantage over the years: a dedicated, competent staff of professionals in the CNDC. But competition policy has not achieved its proper place in the Argentine economy. There are many reasons for this, not the least of which has been the country's unsettled economic and political experience in the past several decades.

The following recommendations (Box 4) address several of the issues highlighted in the sections above. It is recognised that some of them, including the most important, cannot be fully implemented by the competition agency alone. These require concurrence and action by other parts of government, both executive and legislative. Thus, there is a political component to the strengthening of competition policy in Argentina.

6.1 Create the National Tribunal for the Defence of Competition

- If it is necessary to amend the law to give the executive some power to overrule a decision of the Tribunal in merger cases, this power should be limited in scope to matters of "overriding public interest," or words to that effect.

It is anomalous that nearly seven years after the enactment of the competition law the agency that it provided for has not yet been established. Doing so would address two fundamental problems that the CNDC faces: insufficient budget and insufficient independence. Section 17 of the law provides that the Tribunal would be a "self financing agency." Section 25 provides that the Tribunal shall annually submit a draft budget "to the National Executive," and that it can impose "fees to be paid by the interested parties for the proceedings brought before said Tribunal." Presumably this includes merger notification fees, a practice employed in many countries. Of course, to the extent that fees do not cover its expenses the Tribunal would still depend on the National Executive and ultimately the Parliament for its funding. Still, it would have its own, separate budget and the authority to decide how to spend it.

Box 4. Competition Advocacy

Petrol Retailing

YPF was privatised in 1991. At that time it controlled a dominant share of crude oil refining capacity, 63%. Shell and Esso together controlled 32% and smaller firms the remainder. By 2000 the market was somewhat less concentrated, with four firms controlling about 85% of capacity. YPF (by now, Repsol YPF) was still the largest, with about 50%. Shell, Esso and an independent firm (later acquired by Petrobras, the large Brazilian oil company) were the other significant players. By 2000, however, it was apparent that retail petrol prices in Argentina were not reacting to world market forces to the extent that one would have expected in a competitive market. There had been investigations of possible cartel activity among the Argentine producers, but they did not produce sufficient evidence of cartelisation.

In 2000 the CNDC undertook a comprehensive study of the market. It focused on the vertical relationships between the refiners and retailers. Although most petrol retailers were independently owned and operated, they were parties to supply contracts of long duration – more than 11 years in most cases – which effectively integrated them with their supplier. Given the obvious importance of a retail network in this industry, this integration constituted a barrier to entry. The CNDC's recommendation to the Secretary of Energy, provided through the Secretariat for the Defence of Consumer Affairs and Competition, was to limit the duration of new supply contracts to five years. Because the reaction of the producers to this limitation would have been to vertically integrate into ownership of retail outlets, the Commission also recommended that producers be limited to owning 40% of their retail network. These recommendations were implemented through a presidential decree.[58]

Compressed Natural Gas

A more recent recommendation by the CNDC in the auto fuels sector, provided in 2004, involved the sale of compressed natural gas (CNG) for use in automobiles. The use of natural gas for this purpose is common in Argentina, given the country's significant gas production. While the price of gas for residential purposes remains subject to regulation, in 2004 the price of gas for transportation use was deregulated by decree. A decree also required CNG retailers to contract directly with gas producers for their supply.

In a report to Enargas, the gas regulator, the CNDC (through the Secretariat) noted that two gas producers, YPF and Petrobras, also operated a significant number of retail outlets for CNG. Together these two firms controlled about 40% of natural gas production in the country and an equal percentage of retail sales by volume of CNG. The report noted the possibility for these vertically integrated firms to engage in various anticompetitive practices, including discrimination in prices or service against non-integrated retailers, refusal to supply independent retailers and imposition of minimum resale prices, limiting intra-brand competition. The CNDC's report did not contain any specific recommendations, given that the decrees effectively created a new market structure for automotive CNG, but it pointed out the importance of closely monitoring the situation with a view toward preventing possible anticompetitive effects from vertical integration.[59]

Creating the Tribunal would substantially enhance the independence of the competition agency. Its members would be appointed on merit, for fixed terms, by a quasi-independent jury. It would have the power to issue enforceable decisions, which would be subject to review only by the courts. It is said by knowledgeable people, however, that it is politically impossible to vest the agency with the degree of independence that the law currently provides. That was the reason for the proposed amendment in 2005, described above, which would have restored some oversight to the government in merger cases. The competition laws of other countries do provide for such powers in the executive, but the best practice in that regard is to severely limit them to matters of "overriding public interest," or words to that effect. Ideally, this veto power is rarely used.[60]

6.2 Increase the budget of the competition agency

- Give the agency, whether the Tribunal or the CNDC, more authority over how to spend its budget

The severe budget problems that the CNDC faces are described in part 3.2 above. Whether the agency is the CNDC or the Competition Tribunal it will need more money to attract and keep qualified professionals at both the staff and commissioner levels. At a minimum it would seem that the agency's budget should be restored in real terms to 2001 levels. Further, the current system of employing up to half of the CNDC's personnel on a short term contract basis also contributes to the high turnover in the agency. A larger budget presumably would permit the agency to convert some or all of these positions to permanent employee status

It is noted above that the CNDC has little authority to make decisions about how to spend its budget. Of course some oversight it necessary, but it appears that currently the CNDC has too little discretion in this regard, which may be hampering its enforcement work.

6.3 Strengthen anti-cartel enforcement

- Make the fight against cartels the top priority within the agency.
- In successful cases against harmful, knowingly unlawful cartels, increase the fines that are assessed, and begin to fine natural persons as well.
- Increase the statutory maximum fines for conduct violations.
- Establish a leniency programme.
- Consider the judicious use of proactive investigations, especially in public procurement.

In the past several years the OECD has urged competition agencies everywhere to give anti-cartel enforcement their top priority.[61] This seems especially important in Argentina, where there is anecdotal evidence of cartel activity. Fighting cartels is a multi-pronged effort. It requires the allocation of sufficient resources to the task; the assessment of ever larger fines against both organisations and individuals, which creates both a deterrent to future cartel activity and an incentive to co-operate with agency prosecutions; and concurrently, the creation of a leniency programme, which offers the elimination of sanctions for the first cartel participant to offer such co-operation. In this regard, it seems that the maximum fines for unlawful conduct under the competition law are now too low, even though the current maximum has yet to be imposed in a case. Raising the maximum, of course, requires legislative action. One way of ensuring that fines are not further eroded by inflation is to index them to inflation.

Proactive, industry-wide investigations sometimes generate cartel cases – that was true in the oxygen case – but they can also consume important resources over a long period of time, while ultimately resulting in no prosecutions. They should be undertaken with caution. One sector that is quite likely to be productive, however – it has been so in many countries – is public procurement. The agency should consider beginning *ex officio* investigations into possible bid rigging and price fixing in government purchasing and contracting.

Prosecuting more successful cases like the cement and oxygen cases would bring significant benefits to the competition agency, probably more than any other enforcement action the agency could take. It would enhance the agency's reputation both within government and with the public at large. And it would contribute to the development of a competition culture in the country by helping the public to understand how it benefits from aggressive, competent competition law enforcement.

6.4 Increase efficiency in conduct investigations

- Consider ways of summarily dealing with private complaints that clearly do not describe possible violations of the competition law.

- In other cases in which sanctions are ultimately not imposed, consider ways of shortening the time and resources required to arrive at a decision of the Commission and a recommendation to the Secretariat.

The discussion in part 2.1.4 above points up a persistent backlog in conduct investigations. Much of this may be due to the ability of private persons to initiate and participate in investigations by the competition agency, as provided in the competition law. The laws of many countries provide in some way for such private complaints, and there are political reasons why it is useful to have it in Argentina. Many of these complaints are inevitably not credible, however, or they do not describe a possible violation of the law. The Commission can decide that a complaint is not relevant or that it is insufficient in other respects and dismiss it. Over a three year period, 44% of all decisions by the Commission in conduct cases were of this type. But in many more cases there was no decision at all; the backlog grew every year. The Commission must find a way to deal more efficiently with the many complaints that it receives, most of which inevitably are without merit.

The applicable procedures in the majority of cases in which the Commission decides to investigate further can also be cumbersome. Again, the great majority of these cases will result in a finding that the law has not been violated. It should be possible for the Commission to conduct an informal inquiry at the beginning of an investigation, and when it becomes clear that there is no violation, to terminate it. Here, of course, there are conflicting needs for transparency and fairness. This is a balance that the Commission must achieve, but it may be that currently there is too much inflexibility in the relevant procedures.[62]

6.5 Increase efficiency in merger review

- Consider raising the notification thresholds.
- Work to shorten the time required to approve "easy" mergers from the current 3-4 month average.
- Continue to aggressively oppose the right of third parties to appeal from merger decisions of the competition agency.

The decree in 2001 creating a "size of transaction" threshold had a distinctly beneficial effect on the Commission's caseload. Until that time the Commission was having to review too many inconsequential mergers, which soaked up too many of the Commission's resources. In recent years the number of notified mergers has again increased, however. It is beyond the scope of this report to determine if the current thresholds are again too low, but that may be the case. As noted above, there has been significant inflation since 2001, which had the practical effect of lowering the thresholds. The Commission should review the effect of today's thresholds, and if it determines that they are too low, recommend that they be increased by law or decree.

As noted above in part 3.2, the private sector in Argentina is generally not critical of the CNDC for the amount of time that it takes to review mergers. But it is a fact that the Commission takes longer than agencies in many other countries to review and approve "easy" mergers – those that early on can be determined not to present any significant competitive issue. The OECD Competition Committee has conducted a study of merger review periods in OECD countries, and it has determined than in the majority of them non problematic mergers are approved in 30 to 45 calendar days, and sometimes less.[63] The International Competition Network, in its Recommended Practices for Merger Notification Procedures, recommends that merger review be conducted in two phases, and that the duration of the first phase, in which non problematic mergers are approved, should be no longer than six calendar weeks.[64] Regardless of how the private sector views the Commission's efficiency in reviewing mergers, shortening the time that it takes to review easy ones would have the salutary effect of freeing

up some of the Commission's scarce resources for more important work, including anti-cartel enforcement.

With this goal in mind, the Commission should review all of its merger review procedures. If merging parties are completing Form 1, the initial notification form, in good faith it should not be necessary for the Commission to require as often as it does that the information be supplemented, which has the effect of suspending the internal 15 day deadline for phase I. Further, there may be ways of streamlining the manner in which recommended approvals are presented to the Commission, and then to the Secretariat.[65]

The ability of private parties to appeal from merger decisions of the Commission is also an important issue. Such appeals are disruptive, as the experience in the beer and supermarkets cases shows, and they consume the Commission's time and resources. While the competition law authorises the complainant in a conduct case to appeal from a dismissal by the Commission, it does not specifically provide such a right in merger cases. The Commission has been right to oppose such appeals in the courts, and it should continue doing so.

6.6 Review the current merger notification regime which permits the parties to consummate their merger before the competition authority completes its review

- If it is decided not to change to a strict premerger notification procedure, which requires the parties to wait during the agency review, consider creating procedures that would permit the competition agency, in appropriate cases, to apply for an order prohibiting consummation pending the review, or in the alternative, to order the parties in a consummated merger to "hold separate" their operations to permit a meaningful divestiture if it is required.

The fact that the merging parties can consummate their transaction in Argentina before the competition agency completes its review can materially alter the ability of the agency to achieve an effective remedy for an anticompetitive transaction. In some cases the anticompetitive effects of a merger can be relieved through a divestiture of assets, but in others, only the complete prevention of the transaction is sufficient, and if the merger has been consummated this is not possible. Neither the Argentine competition officials nor the private sector seem to think that the current inability of the agency to prevent consummation in advance of the agency's decision is a significant problem. Sometimes the parties voluntarily postpone consummation if they think the merger might be denied. In one case where the Commission ultimately disapproved a merger that had been consummated there was disagreement about whether the transaction should be unwound, but ultimately there was a successful divestiture.

Still, there have been very few cases in which a merger was ultimately disapproved. In a few others, where a partial divestiture was ordered there was disagreement over whether the remedy was adequate. All else being equal, it would be preferable for the competition agency to have the ability to prevent consummation before it makes its decision. One way to do so, of course, is to impose a strict premerger notification regime: the parties cannot consummate for a specified period after notification.[66] Premerger notification has costs of its own, however, and in the current climate in Argentina it seems doubtful that the Argentine business community would support such a change. At a minimum the competition agency would have to dramatically shorten the time it takes to review mergers in a premerger notification regime.[67]

A second way of preventing consummation in specific cases is to provide the competition agency with the power to seek an order to that effect, if there are sufficient concerns about the transaction's competitive effects. The Commission has powers to order preliminary remedies in conduct cases, but apparently not in

merger cases. Because time is often of the essence in mergers, and because the entry of a preliminary order preventing consummation could have the practical effect of preventing the merger permanently, the prevailing view across countries is that the agency should be required to meet a fairly strong burden of showing that the merger could be anticompetitive. One way of ensuring this is to require the competition agency to apply to a court for such an order. An alternative to such a "preliminary injunction," or perhaps a complement to it, is the power to order that the parties "hold separate" their operations after consummation until the agency makes its decision, for the purpose of making a divestiture or dissolution more feasible.[68]

6.7 Until the Competition Tribunal is created, free the CNDC from as much political influence as possible

Since the CNDC became more active in 1996 it has enjoyed periods that were relatively free of political interference. It seems that the current period is one in which it is subject to more of it, if only because it has been enlisted in the government's battle against inflation. By keeping prices at competitive levels, effective competition law enforcement can be a force against inflation, but other, macroeconomic factors are almost certainly more important in this regard. In any case, if the Commission is to be an ally against inflation it must be left free to enforce the competition law. To the extent that its scarce resources have been diverted for other causes its law enforcement responsibilities will languish. The 1999 law articulates a clear policy in favour of independence of the competition authority. Until that law is fully implemented it seems that its spirit should be observed by preserving the CNDC's independence as much as possible.

6.8 Continue and broaden the efforts toward building a competition culture in Argentina

The CNDC has implemented several useful programmes toward developing a competition culture in Argentina, described in part 3.5 above. It should continue these and initiate others, to the extent its resources permit. These could include regular, periodic conferences or seminars open to the public on competition policy, such as an annual "competition day" featuring speakers from the domestic and international competition communities. Participants could come from both the private and public sectors, including especially members of Parliament. Developing good relations with the press is vital in this effort. Every important decision by the Commission should be accompanied by a press release, and in the most important, a press conference. The Commission could publish brochures or pamphlets describing for the general public its functions, the importance to consumers of an effective competition policy and how to contact the Commission to provide information. The CNDC web site could be expanded[69] to include more of the same information of interest to the general public, and more of the Commission's decisions. But while all of these measures are useful and important, effective law enforcement, including bringing cases of demonstrable benefit to consumers, is the most effective means of all in developing a national competition culture.

6.9 Develop an effective, professional relationship with the judges who hear appeals in competition cases

The competition agency is fortunate that many of the appeals in its cases are made to a quasi-specialised court in Buenos Aires, though of course appeals can also be made to federal courts in other parts of the country. In some ways competition cases are unique among civil cases, and the agency can contribute to judges' understanding of the special issues that these cases present by sponsoring seminars for judges on these topics, and also by including judges in public events that the agency sponsors. All such events must observe the relevant legal ethics, of course.

6.10 Expand the competition agency's role in regulated sectors

- Consider opportunities for conduct cases in these sectors, and, consistent with its limited budget, for more competition advocacy,
- Develop co-operative working relationships with sector regulators.

The competition law provides the competition agency with more jurisdiction in regulated sectors than exists in many countries. There are no specific exemptions; the competition agency must approve all mergers in these sectors, with the input of the regulator. Interagency co-operation seems to be working in mergers, but there is relatively little interaction in conduct matters. It would seem that the regulated sectors could be fruitful sources for important dominance cases, and possibly also for cartel cases. Further, while the agency's ability to engage in competition advocacy is limited by its budget, it could do more in this field. Expanding its role in regulated sectors, however, requires developing working relationships with the regulators, who have critical industry expertise.

Notes

1. Background sources for this brief description of Argentina's economy and history include: IADB (2006), *Economic Situation and Prospects – Argentina*; Blustein, Paul, *And the Money Kept Rolling In (And Out): Wall Street, the IMF and the Bankrupting of Argentina*, (PublicAffairs 2005); United States Department of State, Bureau of Western Hemisphere Affairs, *Background Note: Argentina* (2005).

2. The law has a constitutional foundation. Article 42 of Argentina's constitution, which was adopted in 1994, affirms the right to "a defense of competition against all forms of distorsion of the markets . . . ."

3. It is said that an important impetus for the new law was the acquisition in 1999 by tender offer of the former state-owned and then dominant oil company, YPF, by the Spanish company, Repsol.

4. See generally, Peña, Julián, *La defense de la Competencia en la Argentina*, 17 Boletín Latinoamericano de Competencia, 3 (2003).

5. Resolution 164/2001.

6. Yacimientos Petrolíferos Fiscales S.A. [YPF] s/ ley 22262-Comisión Nacional de Defensa de la Competencia-Secretaría de Comercio e Industria, National Supreme Court of Justice, 2 July 2002.

7. The CNDC – and most competition agencies – readily act against conduct or mergers that harm competition in producer inputs, without the need for showing ultimate harm to consumers.

8. In early 2006 a proposed amendment to the competition law was introduced in Parliament that would change the legal standard to "damage to the economic interest of competing companies or consumers." The proposal, in which the CNDC was not involved, provoked a great deal of criticism within the competition community in Argentina and elsewhere in Latin America. It is not known whether the proposal has any significant chance of becoming law.

9. For a more detailed description of some of these cases, see the CNDC's 2002 report to the OECD Competition Committee, available on the OECD web site at *www.oecd.org/competition.*

10. Available on the CNDC's web site at *http://www.mecon.gov.ar/cndc/home.htm.*

11. One of the other two cartel cases in which there were sanctions -- the liquid petroleum gas case in Bariloche – also took five years. The sand case in Parana took two.

12. Article VII, Section 46.

13. It seems that the sand case in Parana was a naïve cartel.

14. Impsat, S.A., complainant; Telefonica de Argentina S.A., Telecom Argentina Stet. France Telecom S.A., Startel S.A., Advance Communications S.A., and Telecom Soluciones S.A., respondents, decided 20 February 2004.

15. Impsat used primarily its own satellite network, and so there was not an issue of access in the case.

16. For a more complete description of some of these cable TV cases, see the CNCD's 2002 report to the OECD Competition Committee, *supra* n. 9.

17. Respondents: Tele Red Imagen S.A. (TRISA), Televisión Satelital Codificada S.A. (TSCSA), Video Cable Comunicación S.A. (VCC), Multicanal S.A. y Cablevisión TCI S.A., decided 12 August 2001.

18. For a more detailed description and analysis of this case see, D'Amore, Marcello R.., *Fijaction Vertical de Precios en el Futbol Codificado: El Caso TRISA-TSCSA,* 19 Boletin Latinoamericano de Competencia, 3 (2004).

19. YPF S.A., decided 19 March 2000, affirmed by the Supreme Court, see n. 6, supra.

20. In 1999 it was acquired by the Spanish firm Repsol. The conduct that was the subject of this case occurred before the acquisition, however.

21. Supra, n. 6.

22. See, e.g., Grosman, Lucas and Serebrisky, Tomás, *El Abuso Explotativo y la Defensa de la Competencis en Argentina,* 16 Boletin Latinoamericano de Competencia 15, (2003).

23. There have been a few complaints of exploitative pricing, mostly in the cable TV sector, which the CNDC has rejected.

24. Section 42. It seems that the language of this section would permit broader intervention, however. This problem has surfaced in merger cases, as described in the merger section below.

25. Mergers were subject to the conduct provisions of the previous law, but few were actually reviewed in that way by the Commission.

26. See generally, Den Toom, Marcelo A., *The Application of ICN's Recommended Procedures for Merger Notification Procedures in Argentina: What Should be Changed to Achieve Full Consistency?,* 18 Boletín Latinoamericano de Competencia, 3 (2004).

27. The 1999 law had a second threshold: total worldwide turnover of the parties exceeding 2,500 000 000 pesos [USD 833 000 000]. This threshold was eliminated by decree in 2001.

28. Decree No. 396/2001, April 5, 2001. Argentina law permits the President to amend statues by a “decree of urgency and necessity.” The decree must ultimately be approved by the Parliament, but it is enforceable immediately.

29. Decree 89/2001. For further information, see, the Argentina *Merger Notification and Procedures Template*, developed in conjunction with the International Competition Network and available on the CNDC’s web site at *http://www.mecon.gov.ar/cndc/argentina_icn_merger_template.pdf.* See also, *Getting the Deal Through: Merger Control/Argentina*, available at *http://www.gettingthedealthrough.com/.*

30. Argentina seems to have avoided a problem that developed in neighbouring Brazil, which has a similar notification regime. In that country, because of the risk that a transaction would be consummated before a final decision on its lawfulness could be made, the competition authority aggressively interpreted the “trigger date” provision of the competition law to ensure that notifications were provided as early in the process as possible. The result was that the agency brought many cases seeking fines for failure to provide timely notification, which occupied too many of the agency’s scarce resources. (That problem has abated in recent years. See, OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, available on the OECD web site at www.oecd.org/competition.) It seems that the CNDC has not had a similar experience. In the 2001-05 period it instituted only five such cases, resulting in fines totalling USD 214 000.

31. Decision no. 323, decided 15 July 2002; LAPA SA, LAPA Estudiantil SA, Fexis SA, AA2000 SA, Edcadassa.

32. The Secretariat’s decision was criticised in some quarters as constituting unwarranted political interference in enforcement of the competition law. See, Serebrisky, Tomás, *Market Power: Airports*, Note no. 259, The World Bank Group, Private Sector and Infrastructure Network, March 2003.

33. Guía para la notificación de operaciones de concentración económica, Resolution 40/2001.

34. Resolution 164/2001.

35. Decision no. 417, 22 December 2004; Bellsouth Corporation and Telefónica Móviles S.A..

36. Decision no. 395, 10 September 2004; Grupo Bimbo Sociedad Anonima de Capital Variable S.A.-Compañía de Alimentos Fargo S.A..

37. Ambev itself was the result of an equally large and controversial merger in Brazil. See, OECD, *Competition Law and Policy Developments in Brazil*, OECD Journal of Competition Law and Policy, October 2000, vol. 2, No. 3, at 204-05.

38. The Supreme Court’s decision did not give the basis for the ruling.

39. Decision no. 226, 9 March 2001; Correo Argentino S.A. (CASA) and Sociedad Anónima Organizacióncoordinadora Argentina (OCA).

40. See, Peña, *El peligro de la “judicialización” del control de fusions*, El Cronista, 29 March 2005.

41. Section 58 of the 1999 law offers support for the position that the CNDC can act on cases until the Tribunal is constituted. It provides (as translated):

> Law 22,262 [the previous competition law] is hereby repealed. However, proceedings pending as of the effective date of the present law shall continue to be conducted in accordance with the provisions of the former law before the corresponding enforcement authority, which will

continue to remain in effect until the National Tribunal for the Defence of Competition is organised and becomes operative. It shall likewise hear all cases brought as from the coming into effect of the present law. Once the Tribunal is organized, such cases shall be referred to the latter for trial.

The law does not explicitly deal with whether the CNDC would be fully independent or continue to have advisory powers only, however.

42. Article IV, Sections 17-23.

43. Section 25. As noted above, the CNDC does not impose merger notification fees or other fees of that type.

44. Decree 296/2001, supra, n. 28.

45. Decree 89/2001, supra, n. 29.

46. It can be accessed at *http://groups.yahoo.com/group/ForoCompetencia.* There are more than 400 members of the group, which also maintains a website at http://www.forocompetencia.com.

47. At www.mecon.gov.ar/cndc/home.

48. The agenda and papers created for the conference are available on the CNDC's web site.

49. One of the most notable examples was the Ambev/Quilmes case, described above. The divestitures ordered by the Commission could not be accomplished for three years, despite the fact that the merger had been consummated, while the case (ultimately resolved in the Commission's favour) was in litigation.

50. Provinces have even issued their own currency; the practice was prevalent in the 2001 crisis, when provinces issued "quasi currency" in the form of bonds to pay public sector obligations.

51. Section 3.

52. Articles 1 and 2, Law no. 25,750. These limits on foreign ownership of media companies do not apply retroactively from the date of the enactment of the law.

53. See generally, IADB (2002), Beato. Paulina, and Laffont, Jean-Jaques, *Competition in Public Utilities in Developing Countries.*

54. The Telefonica/Bellsouth merger, described above, was one in which there was close co-operation between the CNDC and the telecoms regulator.

55. See generally, IADB (2001), Bondorevsky, Diego, Petrecolla, Diego, *The Structure of Natural Gas Markets in Argentina and Antitrust Issues in Regional Energy Integration*.

56. Decision no. 225, 7 March 2001, Maersk Argentina Holdings, Terminal 4 S.A.. y Terminal Emcym S.A.

57. Decision no. 364, 17 October 2003, Terminales Río de la Plata, S.A. y Terminales Porturarias Argentinas S.A. For a more complete discussion of the case see Trujillo, Lourdes and Serebrisky, Tomás, *Market Power: Ports*, Note no. 260, The World Bank Group, Private Sector and Infrastructure Network, March 2003.

58. Decree 1060/00. For a complete discussion of this study and report, see Serebrisky, Tomás, *The Role of Advocacy in Competition Policy: The Case of the Argentine Gasoline Market*, The World Bank, Policy Research Working Paper 3130, September 2003.

59. In another report the CNDC recommended to the Minister of the Economy certain changes in the way that the city of San Carlos de Bariloche administer the subsidies that it provided its citizens for the purchase of liquid petroleum gas.

60. The German competition law has such a provision. It has been used by the German authorities only a handful of times in the past several years, however. See OECD, *The Role of Competition Policy in Regulatory Reform: Regulatory Reform in Germany*, 2004.

61. The OECD has published a Recommendation of the Council and three comprehensive reports on anti-cartel enforcement. All of them are available on the OECD web site, *supra*, n. 9.

62. This process could be complicated by the fact that a private complainant has the right to appeal to the courts from a decision by the competition agency to dismiss a complaint (Section 52(d)). In fact, there have been very few appeals of this type, so the direct burden on the Commission from this source has been minimal. Still, an indirect effect could be to cause the Commission to be more cautious in reviewing these many complaints than it might otherwise be, causing delays and consuming resources. If this is a problem, or becomes one, it seems that the only course for the agency is to pursue in the courts (or by legislative amendment) a standard that confers deference to the agency's decision to dismiss a complaint, and that does not require unnecessary justification by the agency for its decisions in such cases.

63. See OECD, *Merger Control Laws and Procedures in Latin America and the Caribbean*, paras. 50-51, an issues paper presented to the 2005 Latin American Competition Forum, available on the OECD web site, *supra*, n. 9.

64. Recommendation IV.B, available on the ICN web site at *www.internationalcompetitionnetwork.org*.

65. Here again, creating the Tribunal would automatically bring about improvements; it would eliminate the last step in the current process – approval by the Secretariat.

66. Brazil has confronted the same problem. The solution that the competition authority decided upon there was to recommend a change in the law to premerger notification. The law has not yet been amended, however. In the meantime the authority has streamlined its review process through internal changes. See the Brazil peer review, *supra*, n..30

67. For a discussion of different notification regimes and their advantages and disadvantages, see the issues paper cited in n. 63, *supra*. In this regard, there is an error in para. 24 of the paper, in which it is stated that in Argentina the law requires that consummation be suspended upon formal notification. This is not the case.

68. Preventing parties from consummating their merger before the competition agency's review is completed has a secondary benefit, in addition to preserving the agency's option to forbid the transaction completely: it creates an incentive for the parties to expedite the review, resulting in closer co-operation with the agency.

69. Argentina has more Internet users per capita than any other South American country.

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United States Department of State, Bureau of Western Hemisphere Affairs, *Background Note: Argentina* (2005).

Internet Resources

Boletín Latinamericano de Competencia: http://ec.europa.eu/comm/competition/international/others

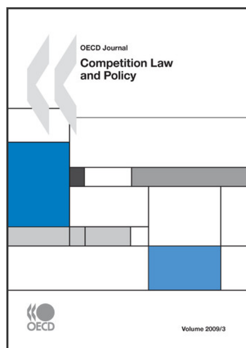
CNDC: www.mecon.gov.ar/cndc/home.htm

ForoCompetencia: http://www.forocompetencia.com

Global Competition Review: www.globalcompetitionreview.com

International Competition Network: www.internationalcompetitionnetwork.org

OECD: www.oecd.org/competition



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