TACIT COLLUSION: THEORY AND CASE LAW IN ARGENTINA, BRAZIL, CHILE, COLOMBIA AND PANAMA (1985 - 2008)*

JUAN DAVID GUTIÉRREZ RODRÍGUEZ**

ABSTRACT

The predominance of oligopolies in Latin American (Latam) markets poses an important challenge for competition authorities (CAs). In the first place, CAs must enforce competition laws in markets where it is difficult to distinguish between conducts

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originated on collusive agreements among competitors from the behavior of interdependent firms that take unilateral decisions to adapt to the conditions of the market or anticipate their competitors’ decisions.

In the second place, price-fixing cases based on circumstantial economic evidence are very complex and the proceedings are costly to carry out. The latter implies high administrative costs of enforcement and risks of enforcement errors, either by sanctioning legitimate oligopolistic behavior (false positives) or by failing to detect true anticompetitive practices (false negatives).

The objective of this document is to present a thorough account of the cases adjudicated in five Latam’s jurisdictions in the period 1985-2008, analyze the evolution of the case law, and compare and contrast the rules and their enforcement under the spectrum of economic theory and the rules applied by other jurisdictions, such as the US (federal level) and the EU.

**Key words:** tacit collusion, conscious parallelism, cartels, oligopolies, oligopolistic interdependence, price fixing, market division, bid rigging, collective dominance, indirect evidence, circumstantial evidence, plus factors, competition laws in Latin America and the Caribbean.

**COLUSIÓN TÁCITA: TEORÍA Y JURISPRUDENCIA EN ARGENTINA, BRASIL, CHILE, COLOMBIA Y PANAMÁ (1985 - 2008)**

**Resumen**

*El predominio de estructuras oligopólicas en América Latina plantea un importante reto para las autoridades de competencia (ACs). En primer lugar, las ACs deben vigilar el cumplimiento de la legislación de competencia en mercados*
en los cuales es difícil distinguir las conductas originadas en acuerdos colusorios entre competidores de las conductas unilaterales de firmas que son interdependientes y que se adaptan a las condiciones del mercado o se anticipan a las decisiones de sus competidores.

En segundo lugar, los casos de acuerdos de precios que se soportan en evidencia económica indirecta son muy complejos y los procedimientos son costosos. Lo anterior implica altos costos administrativos en la vigilancia del cumplimiento de la normativa y riesgos en su aplicación, ya sea por la sanción de conducta oligopólica legítima (falsos positivos) o por fallar en la detección de verdaderas prácticas anticompetitivas (falsos negativos).

El objetivo de este documento es presentar detalladamente los casos decididos en cinco jurisdicciones de América Latina, en el periodo 1985-2008, analizar la evolución de la jurisprudencia, y comparar y contrastar la legislación y su aplicación a la luz de la teoría económica y la normativa aplicada en otras jurisdicciones, como Estados Unidos (a nivel federal) y la Unión Europea.

**Palabras clave**: colusión tácita, paralelismo consciente, carteles, oligoparolios, interdependencia oligopolística, acuerdos de fijación de precios, reparto de mercados, colusión en licitaciones, dominancia colectiva, evidencia indirecta, factores plus, normativa de libre competencia en América Latina.
1. INTRODUCTION

Oligopolistic markets are prone to the formation of cartels, even without the existence of explicit agreements\(^1\). According to Richard Posner, in most cases oligopoly is a necessary condition (but not a sufficient condition) for successful price-fixing where antitrust laws are applicable\(^2\). However, current competition policies and laws do not prohibit *per se* any specific market structure\(^3\). In effect, competition laws do not proscribe the existence of monopolies—which may have a legal or a legitimate economic origin—but consider monopolization and the intent of monopolization as illegal conducts\(^4\). In the same sense, competition laws do not prohibit the existence of oligopolies, but consider agreements on prices, quantities and other relevant variables of competition\(^5\) as illegal conducts.

Economic agents in monopolies and oligopolies may have the sufficient market power (individual or collective) to restrain competition in order to augment their economic power and increase their profits. The latter explains why enforcers take into account the structure of a market whenever a supposed anticompetitive conduct is investigated and why

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3. An important exception in the U.S. was Judge Learned Hand’s view of “great industrial consolidations” as “inherently undesirable” in the landmark opinion *United States v. Aluminum Co. of America*, 148. F.2d 416 (2d Cir. 1945).
4. Current U.S.’s case law addresses the “monopoly problem” from a middle point position, departing from Judge Hand’s view, where monopolization offense has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” (*United States v. Grinnell Corp.*, 384 US 563, 1966, pp. 570-71).
5. Other forms of collusion include agreements on quantity discounts, identical delivered price systems, capacity utilization, quality, variety, innovation, bid rigging and boycott against competitors or customers.
this market structures are subject of close scrutiny by competition agencies.\(^6\)

In close oligopolies if all the firms agree on prices and/or quantity, therefore maximizing joint profits, their action in the market will resemble the conduct of a monopoly. The members of a cartel aim at setting the highest possible price to attain the biggest profit and/or lower the quantity produced and commercialized of a specific good or service,\(^7\) therefore substantially reducing consumer welfare.\(^8\) In practice, national and international hard core cartels are subject of strict prosecution by competition agencies due to the great harm they cause to society.

By lowering the output and raising the market price the consumer welfare is reduced in two ways: i) a deadweight loss produced by the reduction of the quantity offered and ii) a transfer of resources (due to higher prices) from the consumers to the firms.\(^9\)

The following graphs depict the rationality of monopoly pricing and its effects.\(^10\)

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6 According to the structural approach in the enforcement of competition law “industry structure has an important bearing on firm behaviour and performance.” (R. Shyam Khemani, *Competition Policy and economic development*, Policy Options, October 2007, p. 25).


9 Furthermore, Richard Posner argues that the social cost of monopolization also includes the waste of resources in which the monopoly or the cartel incurs in their rent seeking activity, e.g. resources spent on monitoring the cartel or lobbying Dennis W. Carlton and Jeffrey M. Perloff, *Modern industrial organization*, 2005, p. 150.

10 In Graph 1 and Graph 2, marginal costs are assumed to be constant. In the Graph 2 the four members of the cartel are assumed to be the only producers in a given market that have agreed to divide the market in four equal shares. Furthermore, it is assumed that the undertakings have identical similar marginal costs and marginal revenues.
GRAPH 1
Monopolistic pricing by a single-firm monopoly

GRAPH 2
Monopolistic pricing by a cartel
As any other business strategy the cartel will be viable if its benefits exceed its costs. Hence, the success of a cartel is determined by several variables such as its capacity of raising prices (affected by elasticity to price of demand for the product’s market and entry conditions\(^\text{11}\)), the costs of monitoring its members, the costs of coordination, the possibility of penalizing deviators and low expectations of Government enforcement\(^\text{12}\).

Consequently, to enhance the coordination, detection and punishment of cheaters a cartel may agree upon facilitating practices (e.g. joint sales agents, exchange of information mechanisms and delivered or basing point pricing, among others) that make prices and firms’ actions more transparent. These devices may constitute by themselves an infringement to antitrust law or may serve as indirect proof of an anticompetitive agreement\(^\text{13}\).

As mentioned before, cartel activity is actively prosecuted in almost every jurisdiction of the world. In the US the stakes in a cartel case are very high. In effect, the fines for price fixing conspiracies are very high and have an additional ingredient of deterrence: the criminal sanctions. The DOJ’s Antitrust Division current policy “is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations…”\(^\text{14}\).

In the case of the EU the Commission has been very proactive in the prosecution of cartels\(^\text{15}\) and between the years 2002 and 2007 it “has


\(^{13}\) For a complete study on facilitating practices and their illegality under the Sherman Act, see *Page, William H.*, *Facilitating practices and Concerted Action Under Section 1 of the Sherman Act*, (May 2008).

\(^{14}\) However, according to the DOJ not always a criminal prosecution for a “per se” conduct will be considered appropriate. *See* US Department of Justice, “Antitrust Division Manual”, 3 ed., Chapter 3.

\(^{15}\) *P. Lowe*, “Introduction to cartels working group plenary session”, 2007, p. 6.
taken some 35 cartel decisions, and imposed more than 6,3 billion euros of fines.”\textsuperscript{16} Within the DG Competition a dedicated Cartel Directorate was created and the new guidelines, published in the September 2006\textsuperscript{17}, on the method for the calculation of the administrative fines have effectively increased their quantum\textsuperscript{18}. In an interview Justice Bo Vedorf, president of the Court of First Instance, stated that from his personal point of view an increase of fines against cartels wouldn’t have a significant deterrent effect and may even be counterproductive. Instead, Justice Vedorf’s opinion is that the establishment of personal sanctions (including criminal ones) for the managers involved in the illegal behavior should be taken into account in the future\textsuperscript{19}.

1.1. Oligopolies and tacit collusion in the US and the EU

The treatment of firm coordination in oligopolies, especially when noncompetitive results are achieved, has been discussed by antitrust authorities, practitioners and scholars. Price-fixing cases where there is no direct evidence of collusion, thus based on circumstantial economic evidence\textsuperscript{20}, are very complex and the proceedings are costly to carry out.

\begin{itemize}
\item \textsuperscript{16} N. Kroes, “European Competition Policy in a changing world and globalised economy: fundamentals, new objectives and challenges ahead”, 2007, p. 4.
\item \textsuperscript{17} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003.
\item \textsuperscript{18} N. Kroes, “Key developments in European competition policy over the past two years”, 2007, p. 4.
\item \textsuperscript{19} “Kartell-Sündern soll Haft drohen” in Handelsblatt, 19 June 2007.
\item \textsuperscript{20} R. Blair and R. Romano distinguish “circumstantial evidence” (such as price behavior, cost structure, demand behavior, excess capacity, past price wars, dynamics of competition) from “smoking gun” evidence (such as exchange of price lists and selling in delivered-prices basis). Roger Blair and Richard E. Romano, Distinguishing Participants from Nonparticipants in a Price-fixing Conspiracy: Liability and Damages, 1998, p. 25-37.
\end{itemize}
Furthermore, prominent scholars suggest that non-competitive behavior may occur in oligopolies without the existence of any form of overt agreement among the competitors. Hence, enforcers and adjudicators have the cumbersome task in absence of direct evidence of distinguishing behavior that is product of collusion from patterns originated in the firms’ unilateral decisions (independent or interdependent) that take into account common economic facts or their rivals’ actions into account.

1.1.1. The Turner-Posner Debate

The debate between D. Turner and R. Posner (1969) on whether firms in an oligopoly that coordinate their actions without an explicit agreement (referred by US courts as conscious parallelism, tacit collusion or oligopolistic interdependence) should be considered an infringement of antitrust laws illustrates the complexity of the topic.

The Turner-Posner debate initiated in the 60s is current and their arguments are still in the base of the analysis of tacit collusion cases. While Turner argued that noncompetitive behavior from interdependent markets was almost inevitable, Posner asserted that this kind of conduct was a voluntary conduct that could be avoided. Clearly their diverse positions also entailed different views regarding the application of section 1 of Sherman Act to consciously parallel conducts.

According to Turner, interdependent consciously parallel decisions in oligopolies shouldn’t be held a violation of the Sherman Act. These

24 Spence (1978) and Elzinga (1984) are skeptical about the viability of tacit collusion as an effective anticompetitive practice.
25 Excluding the parallel adoption of rigid delivered-price systems, exclusionary practices and refusals to deal which, according to Turner, should be held unlawful.
conducts wouldn’t constitute an infringement either because an “agreement” is not configured or because even if it was considered an “agreement” it wouldn’t be unlawful. TURNER recognized that there are “more grounds” for the latter argument than for the former. The prominent scholar justified the “immunization of pure oligopoly pricing” by arguing oligopolists take decisions with the available information in the market (including their rivals’ probable reactions) and act rationally by operating in conformity with this information. Furthermore, TURNER argued that oligopolists behave in an analogous way as a seller in a competitive market. Finally, TURNER argued that the remedies for oligopolistic interdependence would produce more costs than benefits and would oblige the oligopolists to behave irrationally.

To summarize, TURNER proposed the following conclusions on the relation between conscious parallelism and conspiracy in restraint of trade:

1. Consciously parallel actions per se are not enough evidence to infer an agreement “in the absence of evidence indicating that the parallel decisions of the alleged conspirators were contrary, on the hypothesis

(DONALD F. TURNER, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal; 75 Harv. L. Rev., 1962, pp. 674-677; 677-678 and pp. 678-680 respectively.)

26 In the US the definition of “agreement” for antitrust enforcement purposes has been a strongly debated issue. Turner characterized the matter as a cause of a “legal battleground” and acknowledged that the semantics of the term “agreement” wouldn’t solve the question on whether oligopolistic interdependent decisions constitute an “agreement” (Donald F. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal; 75 Harv. L. Rev., 1962, p. 672). For an analysis on the ambiguity of “agreement” in antitrust see PAGE, WILLIAM H., Facilitating practices and Concerted Action Under Section 1 of the Sherman Act, (May 2008).


28 Id., pp. 666, 671 and 676.

29 Id., p. 665.

of independent individual decision, to their apparent individual self-interest.”

2. Conscious parallelism does not configure an agreement if it is the product of oligopolists’ independent reaction to common economic facts and the decision of each seller would be the same regardless of its competitors’ decision.

3. Conscious parallelism may be considered an agreement if it is the product of the oligopolists’ interdependent decisions, but it won’t be necessarily an unlawful agreement. To determine whether this kind of behavior constitutes an infringement to antitrust law, two questions should be addressed. First, regarding the nature and effect of the conduct: “(a) is the conduct simply the rational exploitation of the profit potential of a current oligopoly position; or is it, on the contrary, restrictive conduct which protects or augments market power or extends it into other market?” Second, regarding the possibility of applying a remedy that is effective and conveys more benefits than costs: “(b) can the conduct be effectively enjoined?”

On the other side, Posner criticized the interdependent oligopoly theory as inadequate to explain the “oligopoly problem” and proposed cartel theory instead to explain the relation between market concentration and the probability that pricing in the market is supracompetitive.

Posner thoroughly evaluated the factors that determined the costs and benefits of a cartel and argued that some form of explicit or tacit communication and implementation is necessary for successful price-
fixing. Posner identified three problems regarding the application of section I of Sherman Act to tacit collusion and solved them as follows:

1) An interpretative problem since section I of Sherman Act requires that there be concerted action. Posner affirmed that tacit collusion (also termed noncompetitive pricing) is a type of concerted action where meeting of the minds takes place in an analogous way as a unilateral contract. Hence, not being an “unconscious state” tacit collusion requires additional voluntary behavior by the sellers. Furthermore, according to Posner, tacit collusion should be considered an illegal restraint of trade since it is a “concert of firms for the purpose of charging monopoly prices and extracting monopoly profits”.

2) An evidentiary problem related to difficulty of proving collusion when acts of collusion cannot be shown. Posner acknowledged this to be the biggest problem and proposed the following types of evidence to prove guilt of sellers: 1) systematic discrimination by sellers, 2) prolonged excess of capacity over demand, 3) low frequency of changes in market price, 4) abnormal profits, 5) uniform and long-continued price leadership, 6) fixed market share for substantial period, 7) identical bids on nonstandard items, 8) refusal to offer discounts in spite of substantial excess capacity, 9) announcement of price increases far in advance in absence of legitimate justification, and 10) public statements regarding what the “right price” of the industry. It must be stressed that Posner also cautioned over the several limits of the cited indicia to infer collusion.

36 Id., p. 1569-1575.
37 “A seller communicates his ‘offer’ by restricting output, and the offer is ‘accepted’ by the actions of his rivals in restricting their outputs as well”. Id. p. 1576.
38 Id., p. 1592.
39 Id., p. 1578.
40 Id.
41 Id., pp. 1578-1584.
3) A remedial problem in regards to the effectiveness of the sanctions to alter the sellers’ illicit behavior. In this sense, Posner considered that the penalty structure was not satisfactory and even suggested that tacit collusion should be punished more severely (e.g. dissolution for extreme cases) since it is more difficult to detect\(^\text{42}\). Here again Posner differed from Turner and argued that the compliance with the prohibition of tacit collusion would not oblige sellers to behave irrationally, but would raise their costs of infringing the law\(^\text{43}\).

In sum, Posner dissents from Turner’s theories and considers that both explicit and tacit collusion may equally constitute a conspiracy in restraint of trade:

“The major implication of viewing noncompetitive pricing by oligopolists as a form of collusion is that section I of the Sherman Act emerges prima facie the appropriate remedy. There is, as we have seen, no vital difference between formal cartels and tacit collusive agreements; the later are simply easier to conceal; this suggests that the tacit colluder should be punished like the express colluder. And tacit collusion is voluntary behavior, which should be deterrable by appropriate punishment.”\(^\text{44}\)

1.1.2. ENFORCEMENT IN THE US AND THE EU

Mere price parallelism does not constitute an infringement of competition laws according US’s\(^\text{45}\), EU’s\(^\text{46}\) and Latin American case law. However, the treatment of conscious parallelism presents variations among jurisdictions.

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42 Id., pp. 1588-1593.
43 Id., pp. 1591-1592.
44 Id., p. 1575.
In the US plaintiffs have the burden of proving that there was an agreement (express or tacit) and that the evidence excludes independent firm behavior\(^47\). In other words, the plaintiff must present sufficient evidence of concerted action, where participants have a common design\(^48\). Inference of an agreement from consciously parallel conduct must be combined with other circumstantial evidence, referred by courts as “plus factors”, such as the following:

- A history of previous collusion\(^49\)
- Proof of meetings and/or communications among alleged conspirators\(^50\).
- Existence of facilitating practices\(^51\) or agreements to adopt common practices such as product standardization\(^52\).
- Concentrated market structure\(^53\).
- A radical departure from prior conduct\(^54\).
- The awareness of alleged conspirators that their competitors “had been solicited to conduct themselves similarly”\(^55\).


\(^{51}\)Id.


\(^{55}\)Id.
• Motive for collective action, in other words, “substantial profit motive for concerted action”\(^{56}\)

• Conduct is against the defendant’s individual self-interest, in other words if “compliance would not profit any single defendant unless all the other defendants similarly complied.”\(^{57}\)

Courts have not ranked these plus factors nor established minimum standards of necessary plus factors to infer an agreement from conscious parallelism\(^{58}\). Furthermore, it is not possible to conclude from the most recent Supreme Court’s case law\(^{59}\) whether Turner’s or Posner’s theories have the lead on US’s courts since the arguments of both scholars are concurrently present in the opinion.

In general terms the EU coincides with the US’s concept of agreement and concerted practices, where a broad set of practices are considered as such whenever there is a joint intention of parties or a concurrence of wills. The EU’s case-law defines concerted practices as “a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them…”\(^{60}\).

The Court of Justice “requires evidence of coordination or cooperation among firms that is likely to influence their conduct so as to restrict or distort competition; (…)”\(^{61}\). Nevertheless, case law recognizes that the requirement of independence (in business decision taking) between economic operators doesn’t deprive them “of the right

\(^{56}\) Id.

\(^{57}\) Id.


to adapt themselves intelligently to the existing and anticipated conduct of their competitors…”62.

In the *Wood Pulp* case the European Commission63 determined that forty undertakings and three of their trading associations had infringed article 85(1) of the Treaty (now article 81(1)) by concerting on prices and imposed fines on 36 of them. The existence of the concertation was not proven by the Commission through direct evidence but by indirect evidence: “the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981…”64.

According to the case law of the Court of Justice, commenting on the probative value of the evidence on which the Commission based its decision, “parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.”65 Based upon the reports of two expert witnesses appointed by the Court, the judgment annulled the Commission’s decision on the basis that in the case, concertation was “not the only plausible explanation for the parallel conduct”66.

According to EU’s case law, concerted practices may be proved through indirect evidence whenever it takes the form of information exchange or “from market behaviour from the parties which cannot be explained otherwise than by collusion.”67 However, the difference in regards to US’s approach is the apparent reluctance of the Commission (based on the Court of Justice’s case law) to support price-fixing cases

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63 Case COMP IV/29.725 - *Wood pulp* [1985].
65 *Id.*, par. 71.
66 *Id.*, pars. 75-79, par. 126.
on consciously parallel behavior jointly with economic evidence⁶⁸. An “oligopoly defense”, consistent with Turner’s views, prevails in EU’s assessment of cartel cases that lack direct evidence.

1.2. Oligopolies and Tacit Collusion in Latin America and the Caribbean

The markets of Latin America and the Caribbean (Latam) tend towards an oligopolistic structure due to historical, political, and economic reasons⁶⁹. Furthermore, oligopolies predominate in all sorts of markets for goods and services, including those markets that have a high impact in terms of poverty and development.

The predominance of oligopolies in Latam’s markets poses an important challenge for competition authorities (CAs). In the first place, CAs must enforce competition laws in markets where it is difficult to distinguish between conducts originated in collusive agreements among competitors from the behavior of interdependent firms that take unilateral decisions to adapt to the conditions of the market or anticipate their competitors’ decisions. The latter implies a high risk of enforcement errors, either by sanctioning legitimate behavior (false positives) or by failing to detect true anticompetitive practices (false negatives).

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⁶⁸ Cfr. Roger J. Bergh, Van den & Camesasca, Peter D. Competition Law and Economics. A Comparative Perspective, 2nd ed., Sweet & Maxwell, 2006. p. 325. Lennart Ritter & W. David Braun, European Competition Law: A Practitioner’s Guide, Kluwer Law, 2005, p. 108. “Since ‘Wood Pulp’, the Commission has not used economic evidence to infer the existence of an agreement, but has relied upon tangible evidence seized during searches of the cartel members’ premises. Where documents are hard to find, it is preferable for the Commission to bring a case based on hard evidence rather than having to argue that it can infer an agreement from the way parties behave on the market. This is because it would have to show that the parallel behaviour has no other explanation except prior collusion, and alternative plausible reasons for parallel behaviour can often be found.” (Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti and Adam Tomkins, European Union Law: text and materials, Cambridge University Press, 2006, p. 994.)

⁶⁹ Among others, due to the import-substitution policies applied by the States between the 1950s and the 1980s and to the small size of their national markets.
Tacit collusion cases imply high costs for CAs, tribunals and private parties. In terms of administrative costs, CAs must spend economic and human resources to prosecute. It is important to stress the fact that Latam’s CAs have scarce resources for the enforcement of antitrust, hence their costs must be minimized. Focusing on hard-core cartels (overt collusion, proved through direct evidence) and leniency programs may be less costly and more effective policies to prevent and sanction collusion in the markets.

Furthermore, expert testimonies and quantitative methods—which require experienced and robust authorities—are indispensable for any “conspiracy” case where there is no “smoking gun” evidence. A court’s ability to handle economic evidence is an important question, even for experienced jurisdictions such as the United States\(^{70}\). In effect, the use of expert witnesses may generate a principal-agent conflict of interest problem between the adjudicator (that is not a specialized economist) and the expert economist. Moreover, the effects of asymmetric information (adverse selection and moral hazard) may increase administrative costs and enforcement errors\(^{71}\).

In sum, “tacit collusion” is an issue that has inherent complexities and poses an important challenge for Latam’s CAs. The objective of this document is to analyze Latam’s competition rules on “tacit collusion” cases and their enforcement by the CAs and the courts. For this purpose, the document presents a thorough account of the cases adjudicated in Latam’s jurisdictions, analyzes the evolution of the case law, and finally compares and contrasts the rules and their enforcement under the spectrum of economic theory and the rules applied in the US (federal level) and the EU\(^{72}\).


\(^{72}\) The analysis takes into account the fact that in theory the same rule in different legal systems should provide similar incentives for the agents subject to its compliance; however, in practice -due to social, economic, cultural and institutional differences- the effects of a rule can be completely different. The more a legal rule
1.3. Scope of the document

The analysis of this document is deductive and is framed mainly from the point of view of positive economics, describing the law and institutional framework and its possible effects on the agents. However, from the analysis of the principles of the case law it is possible, in future studies— to draw conclusions from the point of view of normative economics, especially to assess the negative impact in achieving the aim of poverty reduction in Latam due to tacit collusion.

The second section is divided into chapters corresponding to each of Latam’s jurisdiction case law on tacit collusion. Each jurisdiction’s antitrust system is described as well as the prohibition on horizontal agreements established by the law.

Furthermore, all relevant facts, evidence (circumstantial or indirect), arguments and principles contained in tacit collusion decisions are thoroughly explained. The case law is presented in chronological order in order to appreciate its evolution. In several jurisdictions different periods of enforcement were identified. Finally, the main conclusions from the burden of proof and the standard of proof applied by the CAs and the courts are drawn from the cases. A check list of the attributes of successful defense and of successful prosecution in a tacit collusion case is included.

The third section contains the conclusions from the positive analysis presented in the previous section, by contrasting and comparing the different features of the jurisdictions’ competition laws and case law.

Finally, the document is complemented with a detailed list of the relevant cases of each jurisdiction and an Annex with the graphs and...
tables that illustrate the parallel behavior from several cases in Argentina, Brazil, Chile and Colombia.

2. LAWS AND ENFORCEMENT IN LATIN AMERICA

The beginning of the twenty first century coincided with the issuance of a third generation of competition laws in Latam and substantial reforms to the antitrust regimes established decades before. Although more than 90 per cent of the Gross National Product of the region is produced in the economies that have competition policies and laws, a number of Latam’s countries lack national antitrust legislation.

On the other hand, twenty one countries have competition laws currently in force: Argentina, Barbados, Bolivia Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Saint Vincent and the Grenadines, Uruguay, Trinidad and Tobago, and Venezuela. These antitrust systems have different degrees of maturity and the enforcement of the laws is not uniform. Furthermore, the Andean Community of Nations, the Caribbean Community (CARICOM) and the Mercado Común del Sur (Mercosur) have enacted supranational competition laws.

The following chart contains the statutory provisions for collusion and shows whether there are specific tacit collusion provisions (including additional guidance on tacit collusion such circumstantial evidence).

74 This is the case of the following countries: Antigua and Barbuda, Bahamas, Belize, Cuba, Dominica, Granada, Guatemala, Haiti, Paraguay, Saint Kitts and Nevis, Saint Lucia and Surinam.

75 For an inventory of current competition laws in Latam, see JUAN D. GUTIÉRREZ, La legislación de competencia en América Latina y el Caribe: historia, vigencia, aplicación y reformas, 2007.

76 The chart does not include the decrees that develop the competition laws unless they contain explicit provisions on collusion or circumstantial evidence.
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(Continúa)

77 The decree with force of law N° 1 of the year 2005 contains the restated, coordinated and systematized text of the current law. The last amendment of the Decree Law 211 of 1973 was the Law 20.361 of 2009, “Modifica el Decreto con Fuerza de Ley N° 1 del Ministerio de Economía, Fomento y Reconstrucción, de 2005, sobre Tribunal de Defensa de la Libre Competencia”.

78 Decree 1614 of 2009 created Ecuador’s competition authority that is competent to enforce the Andean Community’s Decision 608 regarding conducts that have effect solely in Ecuadorian markets.


80 Resolution 20 of 1999 contains the guidelines on the implementation of competition laws. Attachment I of the Resolution defines horizontal restrictive trade practices.

81 Article 1 defines “agreement”, among others, as any coordination among economic agents.
Attachment I of the Resolution 20 of 1999 establishes that certain “structural factors may favor cartelization: high level of market concentration, existence of barriers to the entry of new competitors, homogeneous products and costs, and stable cost and demand conditions.”

Section “a” of article 3 establishes as a restrictive practice any explicit or tacit agreement or concerted practice among economic agents. In relation to the proof of tacit collusion in the proceedings, as will be noted bellow, the Chilean rules admit the use of circumstantial evidence and presumptions. Article 22 of the law establishes that all the “means of evidence indicated in the article 341 of the Code of Civil Procedure shall be admissible as proof, as well as any findings or grounds that, in the opinion of the Court, are fit to establishing the relevant facts”.

Article 47 defines “agreement”, among others, as any practice that is concerted or tacit.

85 Article 4 defines “agreement” as “any meeting of minds expressed through contract or covenant, whether express or tacit, written or verbal, susceptible of aligning the competitive behavior of competitor economic agents”. Article 4 defines “concerted practice” as “any voluntary deed among competitor economic agents directed to annul competition among them”.

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<td>El Salvador</td>
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<td>- Art. 6</td>
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86 Article 1 defines “agreement”, among others, as any coordination among economic agents.

87 Article 12 establishes as circumstantial evidence that indicate the existence of anticompetitive agreements among competitors, among others, the price parallelism over a long period of time that cannot be attributed to price variations in the production factors.

88 Article 5 (ii) establishes as circumstantial evidence that indicates the typification of price fixing when two or more competitors establish the same maximum or minimum prices for a good or service.
The group of countries with more than a decade of practice and experienced CAs is composed of Argentina, Brazil, Chile, Colombia,
Costa Rica, Jamaica, Mexico, Panama, Peru\textsuperscript{92}, and Venezuela\textsuperscript{93}. The rest of the jurisdictions have enacted their laws very recently, lack the necessary economic and human resources or simply haven’t enforced their laws. Furthermore, some of the principal jurisdictions lack case law on tacit collusion. The most notorious examples of the latter are Mexico\textsuperscript{94}, Costa Rica\textsuperscript{95} and Jamaica.

Concerning Mexico’s and Costa Rica’s case, the enforcement has focused on cases of naked cartels and cases of horizontal practices where direct evidence was available\textsuperscript{96}. In the case of Jamaica representatives from the Fair Trading Commission have explained in international forums that parallelism in firms’ behavior is very common due to the small size of Jamaica’s economy. The Free Competition Act prohibits generally uncompetitive practices (section 7) as specifically certain horizontal practices, such as price fixing, restraints of production and bid rigging\textsuperscript{97}. However, according to David Miller, General Manager of the Jamaican Fair Trading Commission, tacit collusion is not proscribed under the Free Competition Act\textsuperscript{98}.

\textsuperscript{92} For a thorough study of the Peruvian case law on tacit collusion and abuse of collective dominance see EDUARDO QUINTANA SÁNCHEZ, Abuso de posición de dominio conjunta y colusión tácita: ¿infracciones sin contenido real?, in “Thémis Revista de Derecho” Nº 51, Perú, 2005.


\textsuperscript{97} Sections 34-37 of the Free Competition Act. The Act establishes that agreement “includes any agreement, arrangement or understanding whether oral or in writing or whether or not it is or is intended to be legally enforceable”.

\textsuperscript{98} “Parallelism in business, where each enterprise when deciding its prices and other market strategies, takes into consideration the likely reactions and counteractions...
Taking into account the status of Latam’s antitrust systems described above, this section describes and analyzes the laws, the decisions and case law on tacit collusion from Argentina, Brazil, Chile, Colombia, and Panama.

2.1. ARGENTINA

Argentina enacted its first competition law in 1933 (Act No. 11.210), which was amended in 1946 (Act No. 12,906). However, according to Coloma, the law was scarcely enforced for almost five decades\(^9^9\). The replacement of these laws by Act No. 22.262 in the year 1980 (called *Competition Defense Act*\(^1^0^0\) or CDA) marked the beginning of a more rigorous enforcement of competition laws in Argentina and the prolific production of an organized doctrine\(^1^0^1\). The latter may be explained, among other things, by the fact that the new law modified the antitrust system from a judiciary-based system to an administrative-based system\(^1^0^2\). In effect, Act No. 22.262 created a competition authority, the National Commission for the Defense of Competition (CNDC)\(^1^0^3\),

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\(^{99}\) From 1933 to 1980 only four cases were decided by the competition authority. \textit{Germán Coloma}, \textit{The Argentine Competition Law and its enforcement"}, 2007, pp. 2-3.

\(^{100}\) In Spanish, \textit{Ley de Defensa de a Competencia}.


\(^{102}\) See Germán Coloma, \textit{The Argentine Competition Law and its enforcement"}, 2007, p. 3.

\(^{103}\) Acronym according to its name in Spanish, \textit{Comisión Nacional de Defensa de la Competencia}.
an administrative body which delivered opinions that had to be approved (or disapproved) by the Secretariat of Commerce\textsuperscript{104}.

The current competition law in Argentina was enacted in the year 1999 through the Act No. 25,156\textsuperscript{105}, which maintained the basic structure of the previous Competition Defense Act but created a new antitrust authority, the National Court for the Defense of Competition (TNDC)\textsuperscript{106} (which has not yet been installed and so the CNDC has been maintained in its place) and included merger review as one of its functions\textsuperscript{107}.

According to the present structure the competition authority has a dual nature of prosecutor and adjudicator since it may both investigate and decide the cases\textsuperscript{108}. The investigations are initiated either by a private complaint or ex officio\textsuperscript{109}. The decisions, products of an administrative proceeding\textsuperscript{110} that must start at the CNDC (when established, before the TNDC), may be challenged before the courts\textsuperscript{111}, in the first instance before a court of appeals and in the second instance before the Supreme Court\textsuperscript{112}.

\textbf{104} According to Coloma, the Secretary of Commerce has systematically endorsed the CNDC’s opinions. See Germán Coloma, The Argentine Competition Law and its enforcement”, 2007, p. 3


\textbf{106} Acronym according to its name in Spanish, Tribunal Nacional de Defensa de la Competencia. See article 17, Act No. 25,156.


\textbf{108} Article 24, Act No. 25, 156.

\textbf{109} Article 26, Act No. 25, 156.


2.1.1. Statutes

Argentina’s CDA and the Decree 89 of 2001\(^{113}\), which develops the law, do not explicitly mention tacit agreements or conscious parallelism as forms through which collusion may take place. However, article 1 of the law prohibits any act or conduct \textit{manifested in any form} that has the object or the effect of restricting competition or constituting an abuse of a dominant position in such a way that the “general economic interest” is injured or potentially injured\(^{114}\). Moreover, as explained below, according to the Argentine doctrine and case law a \textit{form} in which anticompetitive practices may take place is parallelism.

Article 2 of the CDA establishes six types of collusive agreements: “price fixing, quantity fixing, horizontal market division, bid rigging, horizontal agreements to restrict investments and horizontal agreements to restrict research and development…”\(^{115}\). These conducts will be considered a restraint of trade\(^{116}\) if they distort competition in such a way that the “general economic interest” may be injured.

\(^{113}\) See the decree 89 of 2001 at: http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm

\(^{114}\) Cf. GERMÁN COLOMA, \textit{The Argentine Competition Law and its enforcement”}, 2007, pp. 4-6. GERMÁN COLOMA, Prácticas horizontales concertadas y defensa de la competencia, 2000, p. 28.

\(^{115}\) COLOMA, GERMÁN, \textit{The Argentine Competition Law and its enforcement”}, 2007, pp. 8-9. These types are defined in paragraphs a, b, c, d, e and h of article 2.

\(^{116}\) In Spanish, \textit{prácticas restrictivas de la competencia}.
2.1.2. DECISIONS AND CASE LAW

Argentina’s CAs and courts have studied several cases of explicit collusion\textsuperscript{117} and tacit collusion\textsuperscript{118}. Furthermore, the Argentinean authorities have developed a consistent case law regarding tacit collusion in the last twenty years. The basic conclusion from the cases, which follows the prevailing doctrine in antitrust, is that price parallelism is not enough evidence to prove the infringement of the competition law\textsuperscript{119}.

Most cases of tacit collusion were decided during the period when Act No. 22.262 of 1980 was in force. Since substantial characteristics of the Competition Defense Act (CDA) of the year 1980 were maintained by the reform of 1999, especially regarding the typification of anticompetitive practices\textsuperscript{120}, it is relevant to study the doctrine and case law developed between the years 1980 and 1999. In effect, according to Coloma “[t]he dominant Argentine antitrust doctrine therefore considers that the case law developed between 1980 and 1999 is still valid nowadays.”\textsuperscript{121}

The following chart lists the analyzed cases:

\textsuperscript{117} Among others, the most important cases of overt collusion are the following: Secretaría de Comercio, Resolución 442 de 1986 (Silos Areneros de Buenos Aires v. Arenera Argentina and others) CNDC, Dictamen No. 118 de 1989 (Lara Gas and others v. Agip and others); Secretaría de Comercio, Industria y Minería, Resolución 382 de 1996 (AGP v. CCAP and others); CNDC, Dictamen No. 417 de 2003 (Cámara Argentina de la Construcción and Delegación Entre Ríos v. Cooperativa Entrerriana de Productores Mineros Ltda. and others); and Dictamen No. 510 de 2005 (CNDC v. Air Liquide and others).

\textsuperscript{118} See GERMÁN COLOMA, Prácticas horizontales concertadas y defensa de la competencia, 2000, pp. 28 – 34.

\textsuperscript{119} Cf: GERMÁN COLOMA, Prácticas horizontales concertadas y defensa de la competencia, 2000, p. 31.

\textsuperscript{120} COLOMA, GERMÁN, Prácticas horizontales concertadas y defensa de la competencia, 2000, pp. 27-28.

\textsuperscript{121} COLOMA, GERMÁN, The Argentine Competition Law and its enforcement”, 2007, p. 3.
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<td><strong>La Casa del Grafito v. Rich Klinger y Bruno Cape (1989)</strong>&lt;sup&gt;123&lt;/sup&gt;</td>
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<td><strong>Fecliba v. Roux Ocefa, Rivero and Fidex</strong>&lt;sup&gt;128&lt;/sup&gt; (1998)</td>
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<td>Close investigation</td>
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<td><strong>Asociación de Agencias de Viajes y Turismo de Buenos Aires v. American Airlines and others (2001)</strong>&lt;sup&gt;129&lt;/sup&gt;</td>
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<td>Close investigation</td>
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<tr>
<td><strong>CNDC v. Loma Negra and others (2005)</strong>&lt;sup&gt;130&lt;/sup&gt;,</td>
<td>Cement</td>
<td>Sanction firms. The defendants appealed the decision and the first instance tribunal’s decision is still pending.</td>
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122 CNDC, Dictamen 065 de 1985.
123 CNDC, Dictamen 110 de 1989.
125 CNDC, Dictamen No.233 de 1995.
126 CNDC; Dictamen 209 de 1995
128 CNDC; Dictamen 284 de 1998.
129 CNDC, Dictamen No. 356 de 2001. Two officials from the CDNC that participated in the instruction of the proceeding published a brief account of the case, see HUGO ALEJANDRO ASPLINDH & MARINA BIDART, Acuerdo internacional en la industria de transporte aéreo internacional: su tratamiento por la Comisión Nacional de Defensa de la Competencia, en Boletín Latinoamericano de Competencia No. 13, 2001, pp. 3-8.
130 CNDC; Dictamen 513 de 2005. For a summary of the case see, OECD, Prosecuting cartels without direct evidence of agreement, 2006, pp. 80-82.
2.1.2.1. First period

The basic principles regarding tacit collusion were established by the CA in the cases decided between the years 1985-1999 that will be described bellow.

The first case was CNDC v. Duperial SA and Compañía Química S.A. (1985)\(^ {131}\), where the only two producers of phthalic anhydride in Argentina were investigated for having similar tendencies in prices and serving the market almost in equal quantities\(^ {132}\). In the decision the National Commission for the Defense of Competition (CNDC)\(^ {133}\) analyzes the structure of the market of production and commercialization of phthalic anhydride in Argentina, as well as its historical evolution\(^ {134}\).

According to the CNDC the fact that both firms produced the same amount of the product could’ve been explained by the fact that the firms were at the maximum level of their capacity. However, it was not the case since their usage oscillated between 20 and 30 per cent bellow the total capacity\(^ {135}\). On the other hand, the investigated firms alleged that the similar tendencies of prices since 1975 were a consequence of having a similar cost structure, since both firms had to purchase the same input (orthoxylene) to the sole provider of it in Argentina. However, the CNDC considered that this argument didn’t justify the parallelism of prices and the division or the market\(^ {136}\) since there were other costs that should have incidence, such as the difference in usage of the capacity and the transport costs\(^ {137}\).

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131 CNDC, Dictamen 065 de 1985.
133 Acronym according to its name in Spanish, Comisión Nacional de Defensa de la Competencia.
134 CNDC, Dictamen 065 de 1985, pp. 5-8.
135 CNDC, Dictamen 065 de 1985, p. 8.
136 CNDC, Dictamen 065 de 1985, p. 10.
137 CNDC, Dictamen 065 de 1985, p. 10.
Nevertheless, the CNDC’s opinion advised to accept the explanation of the investigated firms and close the investigation due to the following reasons:

- Since the entrance to the market of one of the firms the prices had decreased steadily, although the prices were high in comparison with international prices\(^{138}\).

- There were contradictory signs regarding the negative effects on the market\(^{139}\).

- There were competitive elements in the firms’ conduct, such as different payment conditions, different volume rebates and the absence of restriction in the election and change of providers of phthalic anhydride\(^ {140}\).

The CNDC’s opinion was endorsed by the Secretariat of Internal Commerce through the Resolución 328 de 1985.

The second case of tacit collusion decided by the CNDC four years later, *La Casa del Grafito v. Rich Klinger y Bruno Cape* (1989)\(^ {141}\), has similar characteristics of the previous. In both cases the market has duopolistic structure and the investigation started with a private complaint of a customer. In both cases the authority recognized elements that demonstrated a competitive conduct among the firms, in spite of the similarity of prices, and therefore the firms were not found guilty.

In this case two producers of compressed asbestos slabs, which served the 100% of the Argentinean market, were investigated due to a private complaint of a customer. According to the complaint there were similarities in prices both in the level of the variations as well as in the dates when these took place. The investigated firms argued that the

\(^{138}\) CNDC, Dictamen 065 de 1985, pp. 10-11.

\(^{139}\) CNDC, Dictamen 065 de 1985, p. 11.

\(^{140}\) CNDC, Dictamen 065 de 1985, p. 12.

\(^{141}\) CNDC, Dictamen 110 de 1989.
similar prices were given by similar cost structures and that the fluctuation of inputs determined the rise and fall of prices.

According to the CNDC there were important differences regarding the commercialization by the investigated firms, especially concerning the conditions of payment and the quality of the product\textsuperscript{142}.

The CNDC analyzed the structure of the market and concluded that the variations in their market share (in terms of volume) in the period 1980-1984 were evidence of a competitive conduct among the firms\textsuperscript{143}. Furthermore, the CNDC stressed the fact that the market was not under-supplied and that there were no restrictions in the product requests by the customers\textsuperscript{144}.

Taking into account these arguments, the CNDC concluded that the evidence did not prove the existence of a collusive agreement and advised to close the investigation. The CNDC’s opinion was endorsed by the Secretariat of Internal Commerce through the Resolución 70 de 1989.

The case Secretaría de Energía v. YPF, Esso and Shell (1994)\textsuperscript{145} is, according to G. Coloma, the most important precedent of tacit collusion since the core principle was established: price parallelism is not enough to prove a concerted practice\textsuperscript{146}.

The investigation started due to a complaint of the Secretariat of the Department of Energy\textsuperscript{147} that accused three fuel refiners due their similarities in pricing policies\textsuperscript{148}. Two specific conducts provoked the complaint: i) the firms didn’t decrease the price of fuel and its derivatives,

\begin{itemize}
  \item \textsuperscript{142} CNDC, Dictamen 110 de 1989, p. 10.
  \item \textsuperscript{143} While Rich Klinger S.A. had dealt successfully with the 81/82 recession and increased the volume of sales in 1984 by 200 tons, Bruno Cape S.A had reduced the volume of sales by 100 tons. (CNDC, Dictamen 110 de 1989, p. 11).
  \item \textsuperscript{144} CNDC, Dictamen 110 de 1989, p. 12.
  \item \textsuperscript{145} CNDC, Dictamen 160 de 1994.
  \item \textsuperscript{146} Germán Coloma, Prácticas horizontales concertadas y defensa de la competencia, 2000, p. 31.
  \item \textsuperscript{147} In Spanish, Secretaría de Energía.
  \item \textsuperscript{148} Although it was a case of horizontal collusion the secretary accused them of abusing of their dominant position in the market.
\end{itemize}
although the price of petroleum had fallen, and ii) an increase of the tax on liquid fuel was simultaneously passed on to the customers by equally increasing the retail price.\(^{149}\)

The CNDC, as in the previous cases, described the recent history and structure of the national fuel market. The market was characterized as concentrated since the three fuel refiners had 85% of the market share and one of those firms (YPF S.A.) had 50% of the market share.\(^ {150}\) Furthermore, the market was restricted because the import of fuels and their commercialization by other firms was not viable and that there was a vertical integration (since the gas stations are owned by the fuel refiners). Finally, the agency argued that the demand in the retail fuel market was inelastic.\(^ {151}\)

Between January 1993 and March 1994 there was a similar pricing tendency among the firms and there were two occasions, noted by the Secretariat of the Department of Energy, where the movements were identical (See Annex 1). However, the CNDC concluded that the price variations didn’t have a degree of similarity and simultaneousness that proved a concerted practice.\(^ {152}\) Moreover, the CNDC acknowledged that the offer of fuel was very concentrated and that the three firms were price-takers, but that there was not enough evidence to prove an abuse of dominant position.\(^ {153}\)

The CNDC’s opinion advised the closure of the investigation and proposed to monitor the market of fuel in all the territory to prevent possible anticompetitive practices. The CNDC’s decision was endorsed by the Secretariat of Commerce and Investment through the Resolución 99 de 1994.

In René Veder Diez v. Agip and others (1995)\(^ {154}\), the CNDC investigated, due a private complaint, a supposed collusion among several firms that bottled liquid gas (LPG) which consisted on a

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149 CNDC, Dictamen 160 de 1994, p. 2.
151 CNDC, Dictamen 160 de 1994, p. 15.
154 CNDC, Dictamen No.233 de 1995.
simultaneous increase of prices in a degree of 40%. This case has an important precedent concerning almost the same firms. In effect, in *Lara Gas and others v. Agip and others* (1989)\(^{155}\) the CNDC’s determined through direct evidence that the investigated firms of the bottled LPG market had colluded. The opinion was endorsed by the Secretariat of Interior Commerce and the firms were fined. The case was reviewed by the competent tribunals and finally it reached the Supreme Court that upheld the decision in a landmark opinion\(^{156}\).

In the case initiated in the year 1991 due to a private complaint the end of the story was different. While in the previous case the decision was based upon direct evidence, in the case decided by the CNDC in the year 1995 there was no “smoking gun” evidence of collusion and the indirect evidentiary elements were not conclusive. According to the evidence the price tendency among the investigated firms was different\(^{157}\). Furthermore, the CNDC found that in the city of Posadas the liquid gas was imported from Paraguay, apparently without paying taxes or tariffs, thus generating more competition and preventing local prices from increasing\(^{158}\). The CNDC concluded that collusion was not proved and advised the closure of the investigation. The CNDC’s opinion was endorsed by the Secretariat of Commerce and Investment through *Resolución 281 de 1995*.

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155 CNDC, Dictamen No. 118 de 1989.

156 The market related to bottled LPG in Argentina has been subject of several investigations. Another case where firms were fined for collusion, based upon price parallelism plus direct evidence (testimonies), was *Bariloche Neighbourhood Councils v. Suppliers, distributors and/or sellers of bottled LPG* (CNDC, Dictamen No. 417 de 2003). The conduct between several LPG bottlers took place in the town of Bariloche. For a brief summary of the case, see Ismael Malis, Diego Povolo and Orge Pereda, *Anti-Cartel Activity in Argentina*, Argentina’s Country contribution to the “Third Meeting of the Latin American Competition Forum - Madrid, 19-20 July 2005”, p. 3.


158 CNDC; Dictamen No. 186 de 1995, p. 10.
In *Alberto Dupuy v. VCC and Cablevisión*\(^{159}\) (1995) two cable television companies were accused of price fixing and market division. Regarding the fact that in some places only one firm was present, the firms alleged that their conduct was justified due to the nature of the demand in certain zones and the high fixed costs of extending the network.

According to the investigated firms, when the people of a zone had low purchase power, the place was not densely populated, or it was too far away, the existence of a second provider of the service wouldn’t be profitable. However, according to the findings of the CNDC in many zones both firms effectively competed. Among other evidence, the CNDC ordered the practice of a survey of the clients of both cable firms which proved that in some areas there was presence of both firms (therefore allowing the customers to decide and even change their cable television provider) while in other zones only one of the firms operated\(^{160}\).

The economic analysis of the market practiced by the CNDC was not included in the decision, as in previous cases where the market structure and its history were described in detail.

The CNDC concluded that there was no evidence of abuse of dominant position or agreements that limited or distorted competition based on the following facts: i) the monthly fees charged by the firms were not the same (no price parallelism), ii) there were zones in which both firms competed and iii) the existence of new competitors that had entered the market\(^{161}\). The Secretariat of Commerce and Investment endorsed the opinion of the CNDC through the *Resolución 243 de 1995*.

In the five cases described up to now, from the years 1985-1995, the investigated firms were not found guilty of collusion mainly because the CNDC determined that their price tendencies had differences which excluded the existence of price parallelism. Furthermore, the CNDC

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159 CNDC; Dictamen 209 de 1995.
160 CNDC; Dictamen No. 209 de 1995, pp. 5-6.
161 CNDC; Dictamen No. 209 de 1995, p. 9.
also found elements of competitiveness in the firms conduct or in the conditions of the market which discarded collusion. These cases do not contain an in-depth analysis of the evidentiary elements necessary to prove tacit collusion.

2.1.2.2. Second period

In the cases that will be described bellow the analysis of the CNDC includes more insights about the evidentiary elements that are conclusive to detect tacit collusion. especially due to the fact that in two of the cases the firms were found guilty of tacit collusion.

The first case in Argentina where firms were penalized due to parallel behavior was CNDC v. Axle and others (1997)\textsuperscript{162}. In this case five producers of “safety-valves” for LPG bottles were fined for having agreed to use a single marketing company, which was in charge to decide which firm would sell its product to each customer\textsuperscript{163}.

According to the CNDC the distribution system used by the firms, where a single commercial representative would inform each customer which company would provide the product, the price and other conditions of sale, laid the necessary conditions for a concerted price policy\textsuperscript{164}. Hence, it is important to note that this is not a plain parallel behavior case, since the marketing company that coordinated the producers of safety valves represented an ancillary restraint that facilitated collusion.

In Fecliba v. Roux Ocefa, Rivero and Fidex\textsuperscript{165} (1998) three pharmaceutical laboratories were accused for having agreed on a price increase of their physiological serums during the first months of the year 1995. The investigation started due to a private complaint filed by a

\textsuperscript{162} Secretaría de Comercio, Industria y Minería, Resolución No. 730 de 1997.
\textsuperscript{163} COLOMA, GERMÁN, \textit{The Argentine Competition Law and its enforcement”}, 2007, p. 10.
\textsuperscript{164} COLOMA, GERMÁN, \textit{Prácticas horizontales concertadas y defensa de la competencia}, 2000, p. 33.
\textsuperscript{165} CNDC; Dictamen 284 de 1998.
hospital association (Fecliba) of the Province of Buenos Aires. This case, as explained below, is a very important precedent since the CNDC established, for the first time, a structured and detailed doctrine regarding tacit collusion.

According to the CNDC’s analysis the relevant market was composed by two types of physiological serums with a high degree of homogeneity commercialized by the laboratories in Argentina. Furthermore, the CNDC concluded it was a contestable market since the barriers of entry were low and there are no barriers to international trade (due to tariffs)\textsuperscript{166}. Besides the investigated firms, there were other five laboratories that operated at a national level, laboratories that sold the serums at a regional level and imported Brazilian serums.

The three investigated firms had approximately 68\% of the market share (in terms of volume) in the year 1995 and were members of the same trade association\textsuperscript{167}. The CNDC also studied the price tendency during the year 1995 and concluded that there was a fluctuation of prices in the first part of the year (decreasing since February and increasing in April) and stabilization until September\textsuperscript{168}. The CNDC studied the invoices of the laboratories and concluded that their price increases and average prices were not similar (See Annex 1)\textsuperscript{169}. In fact, although there was a price increase, during the first six months of year the average of variation was different for each firm, as the following table shows\textsuperscript{170}:

<table>
<thead>
<tr>
<th>Type of product</th>
<th>Ocefa</th>
<th>Rivero</th>
<th>Fidex</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physiological solution</td>
<td>19</td>
<td>31</td>
<td>31</td>
</tr>
<tr>
<td>Dextrose</td>
<td>7</td>
<td>27</td>
<td>20</td>
</tr>
</tbody>
</table>

\textsuperscript{166} CDNC, Dictamen 284 de 1998, pp. 2-3.
\textsuperscript{167} CDNC, Dictamen 284 de 1998, pp. 3-4.
\textsuperscript{168} CDNC, Dictamen 284 de 1998, p. 4.
\textsuperscript{169} CDNC, Dictamen 284 de 1998, p. 4.
\textsuperscript{170} CDNC, Dictamen 284 de 1998, p. 12.
In this case the CNDC explicitly developed the concept of collusion under the form of price parallelism. The competition authority established that even though a concerted practice consisting in a price increase among competitors may configure an infringement of competition laws, it must be distinguished (through evidence) from other phenomena that may occur in the market such as an increase in production costs or scarcity due to an increase of the demand\textsuperscript{171}. Moreover, the CNDC acknowledged that even if a price increase is an effect of collusion in a market, it is very difficult to distinguish between the firms that colluded and the firms that simply reacted to a variation that is exogenously given\textsuperscript{172}.

Finally, the CNDC argued that according to economic theory, low barriers of entry and the viability of international trade of a good makes price fixing innocuous, since an increase of price will attract new local and international competitors\textsuperscript{173}.

The authority stated that since there was no explicit evidence of collusion in the case it was necessary to evaluate the feasibility of collusion based upon the market’s conduct. As noted before, the CNDC argued on the one hand that the market had low barriers of entry (which deters collusion) but on the other hand, that the demand for the product was inelastic (which incentives collusion)\textsuperscript{174}.

The CNDC finalized its argumentation by noting that during the period of time where price increases took place there were several phenomena that would impede a successful collusion\textsuperscript{175}. This is the case of an increase in interest the rates and a financial crisis in the economy, which makes unpredictable the fluctuation of demand and reduces the possibility of monitoring the conduct of the market\textsuperscript{176}.

\textsuperscript{171} CDNC, Dictamen 284 de 1998, p. 11.
\textsuperscript{172} CDNC, Dictamen 284 de 1998, p. 11.
\textsuperscript{173} CDNC, Dictamen 284 de 1998, p. 12.
\textsuperscript{174} CDNC, Dictamen 284 de 1998, p. 13.
\textsuperscript{175} CDNC, Dictamen 284 de 1998, p. 13.
\textsuperscript{176} CDNC, Dictamen 284 de 1998, p. 13.
The CNDC recognized that even if the hypothesis that the price increases were product of collusion were true, it wouldn’t be possible to distinguish between the firms that were part of it from the firms that were not responsible of collusion\textsuperscript{177}. Additionally, the CNDC advises to close the investigation, opinion that was endorsed by the Secretariat of Industry, Commerce and Mining through Resolución 211 de 1998.

After the enactment of the current competition law in the year 1999 the CNDC has dealt with only two cases of tacit collusion. In \textit{Asociación de Agencias de Viajes y Turismo de Buenos Aires v. American Airlines and others} (2001)\textsuperscript{178} a trade association of Buenos Aires’ travel agents (AVIABUE) filed a complaint against three airlines (Continental Airlines, British Airways and United Airlines) for abuse of dominant position through a simultaneous reduction (from 9\% to 6\%) of the commissions paid to travel agents\textsuperscript{179}.

The CNDC established that an infringement of article 1 of the CDA is configured when the following circumstances are proved:

\begin{enumerate}
  \item The dominant position of the investigated firms.
  \item A reasonable possibility that the investigated firms may acquire the necessary purchase power (regarding the travel agencies’ services) that makes feasible a sustainable abuse of dominant position and collusion.
\end{enumerate}


\textsuperscript{178} CDNC, Dictamen No. 356 de 2001. Two officials from the CDNC that participated in the instruction of the proceeding published a brief account of the case, see HUGO ALEJANDRO ASPLINH, y MARINA BIDART, Acuerdo internacional en la industria de transporte aéreo internacional: su tratamiento por la Comisión Nacional de Defensa de la Competencia, en \textit{Boletín Latinoamericano de Competencia} No. 13, 2001, pp. 3-8.

\textsuperscript{179} Interestingly a similar case (in the same dates and involving Continental Airlines and American Airlines) was studied by the competition authority of Colombia that found Continental Airlines, British Airways and American Airlines not guilty of collusion in spite of a simultaneous reduction (from 10\% to 9\%) of the commissions paid to the travel agencies.
3. A reasonable possibility that the conduct may harm the “general economic interest”.\(^{180}\)

After a detailed analysis of the relevant market (product and geographical) the CNDC concluded the following:

- British Airways did not have a dominant position in the market for direct air transport in the route Buenos Aires – London due to the competitive pressure posed by other three airlines (different from the other two investigated firms). Therefore British Airways did not have a dominant position (from the side of the demand) in the in the market for emission of airline tickets\(^{181}\).

- In the routes Buenos Aires – New York and Buenos Aires – Miami the fluctuation of the market share of the airlines (in terms of passengers) and the expansion of the demand (between the years 1994 and 1999) signaled a competitive dynamic\(^{182}\).

- Regarding the routes Buenos Aires – New York and Buenos Aires – Miami the CNDC concluded that the market was an oligopoly and that the three competing firms at the time of the complaint (American Airlines, Aerolíneas Argentinas and United Airlines) had certain degree of market power\(^{183}\). However, from the latter an abuse of dominant position or harm to general economic interest couldn’t be deducted since the markets present a competitive dynamic\(^{184}\).

- In three analyzed routes collusion wasn’t feasible since in the first case, British Airways would be expected to collude with firms different from the investigated ones and in the second case American

\(^{181}\) CDNC, Dictamen 356 de 2001, p. 20.
\(^{183}\) CDNC, Dictamen 356 de 2001, pp. 28-29.
\(^{184}\) CDNC, Dictamen 356 de 2001, p. 29.
Airlines and United Airlines would have to include in their agreements Aerolíneas Argentinas.

To decide upon the accusation of a supposed collusion to reduce the commissions paid to travel agencies, due to a simultaneous and identical variation reduction, the CNDC made a detailed presentation of the concepts of “tacit collusion” and “conscious parallelism” according to economic theory. Oligopoly pricing, the interdependence of the firms in such a market, the structural reasons that cause these markets as well as the possible effects on competition were described in the decision. Furthermore the CNDC reviewed a similar case that took place in the US in the year 1997 and the rules of the relevant US case law. The CNDC stressed the fact that according to US case law mere price parallelism is not enough to infer the an infringement of the Sherman Act and made a short account of the so called plus factors (additional circumstantial or indirect evidence) which must be present to prove tacit collusion.

Taking into account the economic theoretical framework and foreign case law the CNDC concluded the following:

- Regarding the route Buenos Aires—London, where British Airways had an important position and American Airlines and United Airlines had no participation, there were no elements that showed that British Airways would have profited from the coordination with American Airlines and United Airlines.

- Regarding the routes Buenos Aires—New York and Buenos Aires—Miami there were several elements that discarded collusion:

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186 CDNC, Dictamen 356 de 2001, p. 36.

187 CDNC, Dictamen 356 de 2001, p. 36.
First, the fact that Aerolíneas Argentinas (which had a similar market share than the other two participants) didn’t follow the conduct of American Airlines and United Airlines proved that these airlines found profitable the reduction of the commissions independently of the decision of Aerolíneas Argentinas\(^{188}\).

Secondly, the fact that United Airlines decreased the commissions after American Airlines could be a signal of a competitive conduct since United didn’t want to stay behind regarding the competitive advantage that American could achieve through lower costs\(^{189}\).

Thirdly, the existence of other type of retributions to the travel agencies that are not publicly known would make more difficult any sort of agreement; without a system of information exchange it wouldn’t be possible to monitor the compliance with the agreement.

Fourth, the explanation given by the airlines was plausible in the sense that the reduction of the commissions would lower their costs\(^{190}\).

The CNDC advised the closure of the investigation against the airlines. This opinion was endorsed by the Secretariat of Competition Defense through the *Resolución 115 de 2001*.

The most recent case of tacit collusion, *CNDC v. Loma Negra and others (2005)*\(^{191}\), is also the most important precedent because of the

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\(^{188}\) CDNC, Dictamen 356 de 2001, p. 38.


\(^{190}\) The case *AAAVT v. Junta de Representantes de Compañías Aéreas and others* (CNDC, Dictamen No. 324 de 1999) is a relevant precedent, since a travel agencies’ association also filed a complaint against airlines for the reduction in the commissions. The CNDC concluded that the reduction was legal since it complied with the orders of IATA and most importantly because there was general tendency of decreasing prices which signaled competition in the market (p. 10).

complex analysis of the authority and the evidence that determined its final outcome. In an unusually long decision (more than 200 pages), the CNDC concluded that four cement producers and a trade association had infringed the competition law\textsuperscript{192} by: i) agreeing quotas of production in the national market, with a corollary agreement on prices and other commercial conditions in certain regions, and ii) exchanging information regarding sensible competition through a statistical information system managed by the trade association of cement producers managed by the trade association.

The CNDC started an \textit{ex officio} investigation in August 1999 against four cement producers and their trade association for supposed price fixing and horizontal division of the market during the period of time between July 1981 and August 1999. A magazine’s article, written by the journalist Marcelo Zlotogwiazda, determined the initiation of the investigation. According to the author, the cement producers had agreed to collude through meetings, memos, emails and information exchange. During the proceeding the journalist’s testimony also included a document written by his “source” (a supposed high ranked ex employee of one of the firms) that contained a detailed account of the supposed collusion during twenty years. A big load of evidence was presented and analyzed during the six years of proceedings\textsuperscript{193}, but the main proof was the statistical information exchange system. The system was considered direct evidence of the agreement of exchange of information (sensible for competition) and the main part of the evidence concerning the anticompetitive conduct of allocation of quotas of production and market participation\textsuperscript{194}.

\textsuperscript{192} Since the facts occurred since 1981, the firms infringed the Act No. 22,262 of 1980.
\textsuperscript{193} Among others, the following: 1) Investigated firms’ documents obtained through the search of the premises warranted by a judge. 2) Information delivered by the investigated firms regarding pricing and production. 3) Information delivered by the customers. 4) Affidavits of the investigated firms’ managers and employees 5) Accounting expertise of the investigated firms’ invoices. 6) Information delivered by AFCP regarding the installed capacity of the market during the investigated period. 7) Testimony of the journalist MARCELO ZLOTOGWIAZDA.
\textsuperscript{194} CNDC, Dictamen 513 de 2005, p. 39.
The CNDC’s decision described Argentina’s market of Portland Cement in terms of its production process, the history of the market and its structure\textsuperscript{195}. The market was characterized as highly concentrated (the four fined firms had a 100% of the market share), with the leadership of Loma Negra C.I.A.S.A that always had a participation above 40% during the investigated period\textsuperscript{196}. The latter was due to the existence of high barriers of entry (sunk costs, vertical integration, economies of scale and idle capacity of incumbents) and the difficulties of international trade due to the nature of the good\textsuperscript{197}. High costs of fleets also created a natural barrier of entry that determined a regional structure of the market, although in most places there were always at least two firms that served the market. The CNDC concluded that the market of cement was an oligopoly.

The relevant market of the case, according to the CNDC’s findings, was the production and commercialization of Portland cement at a national level\textsuperscript{198}.

Regarding the conducts of the firms, the CNDC considered that the exchange of information (sensible for competition) infringes the competition law in two different ways: i) as part of the agreement on quotas and market participation, since it allowed the firms to control their agreement and to detect deviation from it and ii) as an agreement on exchange of information sensible for competition, it infringed the law by itself since it distorts competition and facilitates coordination or tacit collusion, therefore reducing the incentives of the firms to compete\textsuperscript{199}. The CNDC explicitly acknowledged the fact that in most cases it is impossible to prove the existence of cartels through direct proof, but that indirect evidence may constitute enough evidence to prove a cartel\textsuperscript{200}. The facts that proved collusion in the case, according to the CNDC, were the following:

\begin{itemize}
\item[196] CNDC, Dictamen 513 de 2005, pp. 24-27.
\item[197] CNDC, Dictamen 513 de 2005, pp. 27-30.
\item[198] CNDC, Dictamen 513 de 2005, pp. 32-42.
\item[199] CNDC, Dictamen 513 de 2005, p. 37 and pp. 102-106.
\item[200] CNDC, Dictamen 513 de 2005, p. 41.
\end{itemize}
1. The statistical information exchange system managed by the trade association: the system provided recent and monthly information regarding each firm’s: production, stock, imports, sales, customers, type of package, transport and destiny of the product\textsuperscript{201}. The CNDC took into account the development of game theory – regarding the inherent instability of cartels and the incentives that a firm has to “cheat” – and concluded that the information system could only be explained by the fact that the firms needed to monitor the quotas of production of the participants\textsuperscript{202}. Moreover, the system was implemented to detected deviations from the agreed terms and also permitted the firms to adjust their conduct to comply with the agreement\textsuperscript{203}.

2. Auditing firms: the cement producers hired auditing firms for dispatching and invoicing to control the exactitude of the information system\textsuperscript{204}.

3. Employees of the firms were involved in the information system: the employees were in charge of sending and receiving the information\textsuperscript{205}.

4. Complaints against firm that delayed the delivery of information for the system\textsuperscript{206}.

5. Trade association’s weekly reports of each firm’s dispatch\textsuperscript{207}.

6. Disclosure of strategic information by the leading to its competitors\textsuperscript{208}.

\textsuperscript{201} CNDC, Dictamen 513 de 2005, pp. 44-55.
\textsuperscript{202} CNDC, Dictamen 513 de 2005, p. 55.
\textsuperscript{203} CNDC, Dictamen 513 de 2005, pp. 43-44.
\textsuperscript{204} CNDC, Dictamen 513 de 2005, pp. 56-59.
\textsuperscript{205} CNDC, Dictamen 513 de 2005, pp. 59-60.
\textsuperscript{206} CNDC, Dictamen 513 de 2005, pp. 60-63.
\textsuperscript{207} CNDC, Dictamen 513 de 2005, pp. 63-64.
\textsuperscript{208} CNDC, Dictamen 513 de 2005, pp. 64-65.
7. Confidential nature of the information shared\(^{209}\).

8. Unusual preoccupation of the firms to improve the information system\(^{210}\).

9. Information revealed by and ex employee of Loma Negra, which coincided with the firms’ conduct and the quota division\(^{211}\).

10. Precedents of collusion: according to the CNDC the cartel was not based on an agreement of prices due to the regional nature of the market that would make it difficult to enforce. However, according to an audit on the prices charged by the firms, the CNDC concluded that there were episodes of price fixing in three cities (Santa Fe, Rosario and Córdoba)\(^{212}\).

11. Meetings of firms’ sales employees\(^{213}\).

12. The explicit requests made by the firms to a competitor for reducing its quantity of production\(^{214}\).

After the explaining these facts, which proved the infringement of the law, the CNDC set the theoretical framework that explains the logic of information exchange as a form of facilitation for cartelization. The elimination of the uncertainty regarding the rival’s future conducts allows them to reduce competitive rivalry\(^{215}\). Moreover, the CNDC’s decision also made a thorough account of foreign (UK, US and EC) regulation, doctrine and case law regarding exchange of information and tacit collusion\(^{216}\).

\(^{212}\) CNDC, Dictamen 513 de 2005, pp. 73-79.
\(^{213}\) CNDC, Dictamen 513 de 2005, pp. 79-81.
\(^{214}\) CNDC, Dictamen 513 de 2005, pp. 82-92.
\(^{215}\) CNDC, Dictamen 513 de 2005, p.105
\(^{216}\) CNDC, Dictamen 513 de 2005, pp. 107-123.
Finally, the CNDC argued that the firms’ conducts configured a harm to “general economic interest” since the consumers were directly damaged due to the artificial reduction of the quantity produced and the consequent increase of prices. The CNDC discarded as a defense of the cement producers the increase in installed capacity and the supposed firms’ low profitability and advised the imposition of record fines equivalent to USD 106 million. The CNDC’s opinion was endorsed by the Secretariat of Technical Coordination trough the Resolución 124 de 2005. The defendants appealed the decision and the first instance tribunal’s decision is still pending.

2.1.3. Conclusions

The cases discussed above indicate that Argentina’s competition authorities have applied a very high standard of proof regarding tacit collusion from 1985 up to date. To date there have been no judicial pronunciation over tacit collusion in Argentina. However, as noted before, the first instance decision regarding CNDC v. Loma Negra and others (2005) is still pending.

From the nine cases of tacit collusion analyzed in this document, in different markets of goods and services, only in two of them were the firms found guilty. Interestingly, in six cases initiated through private complaints the investigated firms were absolved from the charges, while in two cases initiated ex officio by the CNDC the firms were penalized. The most common parallel behavior analyzed by the CNDC was price parallelism (in nine cases) although market division was also investigated in at least four of the cases.

All the cases were set in concentrated markets (three cases of duopolies and the rest oligopolies) that were analyzed in detail by the CA in terms of the markets’ history and structure, with emphasis on the investigated period.

A detailed economic analysis of the investigated market has always been present in the CA’s decisions. However, since Fecliba v. Roux Ocefa, Rivero and Fidex (1998) there has been explicit inclusion of
considerations upon the economic theory underlying tacit collusion and international case law (especially from the US, UK and EC). Furthermore, in Asociación de Agencias de Viajes y Turismo de Buenos Aires v. American Airlines and others (2001) included commentary on the so called plus factors established by US case law are commented and in CNDC v. Loma Negra and others (2005) the CNDC cited to similar cases studied in the UK and the EC.

Finally, abuse of dominant position was an issue (due to a simultaneous increase of prices) in three of the cases. In each case the definition of the relevant market was an important matter of debate as well as the market power of the firms. Collective dominance and its abuse were assessed in these cases, although the CNDC didn’t develop the concept explicitly nor its relation with tacit collusion.

2.1.3.1. Attributes of successful defense

As noted before, the basic assumption applied by the competition authorities is that parallel behavior, by itself, is not enough to prove an illegal concerted practice. The latter follows the prevailing economic reasoning and the case law of the US and EU.

From the analyzed cases of tacit collusion in Argentina’s antitrust system, the following conclusions may be drawn regarding the attributes of a successful defense in a tacit collusion case:

1. The main proof that determined a closure of the investigation was that the conduct of the firms was not simultaneous or similar. In eight of the analyzed cases the firms proved that their behavior was not parallel through the following facts (among others): a) their prices were different due to rebates and discounts; b) the goods of each firm were different (in terms of quality); and c) the payment conditions offered were different.

2. The market structure or exogenous phenomena may legitimately cause parallelism, especially a simultaneous increase of prices. Besides oligopolistic behavior, the CNDC
mentioned as possible justifications for parallel behavior various phenomena, such as the following: a) the existence of a common cost structure in concurrence with a general increase in production costs; b) a change in consumer preferences; c) an increase in demand that causes scarcity; and d) the fact that all the firms produce at full capacity of utilization.

3. **Claims of tacit collusion may be rebutted if the investigated firms do not have a profit motive for concerted action.** This was the case in *Asociación de Agencias de Viajes y Turismo de Buenos Aires v. American Airlines and others* (2001) where CNDC concluded that since American Airlines and United Airlines didn’t participate in the route Buenos Aires – London (a relevant market by itself) British Airways would have not profited from the coordination with these firms.

4. **Claims of tacit collusion may be rebutted if there is proof of competitive dynamism of the market.** Among others, the CNDC identifies as competitive elements reflected in the market’s performance during the investigated period, the following: a) tendency of price decreases, b) existence of different volume rebates and other commercialization conditions, c) variations of market shares and expansion of the market, d) markets are not undersupplied, e) existence of competition through imports, f) entrance of new competitors, and g) low barriers of entry.

2.1.3.2. **Attributes of successful prosecution**

As explained before, in the cases where firms were penalized due to parallel behavior there was also the presence of *ancillary restraints* (common marketing company or information exchange system) that facilitated collusion. Still, even when the CNDC proves tacit collusion, the CNDC has acknowledged that there is an inherent difficulty in distinguishing firms that participated in the concerted practices from the ones that just had to follow due to an exogenous condition of the market.
In conclusion, Argentina’s standard of proof indicates that a successful prosecution in a tacit collusion case must comply with the following attributes:

1. **Proof of the existence of parallel behavior among the investigated firms.**

2. **A highly concentrated market structure with low contestability,** characterized by few participants, high barriers of entry, inelastic demand, low or lack of international trade or an undersupplied market.

3. **Lack of any plausible explanation for the firms’ conduct different from the existence of tacit collusion.** For example, in *CNDC v. Loma Negra and others* (2005) according to the CNDC the firms’ behavior, which eliminated the uncertainty regarding the rival’s future conducts, allowed them to reduce competitive rivalry.

4. **Proof of the existence of practices that facilitate collusion,** such as a common marketing company that allocates clients and sets prices, the existence of an information exchange system that allows the firms to coordinate their actions and the hiring of audit firms that monitor any deviation. It is important to stress the fact that in *CNDC v. Loma Negra and others* (2005) an information exchange system that allowed the firms to share data regarding vital information for competition was considered, by itself, an infringement of the competition law.

In conclusion, Argentina’s standard of proof is close to both the EU’s and US’s approach, in the sense that a parallel conduct will only constitute an infringement if collusion is the only plausible explanation for such conduct and there is evidence of concerted practices represented by contacts among competitors and/or exchange of information about their commercial policy (past, present and future).
2.2. Brazil

Article 148 of Brazil’s 1946 Constitution was the basis for the antitrust system established by the law 4137 of 1962\textsuperscript{217}. This law created the current competition authority, the Administrative Council for Economic Defense (CADE)\textsuperscript{218} and established substantive and procedural rules. However, enforcement of antitrust was not strong until the enactment of a new Constitution in the year 1988 (Article 173, paragraph 4) and especially with the replacement of Law 4137 of 1962 by Law 8884 of the year 1994\textsuperscript{219}.

Law 8884 of 1994 (hereinafter, the law) introduced merger control and reorganized the CADE as a federal independent agency with the faculty of prosecuting and adjudicating cases\textsuperscript{220}. Furthermore, the law established the functions of two complementary agencies with specific enforcement roles: the Secretariat of Economic Law in the Ministry of Justice\textsuperscript{221} (SDE) and the Secretariat for Economic Monitoring (SEAE). The SDE monitors markets, identifies possible infringement and initiates investigations \textit{ex officio} or upon request of interested parties\textsuperscript{222}.

These three agencies constitute the Brazilian Competition Policy System\textsuperscript{223} (BCPS). The proceedings before the competition authorities are administrative in nature\textsuperscript{224} and their decisions may be subject to judicial review before federal courts of first instance if requested by the private litigants. The first instance decision may be appealed before a regional Court of Appeals by private parties or the agencies. Finally,

\begin{thebibliography}{9}
\bibitem{217} KRAKOWSKI, MICHAEL, \textit{Política de competencia en Latinoamérica: una primera apreciación: un análisis comparativo legal e institucional de las políticas de competencia en Latinoamérica"}, p.149.
\bibitem{218} In Portuguese, \textit{Conselho Administrativo de Defesa Econômica}.
\bibitem{220} Articles 2 and 7 of the law 8884 of 1994.
\bibitem{221} In Portuguese, \textit{Secretaria de Direito Econômico do Ministério da Justiça}.
\bibitem{222} Articles 13-14 and 30 of the law 8884 of 1994.
\bibitem{223} In Portuguese, Sistema Brasileiro de Defesa da Concorrência.
\bibitem{224} Title VI ("Administrative Proceedings") of the law 8884 of 1994.
\end{thebibliography}
the Court of Appeals’ decision may reach the Superior Court of Justice if the private parties or the agencies apply for an appeal.\footnote{OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, p. 65.}

Parallel to the administrative agencies, Brazil’s economic crimes law (law 8137 of 1990) establishes criminal enforcement prosecutors that may file indictments before criminal courts.

The current competition law has been amended on several occasions.\footnote{Among others, by the following: law 9021 of 1995, law 9069 of 1995, law 9470 of 1997, law 9781 of 1999, law 10149 of 2000 and law 11482 of 2007. See the current competition laws of Brazil at \url{http://www.cade.gov.br/legislacao/leis.asp}.} One of the most important legislative innovations was the establishment of a leniency program managed by the SDE in the year 2000.\footnote{Law 10149 of 2000.} Furthermore CADE has issued several resolutions (with guidelines attached) that instruct upon the application of the laws, and Horizontal Merger Guidelines.\footnote{See an English version of the Resolutions and the Horizontal Merger Guidelines at \url{http://www.cade.gov.br/english/internacional/law8884-94.asp}.}

### 2.2.1. Statutes

Article 20 of the law\footnote{See an English version of the law at \url{http://www.cade.gov.br/internacional/Law-8884-1994.pdf}.} establishes as an infringement against economic order any act *manifested in any way* intended or able to produce the following effects:

- I - to limit, restrain or in any way injure open competition or free enterprise;
- II - to control a relevant market for a certain product or service;
- III - to increase profits on a discretionary basis; and
- IV - to abuse one’s market control.”\footnote{Translation from CADE’s English version of the law.}

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228 See an English version of the Resolutions and the Horizontal Merger Guidelines at \url{http://www.cade.gov.br/english/internacional/law8884-94.asp}.
230 Translation from CADE’s English version of the law.
Three considerations upon market control are established by the last subsections of Article 20: i) achievement of market control through efficiency is not illegal, ii) market control occurs when a firm or firms hold a substantive share of a relevant market and iii) market control is presumed when a firm or firms hold more than twenty percent of the relevant market. However, regarding the last presumption, it must be stressed that the CADE makes a case-by-case analysis without invoking the 20 percent threshold.\footnote{OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p. 20.}

A distinctive feature of Brazilian antitrust rules is that the proof of market power is necessary to determine the infringement of competition law regardless of the type of conduct.\footnote{Cfr. OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p. 20.}

Article 21 contains a non-exclusive list (\textit{numerus apertus}) of twenty-four acts that are “deemed a violation of the economic order” whenever the hypothesis established in article 20 is configured. A distinctive characteristic of this list, in comparison with other jurisdictions’ competition laws, is that it includes both bilateral or multilateral anticompetitive acts (such as cartels) and unilateral anticompetitive acts (such as abuse of dominance). Article 21 contains the following types of collusive horizontal agreements:

- Price fixing among competitors
- Agreement of sale conditions among competitors
- Adopting or influencing any uniform or concerted business practices among competitors
- Division of markets of goods or services or the sources of inputs.
- Bidrigging

\footnotetext{231}{OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p. 20.}
\footnotetext{232}{Cfr. OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p. 20.}
• Limiting or controlling technological research, development, investment, innovation of products and services or its distribution\(^{233}\).

• Unreasonably increasing prices.

As noted earlier, CADE has issued resolutions to implement competition policy. Resolution 20 of 1999\(^{234}\) contains two important attachments relevant for the purposes of this document. Attachment I defines and classifies restrictive trade practices (horizontal and vertical) and Attachment II establishes the basic criteria for the analysis of the restrictive trade practices listed in the law.

The guidelines contained in Attachment I define horizontal restrictive trade practices in the following terms:

“an attempt to reduce or eliminate market competition, whether by establishing agreements between competitors in the same relevant market with regard to prices or other conditions or by adopting predatory pricing. In both cases these practices seek, immediately or in the future, jointly or separately, to increase the company’s market power or create the conditions required to more easily exercise such power.”\(^{235}\)

The guidelines classify four categories of horizontal restrictive trade practices: 1) cartels, 2) other agreements between companies, 3) illicit practice of professional associations and 4) predatory pricing. According to the guidelines, cartels are

“express or implied agreements between competitors in the same market, involving a substantial part of the relevant market, regarding prices, production and distribution quotas and territorial division, in an attempt to

\(^{233}\) The listed collusive agreements correspond to the numerals I, II, III, VIII, X and XXIV of article 20.


\(^{235}\) Resolution 20 of 1999, p. 3. Translation from CADE’s English version of the resolution.
increase prices and profits jointly to levels that are closer to monopolistic levels.”236 (own italics)

Furthermore, the guidelines establish that certain “structural factors may favor cartelization: high level of market concentration, existence of barriers to the entry of new competitors, homogeneous products and costs, and stable cost and demand conditions.”237 In tacit collusion cases, as explained below, these conditions are verified and configure an important circumstantial evidence for the decision.

In relation to the assessment of a conduct by CADE, the guidelines contained in Attachment II establish the assumption that a conduct that injures competition requires as necessary precondition “the use of leverage in one market to attempt to gain market share in another or the search for a dominant position in the relevant market by the party adopting such practice”238.

Due to the subsection of article 20 which established that the attainment of market power through efficiency is not illegal, a balancing test between restrictive effects and efficiency effects is also included in the guideline’s steps for assessing a conduct. In the case of cartels, “CADE assumes that anticompetitive effects exist once the existence of market power is demonstrated”239.

Finally, it must be noted that within the steps for the analysis of conducts there must be sufficient evidence of the practice in the case records. The verification of the sufficient evidence is not limited to documentary evidence; according to the guidelines it may also include circumstantial evidence such as meetings, data exchange or “the absence of economic rationale for adoption of a practice that is not necessarily illegal.”240

236 Resolution 20 of 1999, p. 3. Translation from CADE’s English version of the resolution.
237 Resolution 20 of 1999, p. 3. Translation from CADE’s English version of the resolution.
238 Resolution 20 of 1999, p. 8. Translation from CADE’s English version of the resolution.
240 Resolution 20 of 1999, p. 8. Translation from CADE’s English version of the resolution.
Brazil’s enforcement of competition law has focused in the last years in the investigation of horizontal restraints, especially regarding cartels\textsuperscript{241}. The authorities were especially active in the period between March 2002 and June 2005 where fifteen cartel cases were adjudicated\textsuperscript{242}.

The following chart summarizes Brazilian tacit collusion cases:

<table>
<thead>
<tr>
<th>Case</th>
<th>Product Market</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textit{SDE v. CSN, Usiminas and Cosipa (1999)}\textsuperscript{243}</td>
<td>Flat rolled steel products</td>
<td>Sanction firms. Confirmed by first instance federal court. Judgment appealed by the firms and the decision is still pending\textsuperscript{244}.</td>
</tr>
<tr>
<td>CADE decisions over a series of cases in different cities (2002)\textsuperscript{245}</td>
<td>Fuel retailing</td>
<td>Closure of investigation / sanction of firms.</td>
</tr>
</tbody>
</table>


\textsuperscript{243} Administrative Proceeding Nº 08000.015337/1997-48.

\textsuperscript{244} OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p. 21.


To date, the majority of the cases have been decided through direct evidence of collusion. Although by the early 1990s CADE assessed tacit collusion cases\textsuperscript{248}, the first big precedent was \textit{SDE v. CSN, Usiminas and Cosipa} (1999)\textsuperscript{249} where the only three producers of flat rolled steel products were fined for price fixing\textsuperscript{250}.

Basically, the investigation was initiated due to two facts detected by the Secretariat of Economic Law in the Ministry of Justice\textsuperscript{251} (SDE) and the Secretariat for Economic Monitoring (SEAE). Firstly, the communications sent by the firms informing a price increase that would take place the same day, 1\textsuperscript{st} of August 1996 at a similar level (\textit{See Annex 1}). Secondly, a meeting that took place in the Brazilian Institute of the Steel Industry (IBS)\textsuperscript{252}, the 30\textsuperscript{th} of July 1996, where the investigated firms manifested their intention of readjusting (increasing) prices which would be effective the next day. Actually in July 1996 representatives from the trade association met officials of the SEAE and informed their intention of increasing prices on a specific date.

Furthermore, according to the evidence compiled during the investigation, the firms sent communications to different customers’ associations regarding the readjustment of prices that would be effective the 1\textsuperscript{st} of July 1997 (in the case of CSN) and the 27\textsuperscript{th} of June 1997 (in the case of Usiminas).

\textsuperscript{248} Coloma mentions \textit{Asbeg v. Sitran and others} (1988) and \textit{Codima v. Ibenep and others} 1990 where authority concluded there was not enough evidence to prove collusion. According to Coloma, the basic principle established in these cases was that parallel behavior was not enough to typify a concerted practice. GERMÁN COLOMA, \textit{Prácticas horizontales concertadas y defensa de la competencia}, 2000, p. 25.

\textsuperscript{249} Administrative Proceeding Nº 08000.015337/1997-48.


\textsuperscript{251} In Portuguese, \textit{Secretaria de Direito Econômico do Ministério da Justiça}.

\textsuperscript{252} In Portuguese, \textit{Instituto Brasileiro de Siderurgia}.
The SDE’s makes a thorough account of the relevant market affected by the conduct and the structure of the market. During the proceedings before the SDE, the investigated firms alleged that the similarity of prices was due to similar cost structures. Furthermore, the firms provided an economic expertise regarding “prices in concentrated markets”. The document exposes the economic theories according to which, in concentrated markets of homogenous products the prices tend to be similar due to potential competition, interdependence of firms in oligopolies, and price leadership where the most efficient firm in the market sets the price and the rest of the firms have to follow it to compete\textsuperscript{253}. A second study is presented by CSN, confirming the previous in terms of justifying the conduct of the firms according to economic theory\textsuperscript{254}.

The SDE requests an opinion of the SEAE, which concluded that the existence of interdependent oligopolies can’t impede the enforcement of antitrust laws\textsuperscript{255}. Furthermore, according to SEAE in the case there was clear evidence of explicit coordination of prices which excludes hypothesis of an interdependent oligopoly\textsuperscript{256}. The SDE concluded that the three firms should be fined due to the concerted increase of prices that took place in the years 1996 and 1997\textsuperscript{257}.

In the proceedings before the CADE, the firms argue the following:

1. Price level. The similarity of prices is due to the fact that they produce homogenous products, with a similar industrial process, and that the prices are set in international markets. The firms reaffirm their argument of interdependence due to the oligopolistic structure of the market\textsuperscript{258}.

\textsuperscript{253} CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 12.
\textsuperscript{254} CADE, P.A. Nº 08000.015337/1997-48, Relatório, pp. 16-19.
\textsuperscript{255} CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 21.
\textsuperscript{257} CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 25.
2. Process of price formation. The firms reiterate that their conduct is economically rational and in accordance to the findings of economic theory, exposed in the economic expertise mentioned before, regarding the behavior of prices in concentrated markets of homogenous goods\(^{259}\). However it is interesting to note that the firms didn’t coincide on which firm was the “price leader”, since according to CSN the price leader of the market was Usiminas/Cosipa\(^{260}\) while Usiminas and Cosipa argued that CSN was the price leader\(^{261}\).

3. Probability of cartel in the Brazilian market of flat rolled steel. The high degree of technological innovation in the market makes less probable the formation of a cartel\(^{262}\).

The CADE makes an account of the SDE’s “technical note” that justified the proof of a cartel through indirect evidence, quoting US doctrine and EC case law\(^{263}\). Regarding the existence of dominance the SDE argued that the three firms were the only producers of flat rolled steel, with high market shares: CSN had 39%, Usiminas 35% and Cosipa 26% (measured in volume)\(^{264}\). The low contestability of the market was due to high barriers of entry and the scarcity of imports\(^{265}\). Finally, the SDE discarded the hypothesis of “price leadership” since the firms alternated the “leadership” by announcing and applying the price adjustments and in an occasion one of the smallest firms was the first to raise prices\(^{266}\).


\(^{260}\) Although Usiminas owned shares of Cosipa, the CADE established the firms were independent economic units.

\(^{261}\) CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 28

\(^{262}\) CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 28.


\(^{264}\) CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 36.


\(^{266}\) CADE, P.A. Nº 08000.015337/1997-48, Relatório, p. 40.
The CADE decided by unanimity there was enough evidence to fine the three firms for infringing article 20 subsection I and article 21 subsection I of the law due to the configuration of a cartel. The collusive practice was proved by the parallel behavior that had no rational explanation from the economic point of view and the meeting of the competing firms before the application of the price increase.

The firms applied for judicial review of CADE’s decision, which imposed a fine equivalent to USD 32 million\(^{267}\). The first instance judge, a federal court, confirmed the previous decision. “The Judge highlighted that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel.”\(^{268}\) The federal court’s judgment was appealed by the firms and the decision is still pending\(^{269}\).

From \textit{SDE} v. \textit{CSN, Usiminas and Cosipa} (1999) it is possible to infer that the standard of proof for tacit collusion requires that the following cumulative conditions are met: i) the market is prone to the formation of cartels (concentrated, homogenous goods, high barriers of entry and lack of imports), ii) a parallel behavior takes place, iii) there is no rational explanation for the firms’ conduct besides collusion, and iv) there is proof of some sort of communication among the firms\(^{270}\).

In the year 2002 the CADE decided over a series of cases of price-fixing by fuel retailers of different cities\(^ {271}\). Some of the cases were decided upon direct evidence, as in \textit{Ministério Público do Estado de Santa Catarina} v. \textit{Sindicato do Comércio Varejista de Combustíveis Minerais de Florianópolis} (2002)\(^ {272}\) nineteen fuel retailers of the city of Florianópolis and their trade association. However,

\begin{footnotesize}
\begin{enumerate}
\item \textsc{Coloma, Germán}, \textit{Prácticas horizontales concertadas y defensa de la competencia}, 2000, p. 25.
\item \textsc{Castellanos Pfeiffer, Roberto Augusto}, \textit{Recent aspects of hard core cartel prosecution in Brazil}, 2005, p. 4.
\item \textsc{Coloma, Germán}, \textit{Prácticas horizontales concertadas y defensa de la competencia}, 2000, p. 27.
\item Administrative Proceeding Nº 08012.002299/2000-18.
\end{enumerate}
\end{footnotesize}
most of the complaints filed have as sole evidence price parallelism (simultaneous and similar price increase) which saturated the capacity of the competition agencies\textsuperscript{273}. In response the SEAE created special criteria based on economic analysis to filter the complaints. Hence, complaints are prosecuted only when the following conditions are met cumulatively:

1. The profit margin is increasing. If the profit margin was decreasing, it would be considered an indication of competitiveness in the market.

2. Causal relation between the margin increase and the reduction of price dispersion.

3. Low costs of monitoring, which may be discarded if the margin and price dispersion follow a pattern in a very big area, such as State geographical area\textsuperscript{274}.

In \textit{SDE v. Varig S.A and others} (2004)\textsuperscript{275} four airlines were fined for price fixing. According to newspaper versions, presented by the SEAE in the proceedings, the four airlines’ chief executive officers (CEOs) met for three hours in a hotel in São Paulo\textsuperscript{276}. Six days after the meeting, the airlines applied a simultaneous increase of prices in Rio de Janeiro-São Paulo route (\textit{See Annex 1})\textsuperscript{277}.

The airlines contested, in the preliminary investigation, that the price elevation was due to the increase of costs and that the decision was a decrease in the discounts, not an increase of the basic fee. The SEAE studied four hypotheses that explained the conduct that were discarded.

\textsuperscript{273} OECD, \textit{Prosecuting cartels without direct evidence of agreement}, 2006, p. 84.

\textsuperscript{274} OECD, \textit{Prosecuting cartels without direct evidence of agreement}, 2006, p. 84.


\textsuperscript{276} Relatório, P.A. Nº08012.000677/1999-70, p. 3.

\textsuperscript{277} Relatório, P.A. Nº08012.000677/1999-70, p. 3.
The first hypothesis was mere coincidence, which according to the SEAE had a very low statistical probability. The second hypothesis was a configuration of a “price leadership” which wasn’t the case since the conduct was simultaneous. The third hypothesis consisted in the influence of government regulation, which again, was not the case. Finally the fourth hypothesis discarded consisted in the elevation of costs, argued by the airlines. The SEAE concluded there is no evidence that a relevant cost for the four firms had an increase of ten per cent\(^2\)78.

Since none of the previous hypotheses explained the conduct of the firms, the SEAE analyzed the possibility of a coordinated exercise of market power. The relevant market was determined to be the Rio de Janeiro- São Paulo route. Since this market was served only by the four investigated airlines and there were high barriers of entry, the SEAE concluded there was a high probability of a coordinated exercise of market power\(^2\)79.

In the proceedings before the CADE, the airlines argued, among the others\(^2\)80, the following\(^2\)81:

1. TRANSBRASIL alleged that the decrease of discounts was due to a crisis caused by the increase of the offer while the demand didn’t grow.

2. TRANSBRASIL and VARIG alleged that the CEOs meeting was due to the mentioned crisis and issues regarding to the discussions of new laws before the Congress.

3. VASP alleged that it didn’t have the necessary market power to influence a uniform commercial conduct.

\(^2\)80 The firms also argued that the CADE was not competent to adjudicate the case and that principles of freedom of competition and concurrence didn’t apply to the airline market.
4. VASP alleged that the variation of discounts didn’t occur in the same date and that following the “price leaders” was justified due to the oligopolistic structure of the market.

5. VARIG alleged that the conduct was not a price increase but rather a discount reduction.

6. VARIG alleged that as “price leaders” they decided to decrease the discounts and the other firms followed their conduct to avoid loosing market share. TAM also adhered to this argument, affirming the existence of “price leadership” exercised by the VARIG.

7. TAM alleged that the firms’ parallel behavior between January and August 1999 was due to ATPCO\textsuperscript{282} system which allowed the firms to monitor the price variations of the “leader” of the market. As it will be explained bellow, this information exchange system was actually one of the most important proofs of collusion argued by CADE to justify its decision.

8. The firms expose thoroughly the argument according to which the logic of a oligopolistic market with a price leader explained their parallel conducts\textsuperscript{283}.

9. Finally the firms allege a “cartel crisis defense”.

The intervention of the SEAE in the proceeding was based on “parallelism plus” doctrine. In order to typify an infringement of the law, it is necessary to verify the existence of a parallel conduct, discard other alternative explanations for the firms’ conduct and circumstantial evidence that prove that parallelism is due to an agreement\textsuperscript{284}. Each argument alleged by the firms is analyzed and discarded by the SEAE.

\textsuperscript{282} Airline Tariff Publishing Company.
\textsuperscript{283} Relatório, P.A. Nº08012.000677/1999-70, pp. 21-22.
\textsuperscript{284} Relatório, P.A. Nº08012.000677/1999-70, p. 30.
Moreover, the existence of the ATPCO system, which allowed the firms to monitor the price variations of the “leader” of the market and was used by the firms as an argument to support the “price leadership” theory, according to the SEAE actually facilitated the implementation of anticompetitive agreements and facilitated tacit collusion among competitors. Through the ATPCO system, the airlines “could configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit.” The SEAE also noted that certain features of the system were also prohibited in the US.

Finally, the SEAE didn’t consider VARIG a price leader, since in certain occasions the other firms reduce their prices first. The SEAE concluded there was no plausible justification for the conduct of the firms and recommended: 1) to penalize the airlines, 2) to prohibit certain features of the ATPCO system and 3) to open an investigation against the company that managed the ATPCO system.

Likewise, the SDE suggested in its “technical note” a precautionary measure against the airlines, based on the possibility that the airlines had of monitoring price agreements through the ATPCO system.

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286 Relatório, P.A. Nº08012.000677/1999-70, p. 34.
288 Relatório, P.A. Nº08012.000677/1999-70, p. 34. “This feature of the ATPCO system had earlier been attacked by the U.S. Department of Justice, but system modifications arising from that case had been implemented only in North America”. (OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, p. 22.)
289 Relatório, P.A. Nº08012.000677/1999-70, p. 34.
290 Relatório, P.A. Nº08012.000677/1999-70, pp. 35-36. The investigation against the company that managed the ATPCO system finished with a settlement accepted by CADE in March 2005. In the negotiation between the SDE and the company, “ATPCO terminated the threeday notice feature of its system with respect to Brazilian airlines.” (OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, p. 22.)
By majority the CADE found the four airlines guilty of violating economic order through the infringement of article 20 subsection I and article 21 subsections I and II of the law.

The most recent case of tacit collusion decided by CADE\textsuperscript{292} is \textit{SEAE/MF v. Sindicato das Empresas Proprietárias de Jornais e Revistas do Município do RJ and others} (2005)\textsuperscript{293}. A preliminary investigation was initiated due to a complaint of the SEAE against three publishing firms and their trade association (newspapers and magazines). According to the SEAE four Rio de Janiero’s journals (owned by the three firms) had applied a price increase at the same date (6\textsuperscript{th} of March 1999) and at the same level (20 per cent)\textsuperscript{294}. Moreover, the journals published in the same day identical notes, attributed to their trade association, justifying the increase due to the elevation of production costs.

In the preliminary investigation, the firms and their trade association alleged, among others, that they didn’t raise prices but rather cancelled discounts, that their conduct was due to an increase of common costs (paper, ink etc.) and that the rivalry in the market was evidenced by the evolution of the market shares. However, the SDE found that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{292} In \textit{SDE v. SINDIPEDRAS and others} (2005) twenty one companies that served the market of crushed rock in Sao Paulo and their trade association were found guilty of forming a cartel. A dawn raid practiced by the SDE allowed the authority to seize evidence that proved a multiple infringement of the law by eighteen firms and the trade association for price fixing, market segmentation, production restriction, and bid rigging. Through the trade association the firms shared detailed pricing and sales data (PAE and SISCO software), had meetings to set the policies (agreed on a document called \textit{Script and Proceedings}), controlled deviations from the agreement and divided customers (each firm had a list of customers called \textit{Biblia}). Regarding the market structure, the SDE concluded that it was highly concentrated (the investigated firms had 55% of the market share) due to high barriers of entry. (See Relatorio, P. A. N\textsuperscript{o} 08012.002127/02-14, pp. 14-17.) CADE adhered to the SDE’s recommendation and fined the mentioned firms. Clearly this case goes beyond tacit collusion due the direct evidence of meetings among the firms, where pricing policies and market division was discussed. For a summary of the case, \textit{see} OECD, \textit{Competition Law and Policy in Brazil: A Peer Review}, 2005, p.53.
\item \textsuperscript{293} Administrative Proceeding N\textsuperscript{o} 08012.002097/99-81. For a summary of the case \textit{see}, OECD, \textit{Prosecuting cartels without direct evidence of agreement}, 2006, p. 86.
\item \textsuperscript{294} Relatório, P.A. N\textsuperscript{o}08012.002097/99-81. p. 1.
\end{itemize}
\end{footnotesize}
explanations of the firms were not sufficient and started an administrative proceeding.\(^{295}\)

During the proceeding the firms and the trade association reaffirmed the previous defense. The SEAE defined the relevant market affected by the investigated conduct as the daily journals of high circulation sold in street kiosks in the city of Rio de Janeiro. The market was described as a concentrated market since in the year 1999 one of the firms had 60.5% of market share and the other two firms had 30.3% and 9.2% respectively.\(^{296}\) This market structure, according to the SEAE, enabled the firms to exercise a coordinated abuse of dominance.\(^{297}\)

The SEAE analyzes and discards eight different hypotheses that could’ve justified the firms’ conduct:

1. Mere coincidence. The statistical probability of coincidence as an explanation was “despicable.”

2. Cancellation of a promotion. It is irrelevant that the cause of the price increase was the cancellation, there is no justification for the simultaneous behavior since the cancellation could’ve been done any other day.

3. Concurrence among firms in street kiosks. According to one of the firms, their concurrence in street kiosks was irrelevant taking into account that the highest profits were obtained form advertisement and subscription fees. The SEAE considered that the latter represent three different markets and that the conduct affected -relevant for the investigation- was the market of journals sold in kiosks.

4. Elevation of costs. The SEAE acknowledged that rate of exchange increased the prices of certain production costs. However, due to the volatility of the rate of exchange and the fact that each firm had

\(^{295}\) Relatório, P.A. Nº08012.002097/99-81. p. 5.
different costs, the raise of prices in a same percentage by all the firms was not justified by the elevation of costs of production.

5. Lack of market dominance. The SEAE argues the existence of market power due to the fact that only the three firms serve the market.

6. Price leadership. One of the firms alleged that through their conduct it was simply following the leader of the market and supported this argument with the economic theory regarding oligopolistic markets. The SEAE argues that the simultaneousness of the firms’ actions discarded the allegation of price leadership.

7. The origin of the notes was a communication of the trade association. If the price increase was originated in a decision of the trade association, this means that either the firms met and agreed on the price or that it was instruction of the trade association to each of its members. In both cases, the SEAE concluded, there was illegal price fixing.298

8. The trade association authorized the price adjustment. The recommendation of a trade association of raising prices in the same level is also an infringement of the competition law.

The SEAE concluded the firms’ conduct infringed the law and recommended to penalize them.

The SDE adhered to the SEAE’s definition of the relevant market and the existence of market power due to the firms’ market shares.299 The SDE established that i) there were high barriers of entry, ii) production costs were similar and iii) the existence of a trade association enabled frequent interaction and information exchange among firms.300

The SDE concluded that the firms’ simultaneous and identical behavior was not explained by similar costs, since none of the firms had identical cost structures. Moreover one of the firms’ managers confirmed that the trade association was the author of the notes published and that the trade association had acted as a means for coordination\(^{301}\). The SDE also discarded the “price leadership” allegations since the conduct was simultaneous.

Finally, the SDE argued that since the consumers of journal were very sensible to price variations the firms had a strong incentive to collude, in order to avoid competition and the risk of loosing market share with unilateral price increase\(^{302}\). From the direct and indirect evidence in the proceeding the SDE suggested a condemnation of the firms due to an infringement of the law through the formation of a cartel with the coordination of a trade association\(^{303}\).

The CADE decided, by unanimity, to fine the three firms for violation of article 20 subsection I and article 21 subsection I of the law and their trade association for infringement article 20 subsection I and article 21 subsection II of the law.

The CADE’s decision contains two notes clarifying reasons for decision by Conselheiro Ricardo Villas Boas Cueva and the president of the CADE Elizabeth Maria Mercier Querido Farina. The Villas’ note makes an account of the facts of the case, doctrinal considerations regarding cartels and the treatment that antitrust laws give to cartels. Among others, the following topics are exposed: the logic of cartels, their negative effects for consumer welfare and the characteristics of markets that make them prone to the formation of cartels. Finally, the note analyzed both the firms’ allegations and the competition authorities’ arguments and concluded from the evidence that there was explicit (expresso) collusion for the increase of prices.

On the other hand, Mercier’s note analyzes de firms’ argument according to which their conduct didn’t produce negative effects on the

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market and the absence of profit for the firms from it. Mercier contends the validity of the bases of the firms’ argument and concludes that it is not necessary for a competition authority to prove the reduction of social welfare to condemn a cartel. Mercier illustrates its conclusion with the following analogy: a driver that crosses a street despite the red traffic light must be sanctioned even if no one is run over or if there is no collision.

2.2.3. CONCLUSIONS

Brazil antitrust agencies are one of most well funded and respected of the region. Their prosecutions are focused on hard core cartels where direct evidence is present. However, tacit collusion cases are few in comparison with its peers (i.e. Argentina, Colombia and Peru).

There are several distinctive features of Brazilian law that are relevant for tacit collusion cases. First, according to Article 20 of the law and Resolution 20 of 1999, CADE requires proving market power for determining an infringement. Hence, the concept of collusion is explicitly linked with the exercise of collective dominance.

Secondly, as noted before, the guidelines contained in Resolution 20 of 1999 explicitly list the factors that make markets prone to cartelization: “high level of market concentration, existence of barriers to the entry of new competitors, homogeneous products and costs, and stable cost and demand conditions”\(^{304}\). Clearly this list is used as a guide by the three competition agencies to assess the cases. Third, Brazil was one of the first Latin American countries to implement a leniency program, by the Law 10149 of 2000.

On the other hand, CADE’s decisions have an economic approach rather than a formal-legal basis. In effect, in each of the cases discussed above, the relevant market and its structured are analyzed and explained in detail. Furthermore, the proceedings are highly contentious due to the interaction of the different competition agencies and the fact that the investigated firms’ present economic expertise to support their defense.

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304 Resolution 20 of 1999, p. 3. Translation from CADE’s English version of the resolution.
There are common features in the analyzed cases that are pertinent for the purposes of this document. First, the existence of an oligopolistic structure, high concentration of the market and a low contestability of the market due to high barriers of entry. Second, the cases are related to price fixing, leaving aside other forms of horizontal collusion such as market division or bid rigging.

Third, there are similar defense strategies of the defendants, based on the following arguments:

- The existence of a similar cost structure and a raise of their costs due to external factors
- The interdependence caused by an oligopolistic structure and the existence of “price leadership” that is followed by the firms, which in turn cause a tendency towards similar prices
- The fact that the conduct is not a price increase but rather an elimination of a discount
- Absence of market power
- Existence of competitive dynamics such as technological innovation

2.2.3.1. Attributes of successful defense

The analysis applied by CADE is clearly influenced by EU and US case law (quoted explicitly) and especially by the latter since the parallel plus doctrine is mentioned explicitly in the cases. Hence, the principle underlying CADE’s decisions on tacit collusion, confirmed by the jurisprudence of the courts, is that parallel behavior is not enough to typify an agreement that infringes the law. The so called plus factors are indispensable for proving collusion.

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305 Cfr: Roberto Augusto Castellanos Pfeiffer, Recent aspects of hard core cartel prosecution in Brazil, 2005, p. 2.
From the analyzed cases of tacit collusion and the criteria established by the SEAE to filter price-fixing complaints based on price parallelism, the following are attributes of a successful defense in a tacit collusion case:

1. **A plausible explanation for the firms’ behavior besides collusion** such as price leadership conducts in an oligopolistic structure, the fluctuation of production costs in combination with a similar cost structure and the influence of Government’s regulations. The price leadership justification was a common argument contained in the investigated firms’ defense which was supported by economic expertise. In the analyzed cases the Brazilian CAs were very careful at assessing every alternative explanation for the firms’ behavior that could exclude collusion and made an effort to rebut them in detail.

2. **The tendency of the market that discards tacit collusion.** According to the criteria established by the SEAE, this is the case when one of the following circumstances is proved:

   1. Firms’ profit margin is decreasing.
   2. There is an increasing profit margin but there is no causal relation between this tendency of the profit margin and parallelism of prices.
   3. High costs of monitoring, which may be verified when the conduct that follows the same pattern is followed by other firms in a large geographical area (e.g. a State).

Finally, it is relevant to mention that in the cases analyzed in this document the conducts were simultaneous and similar; hence a defense based on the argument that the firms’ conduct was not parallel was

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306 In the studied cases the CADE takes into account the possibility that parallel behavior is mere coincidence. However the probability of coincidence always resulted statistically very low.
absent. However, theoretically this argument would be a valid defense for future cases.

2.2.3.2. Attributes of successful prosecution

The standard of proof applied by CADE indicates that a successful prosecution in tacit collusion cases includes the following attributes:

1. **Proof of the simultaneous and identical behavior.**

2. **Structural factors that make a market prone to the formation of cartels.** CADE takes into account the following characteristics\(^{307}\) that may facilitate coordination: high market concentration, low contestability (due to the existence of high barriers of entry and the absence of imports) and the production of homogenous goods.

3. **The facts and circumstantial evidence must demonstrate that no rational economic explanation for the conduct, besides collusion, is plausible.** The latter has been explicitly endorsed by the federal courts of Brazil. In every case CADE carefully analyzes each of the hypotheses that could explain the conduct and has the burden of discarding their probability. Among others, CADE excluded the following hypotheses:

   1. The probability that the parallel behavior was mere coincidence was statically negligible.

   2. Impossibility of “price leadership” justification (e.g. when the conducts are simultaneous, the initiative is alternated among the firms or there is contradiction among firms’ arguments).

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307 The guidelines establish that certain “structural factors may favor cartelization: high level of market concentration, existence of barriers to the entry of new competitors, homogeneous products and costs, and stable cost and demand conditions.” (Resolution 20 of 1999, p. 3. Translation from CADE’s English version of the resolution.)
3. An increase of common costs does not justify a joint price increase\textsuperscript{308} if cost structure or industrial process are not identical.

4. **Proof of practices that facilitate collusion**, such as the following:

   1. Meetings of firm representatives before variation of prices.
   2. Intervention of a trade association that explicitly facilitated coordination.
   3. Information exchange systems (e.g. of pricing, sales and customers) that allow coordination of the agreement and monitor deviations.

2.3. **Chile**

The first competition law enacted in Chile was Law 13.305 of 1959\textsuperscript{309}. However, competition policy and the enforcement the law was not strictly applied until the enactment of the decree–law 211 of 1973\textsuperscript{310}, which is the current competition law.

The *Law for the Defense of Free Competition* (hereinafter, the law) has been amended in several occasions, among others, by the law 18.118 of 1982, the law 19.336 of 1994, the law 19.610 of 1999, the law 19.806 of 2002, the law 19.911 of 2003 and the law 20.361 of 2009. The decree with force of law N° 1 of the year 2005 contains the restated, coordinated and systematized text of the current law\textsuperscript{311}.

Chile’s antitrust regime is a judiciary-based system\textsuperscript{312} with an administrative agency, the National Economic Prosecutor’s Office.

\textsuperscript{308} *Cfr.* ROBERTO AUGUSTO CASTELLANOS PFEIFFER, *Recent aspects of hard core cartel prosecution in Brazil*, 2005, p. 3.

\textsuperscript{309} *Cfr.* PR, p. 15.

\textsuperscript{310} *Cfr.* PR, p. 15.

\textsuperscript{311} See the official translation of the law to English at [http://www.fne.cl/?content=marco_juridico](http://www.fne.cl/?content=marco_juridico).

\textsuperscript{312} Articles 2 of the decree-law 211 of 1973.
(FNE)\textsuperscript{313}, which has a prosecutorial role and a specialized independent tribunal, the Tribunal for the Defense of Free Competition (TDLC)\textsuperscript{314}, with judiciary powers\textsuperscript{315}. The TDLC is subject to the correctional and economic supervision of the Supreme Court\textsuperscript{316}.

The National Economic Prosecutor may initiate investigations due to private complaints or \textit{ex officio}\textsuperscript{317}. If the Prosecutor’s Office finds merits to open a proceeding, it will issue an administrative act\textsuperscript{318} that contains the formal charges against the investigated agents.

The TDLC, as a judicial entity, adjudicates the cases brought by the Prosecutor’s Office or by private demands\textsuperscript{319}. An important feature of the tribunal is its composition: two of the five members must be economists\textsuperscript{320}.

Only the TDLC’s final judgments that impose one of the measures contemplated in article 26 of the law or that waive the application of these measures may be subject of a remedy of complaint\textsuperscript{321}, by the private parties or by the Prosecutor before the Supreme Court\textsuperscript{322}.

2.3.1. Statutes

Article 3 of the current law establishes a general prohibition against any deed, act or convention, executed individually or collectively, that has

\textsuperscript{313} In Spanish, \textit{Fiscalía Nacional Económica}. See Articles 33 to 45 of the decree–law 211 of 1973.

\textsuperscript{314} The law 19.911 of 2003 replaced the Competition Commission, also a special court, with the Tribunal of Defense of Free Competition. In Spanish, \textit{Tribunal de Defensa de la Libre Competencia}.

\textsuperscript{315} Articles 5 to 32 of the decree-law 211 of 1973.

\textsuperscript{316} Article 5 of the decree-law 211 of 1973.

\textsuperscript{317} Article 39 of the decree-law 211 of 1973.

\textsuperscript{318} In Spanish, \textit{requerimiento}.

\textsuperscript{319} Article 18 of the decree-law 211 of 1973.

\textsuperscript{320} Article 6, section “b”, of the decree-law 211 of 1973.

\textsuperscript{321} In Spanish, \textit{recurso de reclamación}.

\textsuperscript{322} Article 27 of the decree-law 211 of 1973.
the effect or that tends to prevent, restrict or hinder freedom of competition. Moreover, article 3 contains a non-exclusive list (*numerus apertus*) of deeds, acts or conventions that are considered restraints of free competition.

Regarding collusion, the section “a” of Article 3 establishes as a restrictive practice any explicit or *tacit* agreement or concerted practice among economic agents that has as an object price fixing, limiting production or dividing markets, and abusing the power conferred by such agreements. Hence, the section “a” of Article 3 is the basis for the prosecution of tacit collusion cases that configure any sort of cartel 323.

From the wording of the article an important question arises: is market power (individual or collective) a necessary requisite for the configuration of an anticompetitive practice? The latter has been a source of debate even among the members of the TDLC and the positions have varied through time.

In *FNE v. Air Liquide Chile S.A. and others* (2006) 324 the TDLC didn’t focus on the existence of market power, a situation that was reproached by the dissenting opinion of one of its members with the argument that the proof of dominance was necessary to typify the infringement. On the other hand, in the most recent case *FNE v. Isapre ING S.A. and others* (2007) 325 the majority considered that the proof of dominance was a *sine qua non* condition for the configuration of an anticompetitive horizontal agreement. The dissenting vote of two members considered that interpretation to be a conceptual error and

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323 “In simple words, according with the law, the hard core cartels are included in the generic form of collectively (sic) agreements between business agents under an explicit or implicit way. In the first case, the hard core cartels have an explicit agreement (but usually not written) in order to affect or cause distortion on the market. In the second, there is not an agreement, just a common behaviour between the competitors that produces the same effect. Both kinds of conducts are illegal under the Chilean competition law. The cartel under an implicit agreement creates a consciously parallel conduct”. (OECD, *Prosecuting cartels without direct evidence of agreement*, 2006, p. 87).

324 TDLC, Sentencia N° 43 de 2006.

325 TDLC, Sentencia N° 57 de 2007.
argued instead that collusion and abuse of collective dominance are two different forms of infringement.

In relation to the proof of tacit collusion in proceedings, as will be noted below, the Chilean rules admit the use of circumstantial evidence and presumptions. In effect, Article 22 of the law establishes that all the “means of evidence indicated in the article 341 of the Code of Civil Procedure shall be admissible as proof, as well as any findings or grounds that, in the opinion of the Court, are fit to establishing the relevant facts.”

Furthermore, according to the last paragraph of article 22 the TDLC must assess the evidence according to due circumspection rules which, as in other “continental law” jurisdictions, gives “the judges the opportunity to assign value to every single proof in harmony with the merit of the process and his or her logic and experience.” However—as explained below—the standards of proof in relation to tacit collusion applied by the FNE, TDLC and Supreme Court vary substantially.

3.3.2. Decisions and Case Law

The TDLC enforcement efforts have focused in recent years on cases of abuse of dominant position. According the TDLC’s statistics from a total of 87 cases adjudicated between the years 2004 and 2007, six cases pertained to collusion and more than half were cases of abuse of

326 “The economic evidence is particularly relevant in those cases because the cartels and the collusive conducts in general, are not crimes under the Chilean law. Thus, the power of the Prosecutor to investigate is limited by law and cannot consider measures like interception telephones or other ways of communication”. (OECD, Prosecuting cartels without direct evidence of agreement, 2006, p. 87).

327 From the official translation of the law.

328 In Spanish, reglas de la sana crítica.

329 OECD, Prosecuting cartels without direct evidence of agreement, 2006, p. 87.

330 The law 19.911 of 2003 replaced the Competition Commission, also a special court, with the Tribunal of Defense of Free Competition. In Spanish, Tribunal de Defensa de la Libre Competencia.
dominant position. Furthermore, tacit collusion cases have only been adjudicated by the TDLC in recent years after long proceedings. Five cases of tacit collusion decided between 2004 and 2007. This section analyzes the two of that reached the Supreme Court.

Three periods of time are identified based upon the evolution of the standard of proof for tacit collusion applied by the TDLC and the Supreme Court.

The following chart lists the analyzed cases:

<table>
<thead>
<tr>
<th>Case</th>
<th>Product Market</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>FNE v. Compañía de Petróleos de Chile S.A. and others (2005)</td>
<td>Fuel</td>
<td>Close investigation. Confirmed by Supreme Court of Justice</td>
</tr>
<tr>
<td>ASOEX and FNE v. Ultramar and others (2006)</td>
<td>Maritime agency’s services</td>
<td>TDLC sanctioned but the Supreme Court reversed the TDLC’s decision</td>
</tr>
<tr>
<td>FNE v. Air Liquide Chile S.A. and others (2006)</td>
<td>Bottled oxygen</td>
<td>TDLC sanctioned but the Supreme Court reversed the TDLC’s decision</td>
</tr>
</tbody>
</table>


Tribunal de Defensa de la Libre Competencia (TDLC), Sentencia N° 7 de 2004. For a summary of the case, see OECD, Prosecuting cartels without direct evidence of agreement, 2006, p. 88.
2.3.2.1. First period

A first period of case law may be identified between the years 2004-2005 when the TDLC adjudicated two cases where there was strong circumstantial evidence of collusion but the standard of proof was not met since the information and facts were not conclusive.

The first precedent is Fiscalía Nacional Económica (FNE) v. Nestlé Chile S.A. and others and Soproleche and Loncoleche v. Preventive Commission (2004)\(^{340}\) where the National Economic Prosecutor’s Office (FNE)\(^{341}\) prosecuted five\(^{342}\) milk producers for the following charges: division of market, refusal to purchase product, manipulation of quality analysis results, gradual reduction of purchase price of milk

333 TDLC, Sentencia Nº 18 de 2005. For a summary of the case, see Fiscalía Nacional Económica, Luchando contra los cárteles duros: la perspectiva Chilena, Chile’s Country contribution to the “Third Meeting of the Latin American Competition Forum - Madrid, 19-20 July 2005”.
334 TDLC, Sentencia Nº 38 de 2006.
335 TDLC, Sentencia Nº 43 de 2006.
336 TDLC, Sentencia Nº 57 de 2007.
337 The measures imposed conditions on the acts or contracts in the market of raw milk, in general for all the country, that obliged the plants to 1) maintain a list of purchases with the parameters that compose it; 2) announce with a month of anticipation, any change in the conditions of purchase of raw milk; 3) justify any refusal regarding the purchase of milk; 4) keep a registry of the rejected offers and inform the FNE twice a year of the significant changes regarding the purchase of milk; 5) abstain from using the historical margin of deliveries in winter and summer to set the purchase price and 6) design a system of quality control that guarantees fairness to the all the parties.
338 Corte Suprema de Justicia, Sentencia del 26 de octubre de 2005.
339 Corte Suprema de Justicia, Sentencia del 22 de enero de 2007.
340 Tribunal de Defensa de la Libre Competencia (TDLC), Sentencia Nº 7 de 2004. For a summary of the case, see OECD, Prosecuting cartels without direct evidence of agreement, 2006, p. 88.
341 In Spanish, Fiscalía Nacional Económica. See Articles 33 to 45 of the decree-law 211 of 1973.
342 There was a sixth plant initially prosecuted by the FNE but the charges were withdrawn afterwards with favorable opinion of the FNE.
and price discrimination\textsuperscript{343}. The agency identified three different geographic relevant markets (three regions) supposedly affected by the firms’ conducts.

According to the FNE the market of purchase of raw milk was an oligopsony since 90\% of the demand was concentrated in four plants (one of them produced more than 40\%). On the other hand, the offer of raw milk was atomized due to the existence of many small producers. The FNE alleged that this market structure allowed the firms’ to abuse of their dominant position\textsuperscript{344}.

The conducts of market division and refusal to purchase, according to the FNE, were typified because the firms refused to purchase milk from suppliers that already sold to other firms. Since the suppliers had to sell their product to the nearest plants, the firms’ conduct impeded the suppliers to offer the milk to other firms (eliminating the producers’ mobility from one purchaser to another). The conduct of price reduction, according to the FNE, was configured by a simultaneous reduction (same date) at a similar level (between 5\% and 10\%) by three firms between the years 1994 and 1995 in one of the regions. The same pattern of behavior occurred in another region where six plants reduced their purchase prices between the years 1994 and 1995 at a similar level (between 8\% and 15\%)\textsuperscript{345}.

The firms refused the existence of any agreement for the division of the market or for price-fixing and they alleged their innocence, among others, by the following arguments: 1) having low profit margins, 2) having low market shares, 3) being overstocked, 4) the influence of international milk prices over local prices, 5) the increase of purchase price of raw milk, 6) the existence of bonuses (volume and quality) that differentiated purchase prices and 7) the market was not an oligopsony\textsuperscript{346}.

\textsuperscript{343} TDLC, Sentencia N° 7 de 2004, p. 5.
\textsuperscript{344} TDLC, Sentencia N° 7 de 2004, p. 1 and 4.
\textsuperscript{345} TDLC, Sentencia N° 7 de 2004, pp. 5-6.
\textsuperscript{346} TDLC, Sentencia N° 7 de 2004, pp. 8-12 and pp. 13-17.
After a thorough account of the FNE’s investigation (that started in the year 1995), the milk producers’ defense and the evidence presented by the prosecution agency and the defendants, the TDLC’s decision analyzes the characteristics, evolution and structure of the milk market. The tribunal concluded, regarding the relevant market, the following:

- The demand for raw milk was characterized by a concentration of purchase power of the milk producers and an atomized offer of unorganized producers\(^{347}\).

- The firms’ participation in the purchase of milk over the years was very stable\(^{348}\).

- Since the commodity is highly perishable the offer was inelastic in the short term.

- There was great variation in the final purchase price since it depends upon factors such as volume and quality\(^{349}\).

The TDLC acknowledged that there was no direct evidence of any agreement among the firms. The TDLC concluded from the behavior of international prices, imports and exports of milk, and due to the seasonality of the product that the evidence was not sufficient to prove an agreement\(^{350}\).

Regarding the oligopolistic structure of the market, the TLDC affirmed that it generated different degrees of competitiveness among plants in the regions, reaching “perfect competition” only under special conditions. Although the prices between the years 1993 and 1995 had a diminution tendency, they were dissimilar among regions and periods of time\(^{351}\).

\(^{347}\) TDLC, Sentencia N° 7 de 2004, p. 28.
\(^{348}\) TDLC, Sentencia N° 7 de 2004, p. 29.
\(^{349}\) TDLC, Sentencia N° 7 de 2004, pp. 29-30.
\(^{350}\) TDLC, Sentencia N° 7 de 2004, p. 32.
\(^{351}\) TDLC, Sentencia N° 7 de 2004, p. 32.
The TDLC found that the entry of Parmalat increased the competitiveness of the market, manifested on an increase of purchase prices of raw milk. This dynamic decelerated as the days passed by and the FNE argued that the latter was product of a collusive agreement among the milk producers. The TDLC contemplated two hypotheses that explained the latter: i) a coordination of price among plants in order to exploit the monopolistic profits or ii) unilateral decisions of the plants. To prove the coordination hypothesis the TDLC concluded that in absence of direct proof it should be backed by economic theory, “at least with evidence of the existence of barriers of entry for new competitors and the achievement of high profits by the undertakings owners of the processing plants”\textsuperscript{352}. The TDLC found there was no evidence of barriers of entry or of high profits.

The TDLC tribunal point out that the stability of the firms’ market share in spite of the dispersion of prices was important indirect evidence of the existence of market division. However, the tribunal concluded that the quality of the information presented in the proceedings didn’t allow definitive conclusions since the average prices were not adjusted to the different degrees of quality of the milk\textsuperscript{353}. In relation to the price discrimination charge the TDLC only found guilty one of the prosecuted firms\textsuperscript{354}.

In conclusion, TDLC did not found the milk producers guilty of tacit collusion but established that due to the market structure there were market imperfections and lack of transparency. Hence, the TDLC resolved to establish six preventive measures\textsuperscript{355}, applicable to all the

\textsuperscript{352} TDLC, Sentencia N° 7 de 2004, p. 33.
\textsuperscript{353} TDLC, Sentencia N° 7 de 2004, pp. 33-34.
\textsuperscript{354} TDLC, Sentencia N° 7 de 2004, pp. 34-35.
\textsuperscript{355} The measures imposed conditions on the acts or contracts in the market of raw milk, in general for all the country, that obliged the plants to 1) maintain a list of purchases with the parameters that compose it; 2) announce with a month of anticipation, any change in the conditions of purchase of raw milk; 3) justify any refusal regarding the purchase of milk; 4) keep a registry of the rejected offers and inform the FNE twice a year of the significant changes regarding the purchase of milk; 5) abstain to use the historical margin of deliveries in winter and summer to set the purchase price and 6) design a system of quality control that guarantees fairness to the all the parties.
regions of the country, in order correct the imperfections of the market and hinder any opportunistic behavior from the milk producers\textsuperscript{356}.

The second case decided by the TDLC was \textit{FNE v. Compañía de Petróleos de Chile S.A. and others (2005)}\textsuperscript{357}, where the FNE charged four fuel wholesalers (ESSO, Shell, YPF and Copec) for a supposed collusive agreement that distorted competition in the market of distribution and commercialization of liquid fuel in the Metropolitan Region.

The FNE analyzed the structure and characteristics of the production chain of fuels, including import, refining, distribution and commercialization by retailers. Only a State owned firm (Enap) refined national petroleum, although there was no evidence of an abuse of dominance regarding this agent. The distribution of fuel had barriers of entry due to the scarcity of terrains apt for fuel storage and the strict legal requisites for their installation and operation. These conditions configured high barriers that prevented potential competitors from entering the market. Finally, the retailing was characterized by a high degree of vertical integration (90\%) since the wholesalers also owned most of the retailer fuel stations\textsuperscript{358}.

The FNE concluded both the refining market and the retailing market were highly concentrated and characterized by the presence of economic and legal barriers of entry\textsuperscript{359}. In effect, in the year 2000 Copec had 51\% of the market share, Shell and Esso had 20\% and 19\% respectively and the other firms had 8\% and 1\% respectively\textsuperscript{360}. Furthermore, in the year 2001 the sales of liquid fuel had decreased by 4.2\% while the profits of the retailers had increased\textsuperscript{361}.

\begin{flushleft}
\textsuperscript{356} TDLC, Sentencia N° 7 de 2004, pp. 36-38.
\textsuperscript{357} TDLC, Sentencia N° 18 de 2005. For a summary of the case, see Fiscalía Nacional Económica, \textit{Luchando contra los carteles duros: la perspectiva Chilena}, Chile’s Country contribution to the “Third Meeting of the Latin American Competition Forum - Madrid, 19-20 July 2005”.
\textsuperscript{358} TDLC, Sentencia N° 18 de 2005, pp. 3-4.
\textsuperscript{359} TDLC, Sentencia N° 18 de 2005, p. 6.
\textsuperscript{360} TDLC, Sentencia N° 18 de 2005, p. 6.
\textsuperscript{361} TDLC, Sentencia N° 18 de 2005, p. 11.
\end{flushleft}
The FNE alleged that the evidence showed the firms were abusing of their dominance through agreements to raise retail prices of liquid fuel\textsuperscript{362} The FNE recommends the adoption of measures to reduce barriers of entry and requests the TDLC to instruct the firms to put an end to any collusive agreement and fine the investigated firms\textsuperscript{363}.

To sum up, the FNE based its conclusions on the following facts: i) an increase of profit while the demand was declining, ii) the effect on the retail price due to the decrease of prices by Enap was not immediate while the increase was passed on to customers rapidly, iii) the similarity of prices, and iv) the fact that the entrance of a new independent retailer, in the Metropolitan Region, had a strong effect on the decrease of profits\textsuperscript{364}.

The principal arguments of defense alleged by the firms were the following:

1) Each firm decided its prices autonomously and according to their costs.

2) Denial of any participation in a collusive agreement.

3) Barriers of entry were not high\textsuperscript{365}.

4) There was a high degree of rivalry in the market\textsuperscript{366}, manifested in their high spending on advertisement\textsuperscript{367}.

5) The price increase was not the result of collusion but of other factors of the market\textsuperscript{368}.

\textsuperscript{362} TDLC, Sentencia N° 18 de 2005, pp. 7-10.
\textsuperscript{363} TDLC, Sentencia N° 18 de 2005, pp. 10-11.
\textsuperscript{364} TDLC, Sentencia N° 18 de 2005, p. 66.
\textsuperscript{365} TDLC, Sentencia N° 18 de 2005, p. 13, p. 22 and p. 34.
\textsuperscript{366} TDLC, Sentencia N° 18 de 2005, p. 13 and p. 40.
\textsuperscript{367} TDLC, Sentencia N° 18 de 2005, p. 78.
\textsuperscript{368} TDLC, Sentencia N° 18 de 2005, p. 13.
6) A similar cost structure among firms, since the price of refined fuel set by Enap plus taxes represents 90% of their production costs and commercialization costs are similar (transport and advertisement), explains a similarity on prices\textsuperscript{369}.

7) Fuel is a homogeneous product and there was weak loyalty of the consumers regarding the brands\textsuperscript{370}.

8) Low profitability\textsuperscript{371}.

To determine the existence of collusion the TDLC first analyzed the profits of the investigated firms. In the present case, the FNE proved that the monthly average gross income between January and September 2002 was higher than the monthly gross income between February and December 2001 (See Annex 1).

According to the TDLC the increase of gross income and a simultaneous reduction of the demand (as in the present case) could be indicative of collusion since the decrease of demand should, \textit{ceteris paribus}, lead to a decrease of the price\textsuperscript{372}. To verify the latter, the TDLC analyzed if other variables, such as costs, didn’t present modifications during the relevant period of time.

The TDLC explained the behavior of firms in concentrated markets, their strategic actions and the existence of price leadership. Furthermore, the tribunal acknowledged that due to the nature of concentrated markets it is frequent that an increase of demand will allow the firms to charge a price higher than the long term average cost. According to the TDLC this situation does not infringe competition laws and possibly it is not even inefficient since, in absence of barriers of entry, the supracompetitive profits may attract new competitors\textsuperscript{373}. Moreover the TDLC affirmed the following:

\textsuperscript{369} TDLC, Sentencia N° 18 de 2005, pp. 24-25 and pp. 35-36.
\textsuperscript{370} TDLC, Sentencia N° 18 de 2005, p. 35.
\textsuperscript{371} TDLC, Sentencia N° 18 de 2005, p. 40.
\textsuperscript{372} TDLC, Sentencia N° 18 de 2005, p. 68.
\textsuperscript{373} TDLC, Sentencia N° 18 de 2005, p. 69.
“If the exercise of market power was sanctioned, the incentives to compete would be lower, particularly the stimulus to innovate, one of the mechanisms through which firms try to beat their competitors would be reduced. However, if the price increase was a result of collusion among firms, it would be illegal.”\(^\text{374}\)

Regarding the facts of the case, the TDLC identified that the price increases took place in the period of August 2001 – March 2002 and contemplated three different hypotheses that explained the situation. In the first place, the TDLC discarded as the cause of the price increase an increase of demand caused by seasons\(^\text{375}\). Secondly, the TDLC argued that the hypothesis of collusion among the investigated firms, which explained the fact that a decrease of fuel prices was not passed on to the final customer was consistent with the information collected in the proceeding\(^\text{376}\). Thirdly, during the relevant period of time there was an increase of the prices set by Enap which elevated the investigated firms’ costs. However the TDLC concluded the latter couldn’t explain the different profit margins found in different regions. Moreover, the presence of an independent distributor, which triggered a “price war”, seemed to be the reason for the price differentiation among zones\(^\text{377}\). After analyzing the hypotheses the TDLC concluded the information available was not enough to reach definitive conclusions\(^\text{378}\).

Regarding the asymmetry in the investigated firms’ reaction towards variations of Enap’s prices, the TDLC concluded it was not proof of collusion, taking into account the concentration in the market\(^\text{379}\). The TDLC also concluded that the similar price tendency of the firms was not a proof of collusion since gasoline is a homogenous product; which explains why a firm couldn’t have significant differences on prices in the long term\(^\text{380}\).

\(^\text{374}\) TDLC, Sentencia Nº 18 de 2005, p. 69.
\(^\text{375}\) TDLC, Sentencia Nº 18 de 2005, p. 71.
\(^\text{376}\) TDLC, Sentencia Nº 18 de 2005, pp. 71-72.
\(^\text{377}\) TDLC, Sentencia Nº 18 de 2005, pp. 73-74.
\(^\text{378}\) TDLC, Sentencia Nº 18 de 2005, p. 75.
\(^\text{379}\) TDLC, Sentencia Nº 18 de 2005, p. 76.
\(^\text{380}\) TDLC, Sentencia Nº 18 de 2005, pp. 76-77.
The TDLC dismissed the request of the FNE of fining the firms and exhorted the President to propose a bill to reduce legal barriers of entry for the installment of new pipelines. Finally, according to the TDLC the barriers of entry and the vertical integration of the market may constitute a menace to free competition. The vertical integration may facilitate explicit or tacit collusion by facilitating final price coordination and constitute, by itself, a barrier of entry⁴⁸¹. Hence, the TDLC requested the FNE to monitor the commercial relations between the wholesalers and the retailers in the market of distribution of liquid fuel.

In conclusion, while the FNE recognized certain facts and market structure which indicated the existence of tacit collusion, for the TDLC—which recognized the existence of most of these facts—there was not sufficient evidence to prove collusion. Clearly the standard of proof applied by the TDLC—regarding tacit collusion—was higher than the standard claimed by the FNE.

The FNE filed a remedy of complaint before the Supreme Court of Justice. According to the FNE in practice, the tribunal’s decision implied that tacit collusion had to be proved through direct evidence. The Supreme Court confirmed the TDLC’s decision and even set a higher standard of proof by interpreting that the competition law only prohibited acts where the will of producing certain effect was proved, not merely coincident behavior or supposed tacit collusion. The Supreme Court coincides with the tribunal in relation of the insufficiency of evidence to achieve definitive conclusions instead of mere hypotheses.⁴⁸²

2.3.2.2. Second period

In spite of the Supreme’s Court decision in the fuel retailers’ case, the TDLC relaxed its strict standard of proof for tacit collusion. For the first time the TDLC fined firms in two tacit collusion cases, analyzed bellow, on the basis of indirect evidence: mainly the parallel behavior of the firms plus a concentrated market structure.

Acknowledgments

381 TDLC, Sentencia Nº 18 de 2005, p. 84.
382 Corte Suprema de Justicia, Sentencia del 26 de octubre de 2005.
The cases reached the Supreme Court that reversed the decisions and maintained its strict standard of proof which almost excluded the proof of collusion through circumstantial evidence. Furthermore the Supreme Court considered that intent of producing an effect (the restriction of competition) must be proved since the law prohibits only willful actions, not mere coincidences.

In *ASOEX and FNE v. Ultramar and others* (2006) \(^{383}\) six maritime agencies were accused of price fixing, abuse of dominant position and price discrimination. According to ASOEX (the exporters’ trade association) the maritime agencies simultaneously (April 2002) charged similar prices for the issuance of a document which enabled the loading of the ships and other related services.

The maritime agencies alleged they didn’t have a dominant position, argued that the market was very competitive\(^ {384}\) and denied the existence of any agreement among them.

The FNE also filed a complaint against the firms which was accumulated by the TDLC. According to the agency, the relevant market was the maritime transport of merchandise and the shipping services of maritime agencies in the ports of Chile\(^ {385}\). From the perspective of the relation between the maritime agents and the shipping companies, according to the FNE, the market was concentrated due to its high barriers of entry in the sense that the investigated maritime agencies represented the biggest shipping companies\(^ {386}\). The agency alleged the maritime agencies had agreed upon the prices and conditions of several services that manifested in the simultaneous creation of a new mandatory service charged at the same price\(^ {387}\).

\(^{383}\) TDLC, Sentencia N° 38 de 2006.
\(^{384}\) TDLC, Sentencia N° 38 de 2006, p. 6.
\(^{385}\) TDLC, Sentencia N° 38 de 2006, p. 12.
\(^{386}\) TDLC, Sentencia N° 38 de 2006, p. 12.
The TDLC analyzed the relations between the exporters, shipping companies and maritime agencies. Each shipping company contracts a maritime agency, hence when an exporter contracts the former it is obliged to work with the latter without option of choosing other agency.

The tribunal concluded that the documentary services were imposed by the maritime agents to the exporters, between March and April 2002, and configured a concerted imposition of services that were not requested by the exporters. According to the TLDC, the indirect evidence that proved the collusion was the following: 1) the simultaneous initiation of the mandatory services by the agencies and 2) the similarity on the charged price and other conditions (See Annex 1).

The TLDC established that the configuration of horizontal collusion takes places in markets where consumers have the opportunity of choosing among different firms but an agreement among them raises prices artificially. On the other hand, in markets where consumers can’t choose among firms the suppliers are able to charge supracompetitive prices. Due to the absence of rivalry these firms had a dominant position and may abuse of it through excessive prices. Although one of the investigated firms argued that the scenarios of collusion and abuse of dominant position exclude each other, the TDLC concluded that “the individual abusive conduct is allowed, reinforced and aggravated by the collusion among the maritime agencies upon the fees charged to the exporters”. Moreover, the tribunal concluded

388 The relation between the exporters and the shipping companies is canalized through the maritime agency; however, there is no contractual relation between the exporters and the maritime agencies. (TDLC, Sentencia Nº 38 de 2006, p. 31).
389 TDLC, Sentencia Nº 38 de 2006, p. 32.
390 TDLC, Sentencia Nº 38 de 2006, pp. 33-34.
391 TDLC, Sentencia Nº 38 de 2006, p. 34.
392 TDLC, Sentencia Nº 38 de 2006, p. 35.
393 TDLC, Sentencia Nº 38 de 2006, p. 35.
394 TDLC, Sentencia Nº 38 de 2006, p. 35.
that since the dominant position of the investigated maritime agencies (that served 71% of the market) was not absolute a collusive agreement was necessary to reinforce it.\textsuperscript{395}

The TDLC fined five of the six charged maritime agencies and the defendants filed a remedy of complaint before the Supreme Court of Justice. The Supreme Court accepted the remedy’s pleads\textsuperscript{396} and adopted the same position exposed in \textit{FNE v. Compañía de Petróleos de Chile S.A. and others} (2005)\textsuperscript{397}. In effect, the Supreme Court reversed the TDLC’s decision on the following grounds:

- The competition law, more precisely article 3, prohibits actions that are voluntary or that have a deliberate intent of provoking certain effect.\textsuperscript{398}

- The law doesn’t contemplate the prohibition of actions where the will is absent, such as the merely coincidental conducts among the maritime agencies.\textsuperscript{399}

- The firms cannot be sanctioned for supposed collusions, since the evidence in the proceeding “only allows to formulate merely hypothetical tacit collusions among the investigated firms, but not to extract definitive conclusions, necessary to typify an infringement and impose sanctions.”\textsuperscript{400}

- The simultaneous and similar behavior of the maritime agencies is not enough proof of collusion. Two more elements must be proved: “the will of the participants and their joint decision to adopt a vicious

\textsuperscript{395} TDLC, Sentencia Nº 38 de 2006, p. 36.
\textsuperscript{396} Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006.
\textsuperscript{397} Corte Suprema de Justicia, Sentencia del 26 de octubre de 2005.
\textsuperscript{398} Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006, p. 23.
\textsuperscript{399} Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006, p. 23.
\textsuperscript{400} Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006, p. 23.
practice, conditions that can’t be proved by the simple coincidence of circumstances (simultaneousness and homogeneity of prices).”

- Moreover, the parallel behavior of the maritime agencies may be explained by the similarity of the services which entail similar costs and that there is a competitive dynamic in the maritime agent’s services.

In *FNE v. Air Liquide Chile S.A. and others* (2006) the TDLC applied a similar standard of proof as in maritime agents’ case, although it is important to stress that this decision was issued before the Supreme Court revoked TDLC’s sentence in *ASOEX and FNE v. Ultramar and others* (2006). The FNE accused the four only firms that bottled oxygen in Chile for concerted actions with the purpose of restricting competition (market division and bid rigging) and discriminating among customers (hospitals).

According to the FNE two of the firms concentrated 75% of the relevant market and the ownership of the storing tanks may have constituted a barrier of entry and an obstacle for the consumers to change their provider. The agency argued that between the years 2001 and 2004 the firms divided the market by abstaining from competing. Furthermore, the agency found there was high price dispersion that was not related to volume or the distance between the providers’ premises and the hospitals.

Regarding the bid rigging charge, the FNE argued the firms tried to act in coordination in the first phase of a State public bid (managed by Cenabast) in the year 2004. The agency recalls a recent similar case in

401 Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006, p. 23.
402 Corte Suprema de Justicia, Sentencia del 28 de diciembre de 2006, p. 23.
403 TDLC, Sentencia N° 43 de 2006.
404 TDLC, Sentencia N° 38 de 2006.
406 TDLC, Sentencia N° 43 de 2006, p. 2.
Argentina\textsuperscript{407} where firms that bottled medical oxygen (four of the firms were also present in Chile’s case) were found guilty –through direct evidence- of collusive practices and bid rigging in public bids of hospitals\textsuperscript{408}.

The investigated firms alleged, among others, the following in their defense:

1) Industrial oxygen and medicinal oxygen are different relevant markets, as well as the different forms of its distribution, which explains the price dispersion\textsuperscript{409};

2) Absence of barriers of entry\textsuperscript{410};

3) Medical oxygen is not a homogeneous product\textsuperscript{411};

4) Price dispersion is also caused, among others by the differences of quality and the form and conditions of its commercialization\textsuperscript{412};

5) Margins of commercialization are not supracompetitive\textsuperscript{413};

6) There are alternative explanations for the behavior of the firms, different from the collusion hypothesis\textsuperscript{414};

7) Long term contracts due to the high initial investments\textsuperscript{415}.

\textsuperscript{407} CNDC, Dictamen No. 510 de 2005 (CNDC v. Air Liquide and others).
\textsuperscript{408} TDLC, Sentencia Nº 43 de 2006, p. 5.
\textsuperscript{409} TDLC, Sentencia Nº 43 de 2006, p. 10 and p. 28.
\textsuperscript{410} TDLC, Sentencia Nº 43 de 2006, p. 11, p. 20, pp. 28-29 and p. 33.
\textsuperscript{411} TDLC, Sentencia Nº 43 de 2006, pp. 11-12, p. 20 and p. 33.
\textsuperscript{412} TDLC, Sentencia Nº 43 de 2006, p. 12, p. 21 and p. 34.
\textsuperscript{413} TDLC, Sentencia Nº 43 de 2006, p. 15.
\textsuperscript{414} TDLC, Sentencia Nº 43 de 2006, p. 16 and p. 35.
\textsuperscript{415} TDLC, Sentencia Nº 43 de 2006, p. 27.
The TDLC firstly analyzed the conditions and characteristics of the market affected by the firms’ conducts. The tribunal warned that the definition of the relevant market is not strictly necessary in collusion cases (as in cases of abuse of dominant position or merger control) since this practice infringes the law whenever the conducts have as an object or an effect restraining competition. The TDLC determined that the market of industrial oxygen and the market of medicinal oxygen are different markets, but closely related. The tribunal also considered that the ownership of the storage tanks was not a barrier of entry.

The tribunal established that the market was served only by the four investigated firms and that the market lacked of transparency in relation to prices and that there was high dispersion of prices. The conditions of the market and the price dispersion, according to the tribunal could have indicated an agreement among the firms to divide the market. However, the TDLC concluded that the evidence was not sufficient to prove a division of the market. On the other hand, the tribunal gave credit to the hypothesis of coordination among the firms in the Cenabast’s public bid and mentioned as indirect evidence the information exchange that took place between the investigated firms in Argentina.

The TDLC made a thorough analysis of the “English bid” applied by Cenabast where the firms had to make bids in several rounds for three different geographic zones. In the first round the firms’ offers were higher than the prices offered in the past and considerably higher than the prices offered in the second round. The TLDC concluded there was no economic justification for the behavior of the firms in the first round of the bid and discarded the firms’ explanations. According to TDLC

416 TDLC, Sentencia Nº 43 de 2006, p. 97.
417 TDLC, Sentencia Nº 43 de 2006, p. 98.
418 TDLC, Sentencia Nº 43 de 2006, p. 100.
419 TDLC, Sentencia Nº 43 de 2006, pp. 101-104.
420 TDLC, Sentencia Nº 43 de 2006, p. 104.
421 TDLC, Sentencia Nº 43 de 2006, p. 111.
422 TDLC, Sentencia Nº 43 de 2006, p. 112.
the incentive for at least three of the firms to sabotage Cenebast’s (through their coordination of high prices) public bid was to impede transparency of prices (maintain the asymmetry of information) that would put pressure on them regarding their current clients\textsuperscript{424}.

The TDLC decided, by majority, to fine the five firms for an agreement that had the object of the effect of sabotaging a public bid through coordination. One of the members of the tribunal, Minister Tomás Menchaca, dissented on the following grounds:

- To oblige the investigated firms to prove the alternative hypotheses (other than collusion) instead requesting the proof of collusion to the party that alleges is against the rules of the burden of proof (\textit{onus probandi})\textsuperscript{425}.

- There are plausible explanations, different from collusion, for the firms’ conduct such as the oligopostic structure of the market and the firms’ interdependence\textsuperscript{426}.

- Article 3 of the competition law establishes as necessary condition to prove an infringement the concurrence of an agreement that has “an anticompetitive object and that the colluding agents have market power o acquires it by the agreement and abuse it”\textsuperscript{427}. According to minister Menchaca the latter was not proved.

The fined firms and the FNE filed a remedy of complaint before the Supreme Court. As in \textit{ASOEX and FNE v. Ultramar and others} (2006)\textsuperscript{428} the Supreme Court accepted the pleads of the investigated firms and reversed the TDLC’s decision\textsuperscript{429}. Regarding the bid rigging

\textsuperscript{424} TDLC, Sentencia Nº 43 de 2006, p. 119.
\textsuperscript{425} TDLC, Sentencia Nº 43 de 2006, p. 127.
\textsuperscript{426} TDLC, Sentencia Nº 43 de 2006, p. 127.
\textsuperscript{427} TDLC, Sentencia Nº 43 de 2006, p. 129.
\textsuperscript{428} TDLC, Sentencia Nº 38 de 2006.
\textsuperscript{429} Corte Suprema de Justicia, Sentencia del 22 de enero de 2007.
charge, the Supreme Court affirmed that the FNE didn’t prove the existence of the infringement since the evidence was not sufficient to prove collusion\textsuperscript{430}. Finally, according to the Supreme Court the facts that would serve as indirect evidence were not proved and the firms’ explanation of their conduct was credible\textsuperscript{431}.

2.3.2.2. Third period

After the Supreme’s Court decisions in the maritime agencies and the medicinal oxygen cases, the most recent case law of tacit collusion of the TDLC is adjusted to the Supreme Court’s requirements for the proof of tacit collusion.

In FNE v. Isapre ING S.A. and others (2007)\textsuperscript{432} the FNE accused five health insurance companies of collusion that consisted on a simultaneous negative to offer a health insurance plan of 100%-80% cover and its replacement an insurance plan of 90%-70% cover (See Annex 1). In other words, according to the agency, since the May 2002 the firms stopped offering a plan and substituted it for a product of lower quality and similar price with an effect of increasing their profits\textsuperscript{433}. The agency argued that the latter wouldn’t be possible in a competitive market unless it was supported by an agreement\textsuperscript{434}.

The defense of firms contained, among others, the following arguments:

1) The behavior of the firms reflects competition and not collusion\textsuperscript{435}.

\textsuperscript{430} Corte Suprema de Justicia, Sentencia del 22 de enero de 2007, p. 20.
\textsuperscript{431} Corte Suprema de Justicia, Sentencia del 22 de enero de 2007, pp. 23-24.
\textsuperscript{432} TDLC, Sentencia N° 57 de 2007.
\textsuperscript{433} TDLC, Sentencia N° 57 de 2007, pp. 1-3.
\textsuperscript{434} TDLC, Sentencia N° 57 de 2007, p. 3.
\textsuperscript{435} TDLC, Sentencia N° 57 de 2007, p. 5.
2) The decision to eliminate the 100%-80% plans had as an object to reduce a *moral hazard* and *adverse selection* problem since the insured persons didn’t have the proper incentives to reduce risk.

3) Profits were not excessively high.

4) Fifty per cent of the industry was left out (including public sector) of the charges, which made unviable the supposed collusion.

5) The strategic and intelligent conduct of the firms upon the changes in the market can’t be sanctioned.

6) The market is mature and has a negative growth.

7) There are no barriers of entry.

8) There are several alternative explanations, different than collusion, for the behavior of the firms.

9) The modification of the health plans was neither simultaneous nor uniform.

10) Transparency of information allows imitation of commercial strategies.

11) There is neither dominant position nor its abuse.

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436 TDLC, Sentencia Nº 57 de 2007, p. 6 , p. 24 and p. 32.
438 TDLC, Sentencia Nº 57 de 2007, p. 6 and p. 21.
439 TDLC, Sentencia Nº 57 de 2007, p. 6.
440 TDLC, Sentencia Nº 57 de 2007, p. 8.
443 TDLC, Sentencia Nº 57 de 2007, p. 13, p. 17 and ‘p. 34.
444 TDLC, Sentencia Nº 57 de 2007, p. 35.
The TDLC initiated its analysis by affirming that the conducts described in the numeral “a” of article 3 of the law are just three examples of horizontal collusion (price fixing, limitation of quantity and market division), but that the wording of the article doesn’t exclude other forms of illegal horizontal collusion. Furthermore, the tribunal established that a horizontal agreement must be sanctioned when three elements are present:

1. Existence of an agreement among competitors

2. Incidence of the agreement on any element relevant for competition

3. That the agreement allows the firms to attain, maintain or increase a dominant position (collective) and abuse it. In effect, the agreements among competitors that have an “insignificant dominant position” (individually or collectively considered) are not illegal since the practice wouldn’t be apt to effectively or potentially restrict competition.

To determine the proof of the three elements described above, the TDLC first defined the relevant market by a thorough account of the characteristics of the health security systems in Chile. The relevant market was composed by the mandatory health insurance services offered by the private sector, excluding voluntary health insurance plans and mandatory health insurance plans offered by the State. The five investigated firms had a joint market share of 80% during the years 1999-2005. The tribunal also affirmed that the market had barriers of entry that did not impede the entrance of new competitors but that delayed and made more difficult their entrance. The TDLC concluded

446 TDLC, Sentencia Nº 57 de 2007, p. 59.
447 TDLC, Sentencia Nº 57 de 2007, p. 60.
448 TDLC, Sentencia Nº 57 de 2007, p. 59.
449 TDLC, Sentencia Nº 57 de 2007, p. 65 and p. 69.
450 TDLC, Sentencia Nº 57 de 2007, p. 65.
451 TDLC, Sentencia Nº 57 de 2007, p. 70.
that the market structure and the firms’ participation of the market it was possible to identify a collective dominant position\textsuperscript{452}.

The tribunal identified four factors that could facilitate collusion in the relevant market: i) few competitors, ii) frequent interaction among firms (in a trade association), iii) transparency of information about competitors and iv) the existence of barriers of entry\textsuperscript{453}.

However, the TDLC also established that the different levels of market share of each firm according to the segment of insurance (divided in different segments, according to the employees’ income) were an element that would disincentive collusion\textsuperscript{454}. Furthermore, the transparency of information, that allows the monitoring of the competitors’ policies, may produce a parallel behavior that is not illegal (oligopoly interdependence)\textsuperscript{455}; hence, parallelism by itself is not sufficient to prove collusion\textsuperscript{456}. Other indirect evidence must complement the parallel behavior to detect and infringement of the law.

The TDLC analyzed the alternative explanations of firms’ conduct and concluded that following of the arguments should not be discarded: 1) the economic recession of Chile’s economy; 2) the \textit{moral hazard} problem reflected on a usage of the health services higher than the socially optimal level and an \textit{adverse selection} problem\textsuperscript{457}; and 3) that the conducts correspond to the interdependence inherent to oligopolies\textsuperscript{458}. Regarding the last argument, the tribunal analyzed thoroughly the firms’ actions and the rationality of their decisions\textsuperscript{459}. Furthermore, the similar investments on advertisement and the efforts to increase sales were consistent with the hypothesis of collusion\textsuperscript{460}.

\textsuperscript{452} TDLC, Sentencia Nº 57 de 2007, p. 72.
\textsuperscript{453} TDLC, Sentencia Nº 57 de 2007, p. 73.
\textsuperscript{454} TDLC, Sentencia Nº 57 de 2007, p. 74.
\textsuperscript{455} TDLC, Sentencia Nº 57 de 2007, pp. 74-79.
\textsuperscript{456} TDLC, Sentencia Nº 57 de 2007, p. 74 and p. 79.
\textsuperscript{457} TDLC, Sentencia Nº 57 de 2007, pp. 82-83.
\textsuperscript{458} TDLC, Sentencia Nº 57 de 2007, pp. 86-91.
\textsuperscript{459} TDLC, Sentencia Nº 57 de 2007, pp. 86-92.
\textsuperscript{460} TDLC, Sentencia Nº 57 de 2007, pp. 92-97.
However, from the facts and evidence the TDLC concluded that neither the interdependence argument nor the collusion argument was proved\(^{461}\).

The TDLC decided by majority that albeit the parallel behavior the evidence was not enough to prove the collusive practices\(^{462}\). Two of the members of the tribunal, Ministers Butelmann and Depolo, dissented from the majority mainly on the interpretation of the numeral “a” of the article 3 of the law.

According to the dissent, to prove a collusive agreement it is enough to prove “a meeting of the minds with the object or the effect of substituting the uncertainty and incentives inherent to competition with the certainty of collaboration.”\(^{463}\) Hence, the mentioned rule didn’t create an additional requirement consisting on the proof of the attainment, maintenance or increase of a dominant position and its abuse through the agreement\(^{464}\). According to the dissenting Ministers, requiring the proof of this additional condition was a conceptual error, since collusion and an abuse of collective dominance are different kinds of infringements\(^{465}\).

Moreover, the dissent argued that collusion may also be proved through sole indirect evidence or circumstantial evidence, which actually constitutes most of the cases due to nature of the anticompetitive practice\(^{466}\). Regarding the assessment of alternative hypotheses that could explain the firms’ conduct, different from collusion, the dissent considered it was not enough to argue that the explanations were theoretically viable but that evidence must show that these justifications are more plausible than the supposed collusion\(^{467}\).

The dissenting Ministers conclude that in the present case the conditions that facilitated collusion (barriers of entry, few competitors,

\(^{461}\) TDLC, Sentencia Nº 57 de 2007, p. 92.
\(^{462}\) TDLC, Sentencia Nº 57 de 2007, p. 99.
\(^{463}\) TDLC, Sentencia Nº 57 de 2007, p. 100.
\(^{466}\) TDLC, Sentencia Nº 57 de 2007, p. 102.
\(^{467}\) TDLC, Sentencia Nº 57 de 2007, p. 103.
frequent exchange of information through their trade association, and easy access to information), the indirect evidence (simultaneous actions, notorious parallelism, and diminution of competitiveness) and the insufficiency of the firms’ allegations were enough to conclude that the firms’ conduct could only be explained by collusion and thus establish an infringement of the law.

2.3.3. Conclusions

Chile’s antitrust agency and tribunal are well funded and well regarded in the region by their peers. Their prosecutions on horizontal collusion have focused on cases where direct evidence was not available. The five cases analyzed in this document are set in markets with an oligopolistic structure and high concentration. In four of the cases price fixing charges were studied, in two cases market division charges and only in one case the firms were prosecuted for bid rigging.

Although Chile’s tacit collusion case law hasn’t been as prolific in comparison with its peers (i.e. Argentina, Colombia and Peru) the analysis in each case has been thorough (decisions are quite long for the region’s standards) and the facts and evidence have been subject of intense scrutiny. Another feature that distinguishes Chile’s case law is the absence of explicit reliance on foreign case law, since only in one case a decision of the EC is mentioned.

The FNE and the TDLC apply an economic approach for the assessment of the cases where the market structure and characteristics are explicitly identified. This approach is reinforced by the presence of expert economic testimonies (provided by the plaintiffs and the defendants) in every case and by the fact that two of the members of the tribunal are economists rather than lawyers. The latter is a unique characteristic of Chile’s enforcement system that differentiates it from the other Latam jurisdictions. Perhaps because of this institutional setup, the economic analysis in the TDLC’s decisions contrasts with the strict formalistic approach of the Supreme Court.

468 TDLC, Sentencia Nº 57 de 2007, p. 104-114.
2.3.3.1. Attributes of successful defense

The case law of the TDLC and the Supreme Court both hold that parallel behavior is insufficient to prove tacit collusion. Furthermore, the Supreme Court’s concern with sanctioning firms that act legitimately or without the will of restricting competition is reflected in their standard of proof which is close to the position of the European Court of Justice.

The TDLC’s case law explicitly deals with the fact that parallel behavior may be explained either by illegal collusion or by the logic of oligopolistic market structures.

Furthermore, the tribunal acknowledges that an increase in prices in a concentrated market, in the absence of barriers of entry, does not create a per se infringement. To discard the possibility of parallelism due to the firms’ interdependence or “price leadership” the TDLC analyzes thoroughly each hypothesis that may justify on economic grounds a firm’s conduct. Ultimately, the plaintiff has the burden of proving there is no economic justification for the firms’ decisions besides the existence of collusion.

Likewise, the defendant’s arguments have been strongly supported on legal and economical grounds. The main objective of the firms’ argumentation was to present credible explanations and justifications for their conduct.

In summary, the three arguments present in the cases where none of the firms were found guilty are the following:

1. The conduct was not parallel.
   1. The quality of the product is different
   2. The prices are not really homogenous due to the existence of rebate schemes

2. There is a reasonable explanation for the firms’ behavior besides collusion.
   1. In price-fixing case: a) The prices were raised due to an increase of production costs and their cost structures were similar and b)
behavior is normal in the context of an oligopoly where firms are interdependent, transparency of information allows imitation (strategic conduct) and the product is homogenous  

2. In market division case: different conditions of commercialization or distribution explain price dispersion

3. In a case where there is a simultaneous negative to offer a product: the conduct had the objective of reducing a moral hazard and adverse selection problem

3. **The market tendency excludes collusion since there is no dominant position.** The following characteristics of the markets were alleged by the defendants:

   1. Market shares were low
   2. The profit margins were low or at least not supracompetitive;
   3. Barriers of entry are not high
   4. There is a high degree of rivalry in the market

2.3.3.2. **Attributes of successful prosecution**

As explained along this section the TDLC’s requirements for the proof of tacit collusion have varied since the first case was decided in the year 2004 due to the strict position assumed by the Supreme Court regarding the burden of proof and the standard of proof.

As an effect of the Supreme Court’s standard of proof for tacit collusion is that there are no cases where firms have been fined for tacit collusion, which is a fundamental feature of Chilean enforcement of competition laws that is shared by the EU’s case law. Since there are no cases of successful prosecution for tacit collusion in Chile, its attributes

469 In the case where bid rigging and market division were charged, the argument was the inverse: the quality and commercialization of the good was different.
must be inferred from the theoretical considerations of the TDLC and the Supreme Court.

Before analyzing the specific rules on tacit collusion, it is pertinent to mention the TDLC’s case law of collusion. To establish that a horizontal agreement infringes the law, the following elements must be proved: 1) the existence of an agreement; 2) on a relevant variable for competition; 3) which allows the firms to attain, maintain or reinforce dominance and abuse from it. Obviously, a successful prosecution in a tacit collusion case starts by proving these elements.

The case law of the TDLC and the Supreme Court, regarding the elements that must be proved to determine the infringement of the law through tacit collusion, may be summarized in the following terms:

1. **Concurrence of wills to restrict competition.** According to the Supreme Court the plaintiff must prove the deliberate and joint intent of the firms to adopt an illegal practice

2. **Dominance of the market** (individual or collective) and the possibility of abusing it through the agreement

3. **No economic justification exists for the firms’ decisions besides the existence of collusion.** The Supreme Court has been emphatic in the following principle: the evidence must allow the adjudicator to go beyond the production of plausible hypotheses, it must be conclusive. Hence, the adjudicator cannot rely exclusively on market evidence to infer collusion. Without losing sight of this principle it is important to mention that according to the TDLC’s case law the following facts, concurrently, may indicate:

   a. Market division: 1) stable participation of the firms for long periods of time; 2) high dispersion of prices; 3) lack of transparency –asymmetry of information- regarding prices charged; and 4) concentrated markets with high barriers of entry.
b. Coordination among firms: 1) existence of high barriers of entry; 2) high (supracompetitive) profits; 3) reduction of demand; 4) few competitors; and 5) frequent interaction among firms (e.g. within a trade association). Other characteristics of a market have been considered as facilitators of collusion, such as vertical integration which allows the firms to control the final price (which is public and apt for monitoring).

2.4. Colombia

Colombian competition laws\textsuperscript{470} were in 1959 (Law 155) but were not enforced until the mid 1990s\textsuperscript{471}. Decree 2153 of 1992 reorganized the competition authority, the Superintendence of Industry and Commerce\textsuperscript{472} (SIC), and established a structured antitrust system. The SIC is part of the executive branch of the Colombian State, under the supervision of the Ministry of Commerce, Industry and Tourism but with administrative, financial and budgetary autonomy\textsuperscript{473}.

\textsuperscript{470} For a complete review and compilation of Colombian competition laws, see \textsc{Alfonso Miranda Londoño & Juan David Gutiérrez Rodríguez}, \textit{Compilación de normas de derecho de la competencia en Colombia Referencias jurisprudenciales, concordancias y anotaciones}, Cámara de Comercio de Bogotá, 2005.


\textsuperscript{472} According to the Colombian Administrative Law Code the Administrative Tribunals have competence to decide in first instance of the requests of “annulment of administrative acts and restoration of the rights” whenever the quantum of the suit exceeds 300 monthly legal minimum wages (article 132-3). When the quantum of the suit is bellow the threshold an Administrative Judge is competent in first instance (article 134B-3) and the Administrative Tribunal is competent, in second instance, of the appeal of the Administrative Judge’s decision (article 133-1). The maximum penalty that the SIC may impose to a firm that infringes the competition law is 2,000 monthly legal minimum wages (article, 4-15, decree 2153 of 1992). Up to date the requests of “annulment and restoration of the rights” of a Resolution issued by the SIC have only been filed on first instance before and Administrative Tribunal.

\textsuperscript{473} Article 2, decree 2153 of 1992.
The Superintendent of Industry and Commerce is the highest authority of the SIC and is competent to issue the final decisions regarding the infringement of the competition laws\textsuperscript{474}. The competence to decide the cases by himself allows the superintendent to shape competition policy in a relatively autonomous way. The latter has clearly influenced the concept of tacit collusion and the way the Colombian authority has decided these cases in the last decade.

Proceedings before the SIC have an administrative nature and may be initiated due to a private complaint or \textit{ex officio} by the superintendence. The decision that resolves the case is an administrative act (Resolution\textsuperscript{475}) that may be challenged before the courts\textsuperscript{476}. First, the parties may file a request for the annulment of the administrative act before a first instance administrative court, the Administrative Tribunal\textsuperscript{477}. Second, the parties may appeal the decision of the Administrative Tribunal before a second instance court, the State Council\textsuperscript{478}.

Nowadays the Colombian CA is a very robust governmental agency which deals with all sort of cases regarding anticompetitive practices, abuse of dominant position, mergers\textsuperscript{479} and unfair competition.

\subsection*{2.4.1. Statutes}

Article 1 of Law 155 of 1959 contains a general prohibition against agreements or covenants that have the objective of limiting competition\textsuperscript{480}.

\begin{flushright}
\textsuperscript{474} Article 4, decree 2153 of 1992.
\textsuperscript{475} In Spanish, \textit{Resolución}.
\textsuperscript{476} \textit{See}, ALFONSO MIRANDA, \textit{El control jurisdiccional del régimen general de promoción de la competencia y practicas comerciales estrictivas}, 2002.
\textsuperscript{477} In Spanish, \textit{Tribunal Administrativo}.
\textsuperscript{478} In Spanish, \textit{Consejo de Estado}.
\textsuperscript{479} For a complete analysis of merger control in Colombia, \textit{see} MIRANDA, ALFONSO & JUAN D. GUTIÉRREZ, "Régimen de control de concentraciones empresariales en Colombia”, 2007.
\textsuperscript{480} Article 1, law 155 of 1959. Article 46 of the decree 2153 of 1992 contains a similar clause, prohibiting any conduct that affects freedom of competition.
\end{flushright}
As noted before, Decree 2153 of 1992 established a well defined antitrust system that prohibits the abuse of dominant position, anticompetitive acts and practices, and explicitly defines concepts such as dominant position, agreements and control. Article 47 of Decree 2153 of 1992 contains a non-exclusive list (numerus apertus)\textsuperscript{481} of ten types of agreements considered as anticompetitive agreements\textsuperscript{482}. The collusive agreements explicitly defined by the article are the following: price fixing (direct or indirect), fixing conditions of sale, horizontal division of markets, division (quotas) of production or distribution, division or restriction of sources of inputs for production, limits to technological progress, abstaining from producing or affecting the level of production, and bid rigging\textsuperscript{483}. It must be stressed that according to the wording of article 47, these conducts may be considered anticompetitive either because of their effect on the market or due to their objective (potential harm to the market).

Article 45(1) defines agreement as “any contract, covenant, compromise, or practice that is concerted or consciously parallel among two or more firms.”\textsuperscript{484} Hence, it is clear that the Colombian legislation prohibits both explicit mechanisms for collusion and tacit mechanisms such as conscious parallelism.

### 2.4.2. Decisions and case law

The SIC\textsuperscript{485} has frequently dealt with collusion cases, especially with price fixing. The explicit prohibition of collusion through tacit means in

\begin{itemize}
  \item \textsuperscript{481} It is a \textit{numerus apertus} clause since according to the wording of article 47 the agreements listed “among others” are considered anticompetitive.
  \item \textsuperscript{482} For an analysis of each of the anticompetitive agreements established by article 47, see Mauricio Velandia, \textit{Carteles restrictivos}, 2002, pp. 99-120.
  \item \textsuperscript{483} The types of agreements that mentioned correspond to collusive agreements established in the numerals 1, 2, 3, 4, 5, 6, 8 and 9 of article 47.
  \item \textsuperscript{484} In Spanish, the wording of article 45(5): \textit{Acuerdo: Todo contrato, convenio, concertación, práctica concertada o conscientemente paralela entre dos o más empresas}.
  \item \textsuperscript{485} According to the Colombian Administrative Law Code the Administrative Tribunals have competence to decide in first instance of the requests of “annulment of
the decree 2153 of 1992 has been the base upon which the SIC has initiated several investigations that finished with sanctions. Two cases have reached the State Council, the maximum court of the administrative proceedings judiciary branch.

Additionally, at least seven cases of supposed parallelism have been settled with the acceptance of the compromises offered by the investigated firms. In these cases the SIC doesn’t develop the concept of “consciously parallel practice”; instead the agency focuses on the analysis of the viability of the compromise offered. Furthermore in comparison with the decisions that impose penalties to the firms these decisions disclose less information regarding the facts of the case and evidence taken into account.

Three different periods of the enforcement of Colombian competition laws regarding tacit collusion are identified. The division of the periods coincides with the appointment and terms of different Superintendents of industry and commerce who decided the cases. This is because the doctrinal positions of the SIC and the methods of enforcement applied by the agency have clearly varied during each of the superintendents’ tenure. It is important to stress the fact that the superintendent is elected by the President of the Colombia and has no fixed term. Hence, the superintendent may be removed from the post at any time by the President.

Taking into account the influence of the superintendent in the doctrinal postures of the SIC, the following section describes the facts of the tacit collusion cases decided since the year 1999 as well as the legal and economic arguments upon which they are based.
The following chart lists the analyzed cases:

<table>
<thead>
<tr>
<th>Case</th>
<th>Product Market</th>
<th>Decision</th>
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<td>SIC v. Corporación Lonja de Propiedad Raíz de Bogotá and others (1999)</td>
<td>Real estate services</td>
<td>Sanction firms. Administrative Tribunal (AT)487 State Council (SC) confirmed the decision.488</td>
</tr>
<tr>
<td>SIC v. Ladrillera Helios Ltda. and others (2001)</td>
<td>Bricks of clay</td>
<td>Settlement</td>
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486 SIC, Resolución 22759 de 1999.
487 Resolución 22762 de 1999.
488 SIC, Resolución 19644 de 2000.
489 SIC, Resolución 24206 de 2000.
490 SIC, Resolución 25983 de 2000, Resolución 7451 de 2001 and Resolución 7554 de 2001
491 SIC, Resolución 19444 de 2001.
494 SIC, Resolución 7950 de 2002
495 SIC, Resolución 7951 de 2002
496 SIC, Resolución 8732 de 2002
497 SIC, Resolución 8027 de 2002
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<th>Case</th>
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<tr>
<td>SIC v Estación Terminal de Distribución de Productos de Petróleo de Bucaramanga S. and others (2002)</td>
<td>Fuel retailers</td>
<td>Sanction firms. The AT confirmed the decision.</td>
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<td>SIC v Molinos Roa S.A and others (2005)</td>
<td>Green paddy rice</td>
<td>Sanction firms. The defendants individually appealed and the AT’s decision is still pending.</td>
</tr>
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498 SIC, Resolución No. 22625 de 2005.
499 SIC, Resolución 3927 de 2004.
500 SIC, Resolución 6816 de 2005 and Resolución 6817 de 2005.
501 SIC, Resolución 2496 de 2006.
502 SIC, Resolución 4946 de 2009 and Resolución 52202 del 16 de octubre de 2009.
503 SIC, Resolución 6381 de 2007
504 SIC, Resolución 19785 de 2008.
2.4.2.1. First period

The first cases of tacit collusion were decided by the SIC in year 1999. Emilio J. Archila, superintendent of industry and commerce, fined several firms for price fixing in the markets of milk commercialization and real estate services\(^{510}\).

2.4.2.1.1. Real estate services and Milk commercialization cases

In the case \textit{SIC v. Corporación Lonja de Propiedad Raíz de Bogotá and others} (1999)\(^{511}\) the articles of association of “Corporación Lonja

\begin{tabular}{|c|c|c|}
\hline
Case & Product Market & Decision \\
\hline
\textit{SIC v. Ingenio del Cauca S.A and others} (2007)\(^{508}\) & Sugar cane & Pending \\
\textit{SIC v. Comunicaciones Satelitales de Colombia S.A. and others} (2008)\(^{509}\) & Installation of broadband, maintenance and provision of Internet services & Pending \\
\hline
\end{tabular}

\(^{507}\) Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, \textit{Colanta vs SIC}, Sentencia del 7 de Febrero de 2002, Exp. 000665.

\(^{508}\) Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Primera, \textit{Colanta vs SIC}, Sentencia del 23 de enero de 2003, Radicación No.: 25000-23-24-000-2000-0665-01(7909).


\(^{510}\) There were two cases of a supposed price fixing in the market of real estate services in the cities of Medellín and Bogotá respectively. In the first case, \textit{SIC v. Lonja de Propiedad Raíz de Medellín and others} (Resolución 10005 de 1999), the SIC accepted the compromises offered by the real estate firms and their trade association. In the second case, \textit{SIC v. Corporación Lonja de Propiedad Raíz de Bogotá and others}, the SIC found guilty of price fixing the real estate firms and their trade association and imposed the respective fines. Although the firms offered compromises the SIC did not accept them since the filing was extemporaneous.

\(^{511}\) SIC, Resolución 22759 de 1999.
de Propiedad Raíz de Bogotá”, a trade association, established as one of its functions to fix the prices for real estate services that its members should charge. The decisions were informed through letters and had a mandatory nature for the members of the association. According to the investigation of the SIC the deviation from the fixed price of the four fined firms was minimum. Not all members of the trade association were found guilty, only the ones that had adhered to the decisions of the Corporación, fact that was verified by the SIC through their invoices.

This case was not analyzed through the concept of “conscious parallelism” since the existence of the bylaws of the association configured a sort of explicit compromise. In fact, this is not clear cut tacit collusion case where parallelism is evident. However, for the purposes of this document, it is taken as a relevant precedent since the conduct of the real estate services firms consisted on adhering to a trade association and following its orders, without engaging directly in collusive agreements. Moreover, the SIC established that some of the five forms by which an agreement may be configured (contract, covenant, compromise, or practice that is concerted or consciously parallel) require the presence of will while others do not. Thus, according to this interpretation that is reaffirmed in the milk commercialization case, which will be explained in short, the configuration of “conscious parallelism” does not require the existence of will.

The real estate firms applied for rehearing (recurso de reposición) before the superintendent and through the Resolución 6111 de 2000 the initial decision was confirmed. Afterwards, the defendants requested the annulment of the decisions of the SIC before the Administrative Tribunal (AT) which dismissed their pleads in the year 2001. Finally, the AT’s judicial decision was appealed before the State Council which confirmed the judgment in the year 2002. The main debate in the

514 Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Primera, Caceres y Ferro S.A. vs SIC. Sentencia del 22 de Noviembre 2002, Radicación No.: 25000-
proceedings before the courts was not the nature of the collusive agreement but the allegation of the firms in the sense that the level of prices charged was a “commercial custom”. The latter argument was dismissed by the courts since according to the case law “custom” must not infringe the laws.

In the case SIC v Cooperativa Lechera Colanta Ltda. and Derilac S.A. (1999)\textsuperscript{515}, the SIC investigated twelve milk producers that had the same maximum selling prices\textsuperscript{516} during the years 1997, 1998 and 1999. The variation (in time and value) of the prices was made simultaneously by the firms at the beginning of each year. The “selling price” was easily verifiable by the firms since it was printed in the package of the product. The SIC concluded, without a thorough explanation, that only two of the firms had infringed the law because their price parallelism during the years had no economic justification besides the existence of collusion.

This decision contains the first explicit definition of the SIC regarding “conscious parallelism”. According to the SIC, “conscious parallelism” takes place whenever the firms have consciousness of the policies that other firms apply and there is a decision to follow or imitate them in a reiterative way. Intention is not the principal feature that the SIC takes into account, but the way in which the firms act in the market, loosing their autonomy\textsuperscript{517}.

The economical analysis of the milk market made by the SIC is not very deep and the CA simply concludes that the conduct is identical,

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\textsuperscript{515} Resolución 22762 de 1999.

\textsuperscript{516} The evidence of the tacit agreement was based on the “price certifications” that were delivered by the firms and the affidavits of the managers of the investigated firms.

\textsuperscript{517} The exclusion of the intention or the will as an element of conscious parallelism is criticized by a court in the judicial decision that annulled the administrative acts issued by the SIC. See Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, Colanta vs SIC. Sentencia del 7 de Febrero de 2002, Exp. 000665, p. 17.
realized in several occasions and during such a long period of time, that could not be explained by the similar cost structures of the firms. The fined firms applied for rehearing before the superintendent and through the Resolución 10023 de 2000 the initial decision was confirmed.

Both decisions were challenged by Colanta, one of the sanctioned firms, before the AT which annulled the administrative acts in the year 2002. The AT concluded in its judicial decision that the evidence found in the proceedings before the SIC didn’t prove the existence of conscious parallelism. According to the tribunal the uniformity in prices may be explained by different parameters and circumstances given by the market, such as the yearly increase of the inflation, the ordinary costs, the offer of raw milk and the seasons. In summary, the AT justified the price uniformity due to the following factors:

- Same inputs (raw milk)
- Almost identical manufacturing procedure.
- Potential consumer with similar characteristics
- Homogeneous good (milk)

The tribunal considered that the price is not the only means for competition since there are other relevant elements of competition such as quality and the quantity offered. Furthermore, the AT quotes SIC’s

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518 Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, Colanta vs SIC. Sentencia del 7 de Febrero de 2002, Exp. 000665.

519 Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, Colanta vs SIC. Sentencia del 7 de Febrero de 2002, Exp. 000665, p. 10.

520 Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, Colanta vs SIC. Sentencia del 7 de Febrero de 2002, Exp. 000665, p. 10.

521 Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, Colanta vs SIC. Sentencia del 7 de Febrero de 2002, Exp. 000665, p. 10.
parameters for the identification of “conscious parallelism” and concludes that there was no evidence that the milk producers had consciousness of the policies that their competitors applied (although it was a proven fact that the public retail price was printed on the milk packages) and that the prices established by the firms were not influenced by the competitor’s prices\(^{522}\). From the AT’s decision, it seems that the only evidence taken into account regarding the way in which each firm decided upon prices were the affidavits of the firm’s managers.

Finally the AT concludes that the *will* or the *intention* as an element of the “consciously parallel practice” must not be excluded as the SIC stated in its decisions\(^{523}\).

The judgment of the AT was appealed by *Colanta* before the State Council which revoked the AT’s judicial decision in the year 2003\(^{524}\). According to the court the symmetry in prices for such a long period (three years), with identical variations in time and value, was not simple coincidence but enough evidence of conscious price parallelism that infringed the law\(^{525}\).

The State Council’s judicial decision had no considerations regarding on the nature of the milk market (it only stresses its complexity) nor on the proof of *will* or *intention* as a necessary element of tacit collusion. This judicial decision is the most recent sentence of the State Council regarding conscious parallelism.

\(^{522}\) Tribunal Administrativo de Cundinamarca, Sección Primera, Subsección B, *Colanta vs SIC*. Sentencia del 7 de Febrero de 2002, Exp. 000665, p. 16.


\(^{524}\) Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Primera, *Colanta vs SIC*, Sentencia del 23 de enero de 2003, Radicación No.: 25000-23-24-000-2000-0665-01(7909).

2.4.2.1.2. Settlements through compromises

The superintendent E. Archila settled five tacit collusion cases of supposed price fixing and horizontal market division. In the case *SIC v. Postobón S.A. and others* (2000)\(^{526}\) the SIC investigated three bottlers of soda (Postobón, Panamco and Bavaria) for a supposed price fixing (through price coordination) and horizontal market division (through distribution contracts with similar clauses). According to the agency during the years 1997 and 1998 the bottlers had increased their prices in the same day and in the same level in several occasions\(^ {527}\). The investigated firms offered compromises that were accepted by the SIC.

In the case *SIC v. Casa Luker S.A. and Compañía Nacional de Chocolates S.A.* (2000)\(^ {528}\), the SIC investigated two producers of chocolate (different varieties) for supposedly fixing prices during the years 1997 and 1999. The SIC argued that during the investigated period the increases of price were made identically and simultaneously (or at least in close dates)\(^ {529}\). The investigated firms offered compromises that were accepted by the SIC.

In the case *SIC v. Alaico and others* (2000 and 2001)\(^ {530}\) the SIC investigated ten airlines and ALAICO (a trade association of international airlines) for a supposed collusion in prices. The conduct consisted in a simultaneous establishment of an identical “reimbursement fee” for national and international airline tickets\(^ {531}\). The investigated firms offered compromises that were accepted by the SIC.

In the case *SIC v. Comunicación Celular S.A. and others* (2001)\(^ {532}\) the SIC investigated five mobile telephone services companies

\(^{526}\) SIC, Resolución 19644 de 2000.

\(^{527}\) SIC, Resolución 19644 de 2000, p. 2 and pp. 4-5.

\(^{528}\) SIC, Resolución 24206 de 2000.

\(^{529}\) SIC, Resolución 24206 de 2000, p. 2 and pp. 4-5.


\(^{531}\) The firms AVIANCA, ACES and SAM applied the fees in July 1998 and the rest of the airlines in November 1998. SIC, Resolución 25983 de 2000, p. 2

\(^{532}\) SIC, Resolución 19444 de 2001.
for supposed price fixing and discriminatory agreements. The first investigated conduct consisted in a simultaneous and identical increase in the fee for calls to the fixed telephone service in two dates (15th of January 1997 and 8th of January 1998)\textsuperscript{533}. The investigated firms offered compromises that were accepted by the SIC.

Finally, in the case \textit{SIC v. Ladrillera Helios Ltda. and others} (2001)\textsuperscript{534} the SIC investigated six firms and their trade association for a supposed collusion on prices of bricks of clay and division of production quotas. Regarding the supposed price fixing the SIC argued that during a period of four months the firms increased the prices of bricks until they were doubled\textsuperscript{535}. The investigated firms offered compromises that were accepted by the SIC.

In the five cases, described above, there were no further considerations of the SIC regarding the market, the supposed coordination or any other circumstantial evidence.

\textbf{2.4.2.2. Second period}

A second period corresponds to the cases of the airline industry and retail fuel commercialization that were decided by the superintendent of industry and commerce Monica Murcia.

In the case \textit{SIC v. Continental Airlines and American Airlines} (2001)\textsuperscript{536} the SIC investigated three airlines (Continental Airlines, American Airlines and British Airways) that had decreased the commissions paid to travel agencies in the same percentage (from 10\% to 6\%). The change was informed by the airlines in the months of January and February of the year 2001 and applied in close dates\textsuperscript{537}.

\textsuperscript{533} SIC, Resolución 19444 de 2001, p. 2.
\textsuperscript{534} SIC, Resolución 25153 de 2001.
\textsuperscript{535} SIC, Resolución 25153 de 2001, p. 2.
\textsuperscript{536} SIC, Resolución 36903 de 2001.
\textsuperscript{537} In the case of Continental Airlines and American Airlines the modification was effective by the 13th and 15th of January respectively, while in the case of British Airways it was effective by the 1st of March.
The SIC concluded that although the reduction of the commissions in the same percentage and in close dates generated certain degree of suspicion, there was no evidence of agreements among the three airlines either written or oral\textsuperscript{538}. Furthermore, the SIC accepted the version of the airlines according to which, the change was a result of unilateral commercial policy decisions. Finally, the SIC concludes that there was no conscious parallelism between the firms. Instead, the SIC interprets the facts as isolated actions that coincided due to the tendency of the global markets and argues that there was no evidence regarding consensus among the airlines to act in a coordinated way.

In this case the SIC developed in detailed manner the concept of “conscious parallelism”. In the first place, the SIC determined that any form of anticompetitive agreement, either explicit or tacit, contains two elements: 1) the existence of two or more firms that produce the agreement and 2) an expression (external) of will or consensus among the firms, regardless of its nature\textsuperscript{539}. Hence, the SIC varied tacitly its initial position stated in the milk producers case, in which the conduct of the firms was the principal element analyzed, leaving intention aside.

Secondly, the SIC established the meaning of “practice”, “consciously” and “parallel” in the following terms:

- **Practice**: there must be a succession of facts not just one act.
- **Consciously**: the conduct of the firm must not be a product of coincidence but of an action that takes into account the conditions in which other firms compete.
- **Parallel**: the similarity, identity or synchronization of the firms’ conducts\textsuperscript{540}.

\textsuperscript{538} SIC, Resolución No. 36903 de 2001, p. 19.
\textsuperscript{539} SIC, Resolución No. 36903 de 2001, p. 15.
\textsuperscript{540} SIC, Resolución No. 36903 de 2001, p. 21.
In summary, according to the SIC, “conscious parallelism” requires simultaneously consciousness of the competitors’ policies and a reiterative imitation that eliminates autonomy of actions\(^{541}\).

Thirdly, the SIC establishes that the existence of a parallel conduct is not enough to conclude there is an infringement of the law\(^{542}\). Parallelism is illegal when it is not justifiable in economic terms and when it occurs frequently (not an isolated fact). Finally, according to the SIC coordination among the firms must be conscious in the sense that there must be a consensus to alter the normal conditions of competition or harm the market\(^{543}\).

Five months after the decision of the airline industry case, the SIC used a similar theoretical approach of “conscious parallelism” to fine several fuel retailers in four cities of Colombia. Between the 15\(^{th}\) and the 20\(^{th}\) of March of 2002, the SIC fined four operators of gasoline stations in Manizales (Resolución No. 7950 de 2002\(^{544}\)), four in Pasto (Resolución No. 7951 de 2002\(^{545}\)), four in Bucaramanga (Resolución No. 8732 de 2002\(^{546}\)) and eight in Cali (Resolución No. 8027 de 2002\(^{547}\)).

The basic common fact of the four cases was a price parallelism on retail fuel\(^{548}\) during the months of April and May of 1999 (See Annex

\(^{541}\) SIC, Resolución No. 36903 de 2001, p. 21. This approach coincides with the definition used by the SIC in the case SIC v Cooperativa Lechera Colanta Ltda. y Derillac S.A.

\(^{542}\) SIC, Resolución No. 36903 de 2001, p. 22.

\(^{543}\) SIC, Resolución No. 36903 de 2001, p. 22.

\(^{544}\) Case SIC v Estación de Servicios Caldas Limitada and others.

\(^{545}\) Case SIC v Mera Hermanos Ltda. and others. In this case the prices set by a trade association, “Asociación de Distribuidores Minoristas de Combustibles y Derivados del Petróleo de Nariño - ADICONAR”, were followed by the investigated gas stations.

\(^{546}\) Case SIC v Estación Terminal de Distribución de Productos de Petróleo de Bucaramanga S. and others.

\(^{547}\) Case SIC v Silvia Tello Velez and others.

\(^{548}\) In the cases of the cities of Manizales and Pasto regarding “regular” gasoline, “extra” gasoline and ACPM. In the cases of Cali and Bucaramanga, only regarding “extra” gasoline.
1). In the cases of the cities of Cali and Bucaramanga, during thirty days the fuel stations had the same price and in the same day every station changed the price in the same level, which remained unchanged during the next thirty days.

The SIC concludes, in the four cases, that the identity of the prices due to simultaneous price changes applied by each firm in close dates was not a mere coincidence and had no legal justification. According to the SIC, the different operational costs of each firm should be reflected in the market by the existence of different prices.

Although the four decisions quote (tacitly) in a systematic way the concept of conscious parallelism exposed in the airline industry case, there is one statement that appears in these decisions that was not mentioned in the airline’s case and that was first stated in the milk producers’ case. Regarding the circumstances that must be met to verify the existence of consciously parallel practices, the SIC affirms the following: “Hence, it is not necessary to investigate the will of the agent in the market, but the way the firm acts in it”549.

There are two more doctrines contained in the retail fuel cases that are relevant for the purposes of this document. Firstly, in Pasto’s case the SIC established that it is not per se illegitimate that firms take into account the conditions of the market in order to fix their own prices and design their strategies. However, this strategy is not valid when it tends to annul or effectively annuls a factor of competition such as price. Hence, when the objective is not to have more knowledge in the market in order to further competition, but to act in a parallel way that avoids competition the conduct will be considered as a restraint of trade.

Secondly, in Bucaramanga’s case, the SIC established that the authority has the burden of proof regarding the existence of an illegal price fixing. However, in the present case, once the conscious parallelism was proved (as the SIC claims in the case) the investigated firms had the duty to disprove the evidence regarding the “parallelism situation”. The fined firms applied for a rehearing before the superintendent of

industry and commerce, which confirmed its previous decision through Resolución 14539 de 2002.

The SIC established that element of “consciousness” regarding “conscious parallelism” means that the conduct of the agents is not merely a coincidence but the fact that when firms act they know the conditions under which their competitors act. Hence, according to the reaffirmed doctrine of the agency, “conscious parallelism” entails two necessary conditions: 1) that the firms have knowledge of the policies of their competitors and 2) that the firms decide to follow them in a repetitive way, loosing the autonomy of action. According to the SIC, the exact coincidence in prices during sixty days could only be explained by the fact that the firms acted consciously in such a way. Finally the SIC rules that there is no specific kind of evidence indispensable to prove the existence of conscious parallelism, but that the adjudicator must appreciate all the facts and proofs in a given case.

Bucaramanga’s case reached the Administrative Tribunal of Cundinamarca since one of the gasoline station owners in Bucaramanga filed a suit requesting the annulment of the SIC’s administrative acts. The AT denied the pleads and confirmed the legality of the SIC’s decisions.

The AT acknowledges that the meaning and scope of a consciously parallel practice is not defined by the law and that it is an “open text” concept. However, the AT endorses the concept developed by the SIC in its previous decisions. Furthermore, the tribunal agrees that the fact that four gasoline stations have the same prices during sixty one days and that price variations are done in the same day and in the same quantity can’t be mere coincidence.

Justice William Giraldo Giraldo dissents from the opinion of the AT, basically affirming that the “consciousness” of the parallel practices was no proved, especially since there was no concrete proof regarding the knowledge that each firm had from the other’s commercialization.

conditions. The AT’s judicial decision contains the most recent case law regarding conscious parallelism.

Finally, it must be noted that the superintendent M. MURCIA settled no cases of tacit collusion through the acceptance of compromises.

2.4.2.3. Third period

A third period corresponds to the cases of the green paddy rice and the sugar cane markets that were initiated by the superintendent of industry and commerce Jairo Rubio Escobar.

2.4.2.3.1. The green paddy rice case

In the case SIC v. Molinos Roa S.A and others (2005)\textsuperscript{551} five rice mills were found guilty of infringing competition laws due “conscious price parallelism” regarding the purchase of green paddy rice to croppers from the regions of Tolima and Huila. The fined rice mills had a market share of 64%, measured in total sales. The SIC established that the market for green paddy rice was an oligopsony.

The alleged parallelism in purchase prices was identified between January and June of the year 2004 (\textit{See} Annex 1). According to the SIC, during that period of time there was almost an identity in pricing (in value and timing) which included six modifications of the mill’s prices. Furthermore, due to a previous case (\textit{SIC v. Unión de Arroceros and others}\textsuperscript{552}) four of the investigated mills had “price committees” as part of the compromises offered to settle the previous investigation. Each

\textsuperscript{551} SIC, Resolución No. 22625 de 2005.

\textsuperscript{552} SIC, Resolución No. 15645 de 2001. In this case the SIC found a document called “policy of total transparency” in the premises of \textit{Molinos Roa S.A.} in which the four mills agreed a) on purchase prices according to the variety of the green paddy rice and the region in which it was cropped; b) on the price, conditions of commercialization and discounts of the processed rice; and c) division of markets (pp. 2-4). The case was settled by superintendent E. Archila by accepting the compromises offered by the mills, which included the referred “price committees”.

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individual committee had the function of setting, among others, the purchase prices of green paddy rice and informed the decisions to the public through memos. According to the evidence collected by the SIC although all the mill’s committees took place in different dates (and obviously were composed by different people) there was a coincidence in the date chosen for the price change to be effective\textsuperscript{553}.

The appraisal of the market was more rigorous and ample in the present case than in the predecessors. The evidence analyzed in the case was also more sophisticated, since it included not only the movement and level of prices and the affidavits of the investigated firm’s managers (as in the previous cases) but also testimonies from the supposedly affected agents, technical studies regarding the rice market and an economic expertise by Fedesarrollo\textsuperscript{554}, a prestigious independent policy-oriented research center in Bogotá, regarding oligopolistic pricing and its application to the Colombian green paddy rice market. The SIC also took into account the fact that most of the croppers had been financed directly by the mills, therefore reducing their capacity to negotiate the purchase price. According to the contracts agreed with the mills the croppers gave in pledge their future crops and were obliged to sell them to the mills, obligation that was secured through penalty clauses.

In order to set the case, the SIC described the production chain of rice, starting from the industrial crops passing to its processing by the mills and finishing with its commercialization\textsuperscript{555}. The SIC established the places where green paddy rice is cropped, the seasons in which it is collected and the structure of the markets\textsuperscript{556}. Secondly, the SIC analyzed

\textsuperscript{553} Resolución 22,625 de 2005, pp. 31-33.
\textsuperscript{554} The economic expertise, brought by the defendants, was titled “Concepto económico acerca del informe de la Superintendencia de Industria y Comercio sobre la investigación por prácticas comerciales restrictivas iniciada mediante Resolución número 13326 de 2004, en contra de cinco molinos arroceros”.
\textsuperscript{555} Resolución 22, 625 de 2005, pp. 13-18.
\textsuperscript{556} According to the SIC, from the point of view of the offer the market resembles a perfect competition scenario, due to the thousands of croppers, and from the point of view of the demand the market is an oligopsony. SIC; Resolución 22,625 de 2005, p. 18.
the price movements regarding two types of rice during a period of six months and concluded that price parallelism was evident\textsuperscript{557}.

Finally, the SIC concluded that taking into account the structure of the market, the conduct of the firms and the evidence exposed in the proceedings there was no economic explanation for the price parallelism besides the existence of tacit collusion\textsuperscript{558}. In spite of the mill’s justifications concerning their actions, the SIC considered that the coordinated conduct of the mills had the \textit{objective} of avoiding competition or reducing the uncertainty generated by the necessity of setting a price autonomously.

The SIC builds its argument by acknowledging that in imperfect markets, such as an oligopsony, economic agents are interdependent in such a way that any decision taken by one of the participating firms will provoke a reaction by competitors\textsuperscript{559}. The uncertainty regarding the conduct each firm will assume may be mitigated by the firms either by guessing the rival’s reaction and acting beforehand or by colluding\textsuperscript{560}. In the case of collusion in an oligopsony the firms would seek to keep purchase prices low (by fixing maximum purchase prices) or would agree upon the quantity of product to be purchased.

The SIC argued that in free markets, even in interdependent markets where prices can have a similar tendency, the conduct of the agents should not be identical\textsuperscript{561}. The agency argued that the market of green paddy rice was not a free market since the mills had eliminated the uncertainty of their conducts by agreeing upon prices. Furthermore, the SIC concluded that the market didn’t have a performance of a free market since the price changes were not correlated with the demand changes\textsuperscript{562}. In effect, while the “demand” (measured by the SIC

\textsuperscript{557} Resolución 22,625 de 2005, pp. 19-31. \\
\textsuperscript{558} Resolución 22,625 de 2005, p. 37 and 47. \\
\textsuperscript{559} Resolución 22,625 de 2005, p. 34. \\
\textsuperscript{560} Resolución 22,625 de 2005, p. 34. \\
\textsuperscript{561} Resolución 22,625 de 2005, p. 35. \\
\textsuperscript{562} Resolución 22,625 de 2005, p. 35.
according to the volume purchased by the investigated firms) for green paddy rice decreased between the months January and February, the purchase price increased. The opposite occurred between the months of February and March, where the “demand” increased but the purchase price decreased\(^{563}\).

Based upon the circumstantial evidence and in previous case law the SIC finds the five mills guilty of tacit collusion through conscious price parallelism\(^ {564}\). The fined firms applied for a rehearing before the superintendent contesting the arguments of the SIC and especially arguing the economic rationality of their conduct. The SIC confirmed its decision through the Resolución No. 8454 de 2006. In the decision the SIC reaffirmed its doctrine, in the sense that an agreement may be inferred from the parallelism of conducts but that wouldn’t be enough evidence by itself, since “other circumstances must be proved in order to establish the existence of an external will”\(^ {565}\). In the green paddy rice case, the SIC argues that the price parallelism was evident and that the simultaneous absence of economic rationality in the conducts excluded any explanation different than collusion\(^ {566}\).

The fined rice mills requested, separately, the annulment of the administrative acts issued by the SIC before the respective ATs and the decision is still pending.

Although this decision is more structured theoretically and more solid regarding the evidence than precedent cases, there are several circumstances regarding the conducts of the five rice mills, most of them assessed by the SIC, that will probably be analyzed by the courts:

- The first three price movements, identified by the SIC, consisted in an increase of the purchase price, which of course wouldn’t be rational if the mills were colluding since it would mean an increase

\(^{563}\) Resolución 22,625 de 2005, p. 36.

\(^{564}\) The SIC explicitly quotes the case Estación de Servicio la Pedregosa vs SIC decided by the TAC (sentence of the 18th de november of 2004 (Exp.02-0678).

\(^{565}\) Resolución 8454 de 2006, p. 4.

\(^{566}\) Resolución 8454 de 2006, p. 5.
on their own costs. The next three price movements were decreases in purchase prices.

- None of the firms was “leader” in the price changes and the initiative was not always taken by the firm that had the biggest market share (Molinos Roa–Florhuila, 38.14%). This may exclude an oligopolistic price leader defense.

- The conduct of one of the firms, Procearroz, varies from the others since the price it offered was always slightly lower (the SIC argued it was because of transport costs) and its price changes occurred some days before or after its competitors. Moreover, in one occasion Procearroz increases its price while the others are decreasing it and in some occasions it didn’t change its prices when other mills modified theirs.

- According to the mills, the scarcity of green paddy rice by the end of the year 2003 may have caused an expectation of shortage in the first months of the year 2004, which explained why in the months of January and February the purchase price increased simultaneously.

- According to the mills, due to the expectations of scarcity of green paddy rice the Colombian Government allowed the purchase in the international markets of a contingent of 180,000 tons of the product (there is a maximum quantity of rice that may be imported yearly) by the end of February. The certainty of the contingent caused an expansion of the offer of rice (dissipating the scarcity expectations) and could have caused a simultaneous reduction in the purchase price.

- There is no clear justification given by the SIC for including the five mills in the investigation and excluding other firms that although smaller had a similar pricing conduct.

- The structure of the market may favor the tendencies of pricing since green paddy rice is an homogenous good and information regarding
the prices offered by the mills is easy and costless to verify in short time.

2.4.2.3.2. Settlements through compromises

Regarding the settlement of tacit collusion cases, the superintendent Rubio settled two cases through the acceptance of compromises offered by the investigated firms. In the case *SIC v. Pavco S.A. and Ralco S.A.* (2004)\(^{567}\) the competition authority investigated two firms that produced and commercialized PVC tubes for a supposed price fixing through the coordination of prices. According to the investigation the firms had “almost identical” prices in periods of time where similar variations took place\(^{568}\). The investigated firms offered compromises that were accepted by the SIC.

Finally, in the case *SIC v. Redeban Multicolor S.A and Credibanco*\(^{569}\) (2005) the SIC investigated a firm and an association of banks (*Credibanco*) that provide the service of managing the network of commercial establishments that accept credit cards and debit cards. According to the evidence of the SIC the firms charged the same maximum commissions for debit card and credit card charged to the commercial establishments that accepted payments through them\(^{570}\). The investigated firm and association offered compromises that were accepted by the SIC.

In the cases, described above, there were no further considerations of the SIC regarding the market, the supposed coordination or other circumstantial evidence.

2.4.2.3.3. Cases pending

The last tacit collusion cases initiated by the SIC take place in the cement market and in two agricultural markets: cocoa and sugar cane. In the

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567 SIC, Resolución 3927 de 2004.
569 SIC, Resolución 6816 de 2005 and Resolución 6817 de 2005.
Cement case, the SIC initiated an investigation (Resolución No. 2496 de 2006) against four cement producers due to supposed price-fixing and market division agreements. The SIC argued that retailer prices and consumer prices in the second half of the year 2005 were similar and presented a simultaneous increase in December. Although each firm argued its own causes for December’s price adjustments, such as a reduction in the offer or an increase in demand, the SIC stated that evidence didn’t explain sufficiently why prices between June and November were stable, while in December the increase in prices was parallel. Furthermore, the SIC concluded that the firms’ parallel behavior between June and December 2005 and specially the “sudden increase in similar dates and percentages by the firms ARGOS, CEMEX, HOLCIM and ANDINO constitute and indicia of a supposed agreement among the mentioned firms, with the objective of manipulating the market situation”.

In the cocoa case, the SIC initiated an investigation (Resolución No. 28065 de 2006) against two producers of chocolate products for supposed price-fixing in the purchase of cocoa and the sale of finished chocolate and cocoa products. According to the SIC, the investigated firms had a combined market share in the purchase of cocoa, in the year 2004, of 86.7 per cent (54.8 and 31.9 respectively). The market is described by the SIC as an oligopsony where the quantity of cocoa produced is determined by seasons. The SIC established that the purchase price of cocoa was not affected by seasons, in spite of the fact that the seasons determined the scarcity or the abundance of the input.

The SIC concluded that the price parallelism had no explanation, taking into account that the purchase price was not affected by seasons.

571 SIC, Resolución 2496 de 2006, pp. 4-7.
572 SIC, Resolución 2496 de 2006, p. 7.
574 SIC, Resolución No. 28065 de 2006, p. 4.
575 SIC, Resolución No. 28065 de 2006, pp. 4-5.
576 SIC, Resolución No. 28065 de 2006, p. 5.
and that volume of cocoa purchased by the firms was significantly different\footnote{SIC, Resolución No. 28065 de 2006, p. 6.}

The SIC also studied the price tendencies in the market of chocolate finished products. According to the SIC in the period between January 2005 and February 2006 the sale prices, for different products, set by the investigated firms were very similar\footnote{SIC, Resolución No. 28065 de 2006, pp. 7-11.}. The SIC concluded that the price parallelism had no explanation\footnote{SIC, Resolución No. 28065 de 2006, pp. 11-14.}, taking into account the following:

1. The different size of the investigated firms, in terms of assets, sales volumes and working capital.
2. The different production costs of the investigated firms
3. The fact that when production costs rise, the sale price remain constant or even decline.

Finally, the SIC argued that it was not clear why, during the year 2005, when purchase prices of cocoa fell the sale prices of chocolate products were constant\footnote{SIC, Resolución No. 28065 de 2006, p. 14.}.

In the sugar cane case, the SIC opened an investigation (Resolución No. 6381 de 2007) against thirteen sugar cane mills for supposed price fixing (purchase of sugar cane) and agreements to divide the sources of supplies. The analyzed conducts cover a period of time between May 2005 and February 2007 and take place in the region of Valle del Cauca.

According to the evidence\footnote{1) Contracts of purchase of sugar cane. 2) Affidavits of the mill’s managers and of their employees. 3) Administrative visits to the mill’s premises. 4) Documents from PROCAÑA, a sugar cane trade association.} collected by the SIC, the mills used a common formula to fix the purchase price; the formula takes into account,
among others, the average price of sugar in the national and export market and the market share of the mill in the respective markets.

Additionally, according to the SIC, the drafting of the contracts of purchase of sugar cane may have configured an agreement for dividing the sources of supply. The contracts used by the investigated mills obliged the producers of sugar cane to sell their product exclusively to the contractor mill. These contracts had a long duration, between five and ten years, and were secured by a penalty clause in case of breach. The proceedings of the cement and sugar cases are ongoing and the final decision regarding must be taken by the current superintendent of industry and commerce Gustavo Valbuena, whose tenure began in October 2007.

2.4.3 Conclusions

2.4.3.1. Evolution of doctrines and case law

The definition and the elements of “conscious parallelism” have not varied substantially during the last decade in the SIC’s decisions and courts’ the case law. However, there was a conceptual evolution and modification in the enforcement that may be identified in each of the analyzed periods.

In the first period, the development of “conscious parallelism” in legal terms is incipient and economic analysis has no major role in the cases. The decisions were made based upon an analysis of the price movements and the managers’ affidavits of the firms that were investigated. Furthermore the SIC establishes that the existence of “conscious parallelism” as a form of collusion may be identified by determining the consciousness of the firms regarding competitors’ policies and their reiterative imitation, rather than focusing on the existence of the will of the firms. In this period the SIC decided to settle five of the seven cases of tacit collusion while in two cases the firms were found to be guilty of conscious parallelism.
In the second period, the SIC develops in detail—but still from a formal legal standpoint—the concept, scope and elements of “conscious parallelism”. For the first time, the authority acknowledges explicitly that “price parallelism” by itself is not enough to prove the infringement of competition laws. Hence, illegality may be determined with an analysis of the economic justification of the firm’s conducts. Furthermore, the SIC establishes that the awareness of the firms regarding its competitor’s actions is not illegal per se. A strategy of identifying other firm’s actions and policies will configure an infringement when it may distort competition by eliminating competition factors such as price. In this period the SIC didn’t settle cases and fined firms in four cases for conscious parallelism. In this period the SIC didn’t settle cases and fined firms for conscious parallelism in four cases.

Finally, in the third period, the SIC adopts an economic-based approach rather than a formalist appraisal of cases. In fact, the agency takes into account the theories regarding the firms’ conduct in oligopolies (especially their interdependency) and includes a deeper analysis of the relevant markets. The SIC also advances in the use of different proofs, besides the analysis of prices and manager’s affidavits, by including documents that assess the nature of the market and by taking into account economic expertise presented by the investigated firms. In this period the SIC decided to settle two of the four cases of tacit collusion while in one case it found the firms guilty of conscious parallelism.

To date, the doctrine is ambiguous regarding two issues: 1) the will as a necessary element for “conscious parallelism” and 2) the criteria used in order to determine that price parallelism of certain firms infringed the law while other competitors that acted similarly or identically are not found guilty.

The courts, with just one exception, have generally followed the SIC analysis and confirmed the resolutions that fined the firms. So far,

582 The opinion of the economic expert referred to oligopolistic pricing and its implications to the green paddy market in Colombia.

expert economic testimonies have not been included in such cases and it has a pre-eminently formalistic approach.

2.4.3.2. Characterization of enforcement

In the fifteen Colombian cases analyzed in this document, the SIC established in seven of them that the firms infringed the law (47%), in seven of them the SIC settled the cases through the acceptance of compromises (47%) and only in one the SIC concluded that despite the price parallelism the firms didn’t engage in tacit collusion. In four of the cases, in which the firms were found guilty, a trade association was involved in the coordination of prices.

Most recent cases have focused on markets of primary goods (agricultural) and services, which are almost homogeneous, where markets are duopolistic or oligopolistic and concentrated. In summary, Colombian decisions and case law regarding tacit collusion are characterized by: i) a sound development—from the legal point of view—of the concept, scope and elements of “conscious parallelism” as a form of an anticompetitive agreement and ii) an incipient use of economic analysis and the participation of economic experts.

2.4.3.3. Attributes of successful defense

The SIC’s decisions have established that “price parallelism” by itself is not enough proof of collusion through “conscious parallelism”. In addition, there must be enough evidence to show that there is no economic justification for the conduct of the firms besides collusion. However, there is only one case where the SIC decided to close the investigation initiated due to supposed tacit collusion. In practice, the SIC endorsed the firms’ defense arguments:

1. **Firms’ parallel behavior is coincidental.**

2. **Firms’ decisions are unilateral commercial policies.**

   Taking into account the concept of “conscious parallelism” developed to date, other justifications that the SIC probably would accept are the following:

1. **Behavior is neither parallel nor similar**

2. **There is an economic justification for the firms’ behavior.** To date, the oligopolistic interdependence defense alleged by the firms in the proceedings has not succeeded. However, the latter does not mean that the SIC doesn’t acknowledge that parallel behavior may legitimate oligopolistic behavior.

2.4.3.4. **Attributes of successful prosecution**

The SIC has established that there are no specific types of evidence indispensable in every case to prove conscious parallelism. However, from the seven cases where the investigated firms were fined for tacit collusion, the elements that must be proved to determine the infringement of the law through tacit collusion are the following:

1. **Proof of simultaneous and identical behavior.** The practice must be reiterative (parallelism manifested in a close imitation of conduct), in such a way that it annuls the firm’s autonomy of decisions. Regarding the time during which the price parallelism occurred in the cases analyzed in this document, the SIC found guilty firms that had similar or identical conduct during two months (retail fuel cases), six months (green paddy rice case) and three years (milk commercialization case).

2. **Parallelism must be “conscious” there must be proof of the firms’ awareness of the competitor’s conducts and policies
that leads to a consensus on altering “normal” conditions of competition. However, the mere knowledge of a competitor’s strategies are not enough evidence of the intention to coordinate actions and collude. This practice will only be illegal whenever it tends to or effectively annuls a competition factor such as pricing.

3. **The market structure facilitates coordination.** In most cases where firms were fined, the market was highly concentrated, the good was homogeneous and the information regarding prices was easily verifiable.

4. **No economic explanation for the firms’ conduct exists besides collusion.** The SIC has been very strict in the assessment of the firms’ justification of their conduct. The SIC analyzes the conducts in light of the market conditions and determines if the firms’ behavior corresponds to the logic of “free markets”.

2.5. **Panama**

Competition policy enforcement began in Panama after the enactment of the Law 29 of 1996. The law was further developed by the Executive Decree 31 of 1998 and by agency guidelines.

Law 29 of 1996 was amended by Decree-Law 9 of 2006 and was reorganized by the Law 45 of 2007. The new laws created a new

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competition authority (Autoridad de Protección al Consumidor y Defensa de la Competencia)\textsuperscript{588} and included substantive and procedural modifications.

The current law establishes a judicial-based system where there is an administrative agency (in charge of the defense of competition, consumer protection\textsuperscript{589} and price monitoring\textsuperscript{590}) with prosecutorial functions while the courts have an adjudicative role\textsuperscript{591}. The agency has a right of action before the courts against economic agents that infringe the law through “monopolistic practices”\textsuperscript{592}. Affected persons, consumer associations and entities of collective management also have legal standing to file before the courts suits for infringement of Law 45 of 2007\textsuperscript{593}. The decisions of the first instance courts may be appealed before a Tribunal of Appeals\textsuperscript{594} and finally a case may reach the Supreme Court if the second instance sentence is also subject to appeal by the parties\textsuperscript{595}.

Regarding merger control, the filing before the CA is voluntary, the proceeding has an administrative nature and the CA is competent to the give an opinion regarding the legality of the operation\textsuperscript{596}.

The enforcement of antitrust in Panama hasn’t been as active as in other jurisdictions of Latam; in terms of the number of cases solved it has less weight in the authority than issues of consumer protection. Up to date all the cases have been decided under the Law 29 of 1996, however since the prohibitions were almost not modified by the

\textsuperscript{588} The former name of Panama’s competition authority was Comisión de Libre Competencia y Asuntos del Consumidor (CLICAC).
\textsuperscript{589} Articles 199-2002 of the law 45 of 2007.
\textsuperscript{590} Articles 199-2002 of the law 45 of 2007.
\textsuperscript{591} Articles 84-107 and articles 124-194 of the law 45 of 2007.
\textsuperscript{592} Article 87 of the law 45 of 2007.
\textsuperscript{593} Article 125 of the law 45 of 2007.
\textsuperscript{594} Article 126 of the law 45 of 2007.
\textsuperscript{595} Limited to the occurrence of certain conditions established in article 190 of the law 45 of 2007.
\textsuperscript{596} Articles 21-29 and article 110 of the law 45 of 2007.
amendment of the years 2006 and 2007 it is possible to consider the precedent case law as valid for futures cases.

2.5.1. Statutes

Article 7 of the current competition law prohibits any act, contract or practice that restricts, diminishes, harms or impedes freedom of competition, or concurrence in the production, processing, distribution, supply and commercialization of goods and services. A specific prohibition against “absolute monopolistic practices” compliments the general prohibition against anticompetitive practices. Article 13\(^{597}\) of the law defines “absolute monopolistic practices” as any act, combination, arrangement, covenant or contract among competitors or potential competitors, or through trade associations, that has as an object or as an effect the following: 1) price fixing\(^{598}\) (and the exchange of information for that object or effect), 2) limiting the quantity of production, processing, distribution or commercialization of goods and services, 3) division of markets, and 4) bid rigging\(^{599}\). All these objects or effects of “absolute monopolistic practices” coincide with the typical collusive conducts.

Although “tacit collusion” and “conscious parallelism” are not explicitly defined and prohibited by the laws, the doctrine\(^{600}\) and the case law (that will be discussed below) points out that an “absolute monopolistic practice” may be configured in these forms. In the first place, according

\(^{597}\) For an analysis of article 13 (former article 11) see Claudia Curiel Léidenz, *El tratamiento de las conductas entre competidores en la legislación Panameña de defensa de la competencia*, Boletín Latinoamericano de Competencia No. 10, 2000.

\(^{598}\) According to the wording of the article, price fixing may take place through *arrangement*, a *combination*, a covenant or a contract. The last two, according to the CLICAC are forms of tacit agreements. See CLICAC, Acuerdo PC-020-01 de 2001, pp. 7-8. (*CLICAC v. Continental Airlines Inc. and others*)

\(^{599}\) The four practices described coincide if the four numerals of the article respectively.

\(^{600}\) Curiel Léidenz, Claudia, *El tratamiento de las conductas entre competidores en la legislación Panameña de defensa de la competencia*, Boletín Latinoamericano de Competencia No. 10, 2000, p. 79.
to the case law, explained in detail below, *arrangements* and *combinations* are forms by which tacit agreements may take place.

Secondly, the wording of Articles 7 and 13 of Law 45 of 2007, and especially of Article 7 of Decree No. 31 of 1998 support the inference of collusion through indirect evidence. In effect, Article 7 establishes a list (numerus apertus) of “indicative elements” of an “absolute monopolistic practice” among two or more competitors or potential competitors:

1. When the price structure, market division or other forms of discounts show coordination among economic agents.

2. When the economic agents maintain or vary in the same proportion the prices of similar goods or services, given that these conducts are not due to changes in consumers’ preferences or common costs of producers or suppliers.

3. When the economic agents adhere, among them, on the prices of sale or purchase for similar goods that are published by a trade association or a competitor.

4. When the trade associations give instructions or recommendations to their associates that entail a) a fixation, manipulation or agreement upon purchase or sale prices of similar goods or services or b) the exchange of information for the latter object or effect.

5. When the trade associations give instructions or recommendations to their associates that entail obligations of a) limiting the quantity of production, processing, distribution, commercialization or purchasing of goods and services or b) dividing the market.

6. When in public bids there is a pattern of conduct that indicates a possible exchange of information relevant for the prices and quantity offered or regarding the participation of the agents in the bidding process.
7. When there is price dispersion for identical goods and the market shares are stable for long periods of time in concentrated markets with high barriers of entry.

Clearly this list contains types of circumstantial evidence that may be used to prove tacit collusion, among others, the following: 1) parallel behavior (in prices and quantities), 2) coordination managed or sponsored by trade associations or leading firms, 3) exchange of information that is vital for competition, and 4) price dispersion coupled with stable participations.

2.5.2. DECISIONS AND CASE LAW

There are few tacit collusion cases decided by Panamanian tribunals and, up to now, all the cases have been resolved under Law 29 of 2006. The following chart lists the analyzed cases:

<table>
<thead>
<tr>
<th>Case</th>
<th>Product Market</th>
<th>Decision</th>
</tr>
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<tbody>
<tr>
<td>CLICAC v. Aceti-Oxígeno S.A. and others (2004)</td>
<td>Medical oxygen</td>
<td>Sanction. The decision was appealed before a Tribunal of Appeals and the final judgment is still pending.</td>
</tr>
</tbody>
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(Continúa)

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601 Juzgado Octavo de Circuito, Ramo Civil, del Primer Circuito Judicial, Sentencia No. 64 del 30 de septiembre de 2003.
602 Juzgado Noveno de Circuito, Ramo Civil, del Primer Circuito Judicial, Sentencia No. 59 del 29 de septiembre de 2004.
604 CLICAC, Acuerdo PC-368-02 de 2002.
605 ACODECO, Resolución DLC-PLP-020-07.
The first case decided by a tribunal where indirect evidence was the basis to prove the existence of a cartel was *CLICAC v. Gold Mills de Panamá S.A. and others* (2003)\(^{609}\). The former competition authority (*Comisión de Libre Competencia y Asuntos del Consumidor - CLICAC*) charged the main four wheat flour mills and their trade association for absolute monopolistic practices, consisting on price fixing and market division. The CLICAC alleged that the firms had agreed on the prices of sale of wheat flour, exchanged information for that object or effect, divided the national market among them and agreed to limit the quantity of flour wheat produced.

According to the evidence that the CLICAC presented, representatives from each firm had signed a document in March 1994 whereby they fixed the prices of wheat flour and divided the market by assigning a maximum quantity of production. However, this document was not admissible evidence since the document was signed before the competition law was in force (November, 1996).

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\(^{606}\) Tercer Tribunal de Justicia de Panamá, Sentencia de 28 de Junio de 2004. Justice Luis Camargo V. delivered the opinion.

\(^{607}\) Corte Suprema de Justicia, Sala Primera, Sentencia del 1 de Diciembre de 2006

\(^{608}\) More precisely before the Tercer Tribunal Superior de Justicia.

\(^{609}\) Juzgado Octavo de Circuito, Ramo Civil, del Primer Circuito Judicial, Sentencia No. 64 del 30 de septiembre de 2003.
Hence, the CLICAC justified its pleads through indirect evidence. The agency argued that since November 1996 until the suit: i) prices were very similar and very high, regarding the costs of production; ii) market shares had not varied significantly since March 1994; and iii) firms had maintained an excess of idle capacity (25%). Finally, it was proved that the firms had hired an auditor to collect, organize and distribute the firms’ information regarding sale prices, volumes of production and market share.

The tribunal explicitly recognized the fact that normally in antitrust cases there is no direct evidence of infringement. Nevertheless, the tribunal affirmed that circumstantial evidence may be enough proof of infringement. Firstly, the tribunal described the structure of the market and characterized it as an oligopoly. Moreover, according to the tribunal the wheat flour market firms were highly interdependent. The tribunal described the possible scenarios that, according to economic theory, oligopolistic markets may present: either a competitive setting (non-cooperative conducts) or collusion (cooperative conduct). The propensity to collusion of a market, as in the present case, is determined by the absence of substitute products for wheat flour and the high barriers of entry.

Finally, the tribunal affirmed there was evidence of close collaboration among the firms by joint imports of inputs, similar prices and commercial packages, the scarce fluctuation of prices, and stable market shares.

After five years of proceedings, the tribunal found the four wheat flour mills guilty of price fixing and division of production during November 1996 and September 1997. The second instance tribunal\textsuperscript{610} and the Supreme Court confirmed the first instance tribunal’s decision\textsuperscript{611}.

The second case decided by a tribunal was \textit{CLICAC v. Aceti-Oxígeno S.A. and others} (2004)\textsuperscript{612} where the agency accused two

\begin{footnotesize}
610 Tercer Tribunal de Justicia de Panamá, Sentencia de 28 de Junio de 2004. Justice Luis Camargo V. delivered the opinion.

611 Corte Suprema de Justicia, Sala Primera, Sentencia del 1 de Diciembre de 2006

\end{footnotesize}
producers of medical oxygen of bid rigging. This case has a structured theoretical framework of the proof of tacit collusion by indirect evidence supported in foreign case law, as it will be explained below.

The CLICAC started an investigation due to a private complaint of Oxigas S.A. and ordered the filing of a demand against the firms through the Resolución No. PC-004-01 de 2001. Through the search of the premises of the investigated firms the agency found documents that revealed that officers from both firms had met. Furthermore the CLICAC argues there is a common pattern on prices among the firms that may indicate information exchange (referring to article 7 of the decree).

The agency establishes three elements for the configuration of the anticompetitive practice: i) a combination, ii) among competitor undertakings, iii) that has as an object or effect the coordination of offers in a public bidding.613

Regarding the first element, the agency concludes that evidence shows a combination among the firms (a tacit agreement) that may be inferred by their conducts that don’t correspond to the logic of a market, i.e. that indicate the absence of will to act independently and avoid competition.614

Interestingly, to support the fact that collusion may be configured through forms different than a written agreement, the agency quoted Peruvian case law615 and Spanish case law616. According to this foreign case law, the judge may infer from indirect evidence, beyond reasonable doubt, the existence of collusion. Moreover the decision adopts the Spanish case law according to which, indirect evidence may be used to prove collusion when three conditions are met: 1) full proof of the facts that compose the circumstantial evidence; 2) causal relation between the circumstantial evidence and the monopolistic practice, i.e. a coincidence of facts that have a low probability of occurring and a

615 Tribunal de la Competencia y Propiedad Intelectual de Perú, Resolución N° 255-1997.
616 Tribunal de Defensa de la Competencia de España, Resolución 395/97 de 1998.
clear benefit obtained by the firms through their conduct; and 3) the explanation of the investigated firms is not credible, i.e. not enough to demonstrate that the result wasn’t the effect of collusion.617

The postures of the firms in the public (multiple) bid for the provision of hospitals of the Social Security showed that a coordination of conduct (competing – not competing) since the firms alternated their price offer allowing each firm to win a bidding.

According to the CLICAC the three conditions were met since the facts were sufficiently proved, the conduct adopted by the firms had a very low probability of occurring (excludes mere coincidence) and the concurrence of indirect proofs makes unviable other explanations for the firms’ conduct, besides the existence of an agreement.619 The latter is reinforced by the evidence of meeting between the investigated firms’ officers. Furthermore, from their individual point of view the firms’ conducts were not profitable, but from the collective point of view it was beneficial for them.620

The CLICAC concluded that clearly the combination was made among and competing firms and that colluding firms have a benefit from coordinating their bids because it entails price fixing and restriction of quantity produced.621

After three years of proceedings the first instance tribunal that decided upon the case found the two medical oxygen producers guilty of infringing the competition law.622 The decision was appealed before a Tribunal of Appeals and the final judgment is still pending.

617 CLICAC, Resolución No. PC-004-01 de 2001, pp. 16-17.
618 The agency ordered the practice of an expertise to calculate the probability of the result in the bids. The result was that the probability of occurrence of the firms’ conduct was of .039 per cent. Resolución No. PC-004-01 de 2001, p. 25.
623 More precisely before the Tercer Tribunal Superior de Justicia.
In CLICAC v. Continental Airlines Inc. and others (2001)\(^{624}\) the agency initiated an investigation against five airlines for price fixing due to the simultaneous reduction (from 10\% to 6\%) of the commissions paid to the travel agencies in close dates in the year 2000\(^{625}\).

The CLICAC stresses the fact that the airlines are members of the International Air Transport Association (IATA), organization that took the decision of reducing the commissions. Furthermore, the agency affirms that the homogeneity of commissions and the simultaneous modification is not consistent with the conduct of a competitive market\(^{626}\). The airlines’ arguments are mainly of two kinds: 1) that not all of the airlines competed in the same relevant markets and 2) that the reduction of the commission was means of competing and offering better prices\(^{627}\).

The CLICAC’s decision analyzes the concept of absolute monopolistic practice, especially regarding price fixing. According to the law, price fixing may take place by an arrangement, a combination, a covenant or a contract. The first two are forms of tacit agreements where a written document that sets its content is not needed\(^{628}\). Through the tacit agreements the economic agents seek to avoid the risks and uncertainty regarding the competitors’ conducts\(^{629}\).

Taking into account the foreign doctrine and case law (from the EC, US and Venezuela) explicitly quoted in the decision\(^{630}\), the CLICAC identifies as elements of tacit collusion: i) a parallel behavior (e.g. in prices) and ii) the absence of independence in decision taking\(^{631}\).

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625 While the travel agencies were notified by the companies the 27, 28, 29, 30 of December 1999 and 7 of January 2000 respectively, the modification of the commissions was in force 1st of January 2000 for three airlines and 7th of January and 1st of February of 2000 for the rest.
626 CLICAC, Acuerdo PC-020-01 de 2001, p. 3.
Regarding the last element, the CLICAC considers there must be a *meeting of minds* for colluding. The latter is inferred from the conduct of the firms taking into account the observable conditions of the market, such as the knowledge of the competitors’ future actions\(^ {632}\), information exchange systems\(^ {633}\) or the fact that the firms’ conduct may not be explained by autonomous decisions\(^ {634}\). In conclusion, to determine the existence of tacit collusion, it should be possible to infer it from the *meeting of minds* of the competitors through the observation of the market conditions and other circumstantial evidence\(^ {635}\).

Once the form of the agreement is determined, the other two elements needed to prove the absolute monopolistic practice are the following: i) that the colluding firms are competitors or potential competitors and ii) and the object or the effect of fixing a price. In regard to the first part, the CLICAC analyzes the markets in which the airlines participate and concludes that besides the market of air transport for passengers, the airlines concur in the demand for travel agents’ services\(^ {636}\). The travel agent service is one of the channels of distribution for airline tickets and it’s the market affected by the airlines’ conduct\(^ {637}\).

According to the evidence of the CLICAC, for more than ten years the airlines had paid the same percentage (10%) of commission to the travel agency and almost in a simultaneous way all the agencies reduced it to 6%\(^ {638}\). However, the agency explicitly acknowledges, for the first time, that the sole pattern of this variable is not enough to prove an anticompetitive practice; it is only one of the elements that jointly with other circumstantial evidence permit the deduction of collusion\(^ {639}\). The CLICAC identified three facts that show that the conduct of the airlines


\(^{634}\) CLICAC, Acuerdo PC-020-01 de 2001, p. 15.

\(^{635}\) CLICAC, Acuerdo PC-020-01 de 2001, p. 15.


\(^{637}\) CLICAC, Acuerdo PC-020-01 de 2001, p. 20.

\(^{638}\) CLICAC, Acuerdo PC-020-01 de 2001, p. 22.

\(^{639}\) CLICAC, Acuerdo PC-020-01 de 2001, p. 22.
was a conscious strategy in regards to the competitors’ actions: i) the communications addressed to the travel agencies, regarding the change of the commissions, that were sent in close dates and had a similar format and content, ii) the decision taken in the IATA (*Resolución 002p*, September 1999) regarding the reduction of the commissions\(^{640}\), iii) the indirect evidence that the firms knew their competitors’ future behaviors\(^{641}\).

The CLICAC decided to file a demand against the investigated airlines for tacit collusion and the proceedings before the first instance tribunal are still ongoing.

Finally, in *CLICAC v. Compañía Texaco Panamá S.A. and others* (2002)\(^{642}\) the most recent case of tacit collusion, five fuel distributors were investigated for two different conducts: i) combination for fixing fuel transport prices and ii) retail price imposition to its distributors.

The CLICAC’s decision contains a thorough analysis of the historical evolution and structure of the markets affected by the conducts of firms. There is only one firm that refines the petroleum, five distributors (the investigated firms) and several retailers (third parties and distributor’s own retailers). According to the agency the chains of production, distribution and commercialization are subject to high barriers of entry\(^{643}\).

Regarding the transport of the fuel it is usually done with the distributor’s trucks. The distributors charge a fee according to the distance of the retailers and, according to the evidence of the CLICAC, this fee was the same for the five distributors during ten years (1992-2002)\(^{644}\).

From the transport price pattern, that is part of the final price of the fuel purchased by the retailers, the CLICAC deduced that this variable

\(^{640}\) The CLICAC affirms that the decision of the IATA, by itself, is not the fact that configures the anticompetitive conduct. CLICAC, Acuerdo PC-020-01 de 2001, p. 33.


\(^{642}\) CLICAC, Acuerdo PC-368-02 de 2002.


has not been a factor of competition among the investigated firms. In
despite of the reductions of the price of fuel, the principal cost in the
cost structure of the transport of fuel, the price of transport had not varied in
ten years\textsuperscript{645}. Furthermore, the cost structure of each distributor firm in
relation to the transport of the fuel was different. The agency concluded
there was no economic explanation for the firms’ behavior.\textsuperscript{646}

To determine if the firms’ conduct configures an infringement of the
law, the CLICAC analyzed the following elements: 1) the fact that the
conduct restricts competition, 2) the fact that the firms compete in the
same market, 3) if the determination of prices was an independent
decision of each firm or if the price was established through an illegal
combination.

To establish the existence of a combination the CLICAC identified
two elements: i) a common pattern of one or more variables of competition
that can’t be the “logical” product of a market, which indicates that the
firms are not willing to act independently and ii) a meeting of minds
among the firms with the objective of avoiding the result of a competitive
market.\textsuperscript{647}

The CLICAC reaffirmed its previous doctrine, in the sense that it is
not necessary to prove the existence of a contract to determine the
configuration of a combination. Moreover the meeting of the minds
may be deduced from objective facts that demonstrate that the firms’
conduct couldn’t take place without some sort of coordination.
Thereafter, the decision contains the same Peruvian and Spanish case
law quoted in CLICAC v. Aceti-Oxígeno S.A. and others, regarding
the adjudicator’s faculty of proving collusion through indirect evidence
whenever three conditions are met: 1) full proof of facts, 2) causal
relation between the circumstantial evidence and the monopolistic
practice, and 3) that the explanation of the investigated firms are not
credible\textsuperscript{648}.

\textsuperscript{645} CLICAC, Acuerdo PC-368-02 de 2002, p. 16.
\textsuperscript{646} CLICAC, Acuerdo PC-368-02 de 2002, p. 17.
\textsuperscript{647} CLICAC, Acuerdo PC-368-02 de 2002, p. 22.
\textsuperscript{648} CLICAC, Acuerdo PC-368-02 de 2002, pp. 23-26.
For the present case, the first requisite was met due to the identical prices charged by the distributors for the transport of fuel in ten years. The second requisite was proved by the meetings among the firms’ officers and email contacts (where information exchange was possible) and the fact that coordination was a profitable conduct. And the third requisite was met, according to the agency, because there is no other credible explanation for the result besides collusion. A hypothetical justification of having common costs would not be valid, since each firm had its own mechanisms of distribution that represented different cost structures. Furthermore, since the deregulation of the market (occurred in 1992) there was enough time for variations in the fees to take place.\(^{649}\)

As noted before, in this case a second type of conduct was investigated: resale price maintenance (relative monopolistic practice) due to the unilateral imposition of the retail price by the distributors to the retailers. For the purposes of this document the analysis of the CLICAC will be omitted, although it is important to mention that this conduct (configured through the grants of incentives to the retailers that complied) supposedly enabled the distributors of fuel to exclude other competitors in the retail market.

The CLICAC decided to file a demand against the firms for the two conducts described above and the proceedings before the first instance tribunal are still ongoing.

2.5.3. Conclusions

There are several features that distinguish Panama’s competition laws and its enforcement from other Latam jurisdictions. In the first place, the number of cases where competition laws are enforced is low (tacit collusion being a high percentage of them) in comparison with its peers. Secondly, Panama’s competition law is very detailed and includes a list (specifically, Article 7 of Decree No. 31 of 1998) of the type of

circumstantial evidence that the agency takes into account to determine the configuration of an absolute monopolistic practice. Thirdly, foreign doctrine and case law from Peru, Spain, Colombia, the EU, the U.S. and Venezuela were commonly used to support the administrative and judicial decisions.

On the other hand, Panama shares with other jurisdictions the fact that the investigations took place on different types of markets for goods and services and that these markets were oligopolies. Furthermore, tacit collusion was a means for achieving price fixing (in most cases), horizontal market division and bid rigging.

Panama’s doctrine and case law establish that parallel behavior is not enough to prove collusion: it is only one of the elements that must be present to determine its existence. It must be noted that the *meeting of the minds* for collusion must be proved by its inference from circumstantial evidence.

The decisions of the CLICAC and the tribunals have both a consistent economic approach and formal legal approach. Generally the markets’ history and structure are analyzed thoroughly and the legal concept of tacit collusion is well defined.

2.5.3.1. Attributes of successful defense

doctrines of the CLICAC and the tribunals’ case law regarding tacit collusion have been aligned up to date. According to the established standard of proof, in order to determine the configuration of an absolute monopolistic practice through tacit collusion three conditions must proved:

1) **A combination or an arrangement,**

2) **That investigated firms are competitors or potential competitors and**

3) **The conduct does not have as an object or effect the restriction of competition.**
Hence, a successful defense should start by proving against one or more of these elements. Since the existence of a combination or arrangement is inferred from parallelism plus other circumstantial evidence, hypothetically, the defendant may prove the following:

1) **The behavior is not parallel or parallelism is merely coincidental.**

2) **The firms’ behavior has an economic explanation, such as the existence of a common cost structure.**

2.5.3.2. *Attributes of successful prosecution*

The case law establishes that plaintiffs have the burden of proof regarding the three elements that are necessary to infer tacit collusion form the firms’ conduct:

1) **Proof of the parallel behavior among the firms and of other circumstantial evidence,** such as: i) a market structure which facilitates collusion (absence of substitutes and high barriers of entry); ii) close collaboration among competitors (e.g. joint imports of inputs and offering similar commercial conditions); iii) contacts between firms’ officers or other key employees; iv) scarce fluctuation of prices; v) different cost structures; and vi) no variation of market shares over time.

2) **Causal relation between the circumstantial evidence and the monopolistic practice.** For example, that the firms’ conduct is profitable only under cooperation but not if adopted unilaterally (without cooperation) and there is a profit motive for their actions.

3) **No economic explanation for the firms’ behavior exists besides collusion.** The latter is also evident when the firms’ behavior doesn’t correspond to a competitive market’s “logic” and
their explanation is not credible. This element is manifested by the absence of will to act independently or on the intention of avoiding competition. The deduction of tacit collusion from the conditions of the market and the firms’ conduct may be inferred in other ways besides parallel behavior, according to Article 7 of Decree No. 31 of 1998 and the analyzed case law, by other circumstantial evidence such as the following:

- Previous knowledge (awareness) of competitors’ future actions
- Coordination managed or sponsored by trade associations or leading firms
- Exchange of information that is vital for competition
- Excess of idle capacity
- Absence of independence of firms’ decision-making mechanisms

3. CONCLUSIONS
This document analyzes Latam’s competition rules on “tacit collusion” cases and their enforcement by the CAs and the courts. Each chapter of section 2 presents a thorough account of the cases adjudicated in Argentina, Brazil, Chile, Colombia and Panama. The analysis includes considerations upon the evolution of the case law and the identification of the attributes of successful prosecution and successful defense. In the present section, the jurisdictions’ cases on tacit collusion are compared and contrasted from three points of view:

1) The characteristics of the investigated markets
2) The proceedings before the CAs and Courts
3) The standard of proof applied in the cases
3.1. Conclusions from the Characteristics of the Investigated Markets

There are several markets subject to investigation for supposed tacit collusion in more than one jurisdiction. This was the case of the following markets:

1. Medical oxygen: in Argentina, Chile and Panama

2. Fuel retailing: in Argentina, Brazil, Chile, Colombia and Panama

3. Airline ticket distribution: in Argentina, Colombia and Panama

4. Purchase of raw milk: in Chile, Colombia and Panama

5. Bottled liquid gas (LPG): in Argentina, Brazil and Panama

Moreover, the cases of the markets of medical oxygen, fuel retailing and airline ticket distribution have a special connotation since the
investigated conducts were: i) similar or identical; ii) supposedly realized in close dates and/or iii) supposedly realized by the same companies in each country.

In the case of medical oxygen the accusation was based upon a supposed coordination in public bids organized by the State for the provision of hospitals. Four of the accused and fined firms in Argentina (Air Liquide, Praxair, Aga and Indura) were also accused but were absolved in Chile. In Argentina the collusion took place between the years 1997-2002 while in Chile the TDLC accused the firms of bid rigging in the year 2004.

The fuel retailing cases have two perspectives: on the one hand the price parallelism of the owners of the gas stations (Colombian case) and on the other hand the supposed coordination by fuel wholesalers on the prices charged to retailers in Argentina (among others, by YPF, Esso and Shell), Chile (among others, by YPF, Esso and Shell) and Panama (among others, by Esso and Shell).

Finally, the cases where the airlines were accused of agreeing on a reduction of travel agents’ commissions for the sales of tickets had the following common features: i) the reduction occurred in close dates; ii) the conduct involved common firms: in Argentina, among others, British Airways, Continental Airlines and United Airlines, in Colombia British Airways, Continental Airlines, and American Airlines, and in Panama Delta Airlines, Continental Airlines and American Airlines; and iii) consisted of the same simultaneous conduct: a reduction of the commission paid for the sale of tickets from 10%-9% to 6%.

Interestingly, in different countries, common deeds realized in the same market by the same agents had diverse outcomes before the CAs and courts. In spite of the fact that Latam’s jurisdictions prohibit collusion in similar terms, the different enforcement approaches and standards of proof adopted in each jurisdiction produced dissimilar judgments. The latter is specially evident in the airline cases: i) in Colombia the firms were absolved since the Superintendent considered the firms’ justifications to be credible and their simultaneous conduct was a mere coincidence; ii) in Panama the airlines were fined since the authority found no justification—other than collusion—for the airlines’ conduct;
and iii) in Argentina the firms were absolved due to the fact that they didn’t have a dominant position, pertained to different relevant markets, or their explanations were plausible.

Another conclusion upon the nature of the markets is that oligopolistic structures predominate in diverse markets of goods and services. In effect, there are cases in agricultural sectors (milk, sugar cane, green paddy rice, wheat flour and cocoa), in industry (flat rolled steel, PVC tubes, LPG, fuel and asbestos slabs), and in markets for services (cable TV, airline ticket distribution, maritime agents’ services, telecommunications and banking services).

Finally, collusion will have a different effect in terms of the impact on poverty and development depending on the market where it takes place. It is necessary to point out that in agricultural markets, energy markets (fuel and LPG) and health related markets tacit collusion cases were very common\textsuperscript{654}. For example, bid rigging cases were present in the markets for medical oxygen, physiological serums and health insurance services.

There is no doubt of the great harm caused in the cases where collusion was proved -in terms of welfare reduction- for sensible social sectors. On one hand, the harm may be caused to consumers that depend on the good or service and cannot replace it with a substitute. This is the case of hospitals and patients in health related markets, where the demand for the goods and services is inelastic. On the other hand, the harm may be caused to small producers (such as peasants) when a cartel fixes maximum purchase prices for inputs. In effect, the potential damage would have a big impact for croppers in the agricultural cases, where the offer of the good is atomized and the buyers are few.

The main conclusions that may be drawn from the comparison of the markets’ characteristics in tacit collusion cases are the following:

1. Certain markets have been subject to investigation by several Latam’s CAs

\textsuperscript{654} The inelasticity of the demand in these markets might be a plausible explanation and a common feature for this behavior, especially considering the market power of some of the firms involved.
2. In at least three markets the same firms were investigated due to a similar behavior.

3. Although there are cases where the conduct was the same and the market structure was similar, the proceedings had different results in each jurisdiction.

4. Oligopolistic structures predominate in diverse markets.

5. The markets where tacit collusion was investigated have a high impact in terms of achieving the aim of poverty reduction and development.

3.2. Conclusions based on the proceedings before the CAs and Courts

3.2.1. Nature of the proceedings and enforcement results

Antitrust enforcement systems in Latam are mostly of an inquisitorial nature, where the public enforcement by an administrative agency predominates. This is the case of Argentina, Brazil and Colombia that have a complete and systematized antitrust doctrine due to the prolific adjudication of cases by their CAs. Argentina and Colombia are the countries where the competition authorities have decided the highest number of tacit collusion cases. Brazil has less case law on tacit collusion, but the concurrence of several authorities in the enforcement of the law makes the proceedings more contentious.

On the other hand, Chile’s and Panama’s antitrust enforcement systems have an adversarial nature, where public and private enforcement concur. Especially in the case of Chile, the proceedings before the courts are more contentious and complex than the proceedings in jurisdictions with an inquisitorial nature. Taking into account the latter, it is not a coincidence that Chile and Panama have less case law on tacit collusion than their peers (less predominance of their agencies in enforcement).
But at the same time, especially in the case of Chile, the proceedings are long and the decisions are well structured.

The following chart summarizes each jurisdiction’s enforcement results on tacit collusion, which were commented upon above:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Analyzed cases</th>
<th>Judicial Review</th>
<th>Pending Judicial Review</th>
<th>Fines</th>
<th>Fines (%)</th>
<th>No Fines</th>
<th>No Fines (%)</th>
<th>Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>9</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>22%</td>
<td>7</td>
<td>78%</td>
<td>0</td>
</tr>
<tr>
<td>Brazil</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>50%</td>
<td>3</td>
<td>50%</td>
<td>0</td>
</tr>
<tr>
<td>Chile</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>5</td>
<td>100%</td>
<td>0</td>
</tr>
<tr>
<td>Colombia</td>
<td>15</td>
<td>3</td>
<td>1</td>
<td>7</td>
<td>47%</td>
<td>1</td>
<td>7%</td>
<td>7</td>
</tr>
<tr>
<td>Panama</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>100%</td>
<td>0</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>39</td>
<td>11</td>
<td>4</td>
<td>16</td>
<td>44%</td>
<td>16</td>
<td>47%</td>
<td>7</td>
</tr>
</tbody>
</table>

3.2.2. Evidence

The type of evidence assessed by the CAs and the courts is similar in each country; the most common pieces provided by the defendants or brought by the prosecutor or plaintiff are the following:

1) Affidavits of investigated firms’ managers
2) Information provided by the investigated firms
3) Testimonies of investigated firms’ customers
4) Testimonies of investigated firms’ employees
5) Testimonies of competitor firms’ managers
6) Documents and information seized in search of the investigated firms’ premises (warranted by a judge)
7) The investigated firms’ communications among each other and to their customers
8) Proof of meetings of the investigated firms

9) Press reports

10) Surveys of prices and customers preferences

11) The investigated firms’ invoices and contracts

Nowadays all the jurisdictions -in different degrees- apply an economic approach to adjudicate the cases. An evolution from a legal-formal criteria towards an economics approach is the common pattern of the CAs analysis of tacit collusion in Latam. In effect, the decisions include a thorough account of the relevant market’s characteristics, structure and evolution and considerations upon the nature and effects of the investigated conducts.

However, expert economic testimonies are not common pieces of evidence in the proceedings. The exception is Chile, where all cases on tacit collusion decided by the TDLC had expert economic witnesses brought by the defendants and/or by the plaintiffs. In Argentina Brazil, Colombia and Panama there was only one case where economic expertise was provided by the investigated firms as evidence.

3.2.3. JUDICIAL REVIEW

The courts’ review of the agencies’ decisions had diverse effect upon the evolution of the standard of proof on tacit collusion. While in some jurisdictions the courts are aligned with the CA’s standard of proof in other countries the courts have been reluctant to accept tacit collusion claims. The former, is the case of Brazil, Colombia and Panama where the courts have endorsed the CAs decisions without introducing substantial changes to the doctrine.655

On the contrary, Chile’s Supreme Court has had a major role on the shaping of case law. As explained above, the Supreme Court reversed

655 In Argentina the Supreme Court has not adjudicated any case on tacit collusion, although there is an important case’s proceeding ongoing.
two TDLC decisions, with the effect of setting a higher standard of proof which actually may exclude the prosecution of cases that lack direct evidence of collusion.

3.2.4. Influence of Foreign Case Law and Doctrine

It is important to stress the fact that Latam’s competition laws are equally influenced by the Sherman Act and the Treaty of Rome. Moreover, foreign case law and doctrine has influenced the theoretical framework in almost every case in Latam:

- Argentina’s decisions quote explicitly US, UK and EC case law
- Brazil’s decisions quote US doctrine and EC case law
- Colombia’s decisions quote EC case law
- Panama’s decision quote explicitly Peru, Venezuela, Colombia, EC, US and Spain case law and doctrine

Finally, as noted below, the so called plus factors or parallelism plus doctrines developed by US case law have nourished the criteria for adjudication of CAs and courts.

3.3. Conclusions from the Standard of Proof Applied in the Cases

Although every jurisdiction analyzed in this document has established that mere parallelism is not enough to prove tacit collusion, the burden of proof and the standard of proof vary in Latam’s case law. Furthermore, the indirect or circumstantial evidence that determines the configuration of an infringement has slowly evolved in each country, especially in Colombia and Chile.
3.3.1. Attributes of Successful Defense

The investigated firms’ defense has focused on arguments that may be classified in the following terms:

1) Denial of the conduct:
   - The behavior was not really parallel nor simultaneous
   - There was no agreement among the firms, the decisions were autonomous

2) Collusion wouldn’t be viable or would be innocuous
   - Low profit margins of investigated firm
   - Lack of barriers of entry in the market
   - High degree of rivalry in the market
   - Existence of imports
   - The firms have no dominant (individual or collective) position in the market
   - High degree of innovation in the market

3) Justification of common pattern in their behavior (alternative explanations of their conduct different from collusion)
   - Oligopolistic nature of the market and price leadership induces a common behavior of firms
   - Production of a homogenous good or service (explaining similar prices)
   - Similar cost structure and production process plus an increase of common inputs (explaining simultaneous and homogenous raise of prices)
• The firms’ behavior was determined by common exogenous factors in the market

• Different quality of the good or different commercialization and distribution conditions justified a dispersion of prices while the firms’ market shares were stable.

When any of the three categories of allegations was adequately proved, CAs generally closed the investigations or refrained from filing suits before the courts.

A detailed description of each jurisdiction’s attributes for successful defense is contained in the conclusions of the respective chapter of section 2. However, to illustrate the comparison of the standard of proof in each jurisdiction, the following chart identifies the attributes of successful defense, according to the most recent case law (from the highest ranked authority) in each jurisdiction:

<table>
<thead>
<tr>
<th>Attributes for successful defense</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Chile</th>
<th>Colombia</th>
<th>Panama</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Behavior is not parallel</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>2. Plausible explanation for behavior: market structure or external phenomena cause parallelism</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>3. No profit motive for collusion</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Competitive dynamism in the market</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. No dominant position</td>
<td></td>
<td>*</td>
<td>*</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>6. Conduct does not have as object or effect the restriction of competition</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>

*Controversy over attribute

The chart shows that among the analyzed Latam jurisdictions there is consensus about two defenses that rule out tacit collusion: 1) the firms’ behavior is not clearly parallel and homogenous (e.g. different
pricing due to the existence of different volume rebates and other commercialization conditions) and 2) when there is an alternative explanation for the firms’ behavior besides collusion (e.g. oligopolistic interdependence).

### 3.3.2. Attributes of Successful Prosecution

The highest standard of proof for tacit collusion has been set in Argentina and Chile. In Argentina, the investigated firms were found guilty for colluding in two of the nine cases analyzed in this document. In these cases tacit collusion was determined due to the proof of parallel behavior and of other ancillary restraints that facilitated collusion (e.g. having a common marketing company or the existence of an information exchange system).

In Chile the Supreme Court has reversed the only two cases where the TDLC fined firms for a supposed tacit collusion. The current TDLC’s case law (confirmed by the Supreme Court or at least not overruled) establishes that all alternative hypotheses –different from collusion- must be completely discarded. Hence, the plaintiff has the burden of proof regarding the lack of economic justification for the firms’ decisions.

Furthermore, it must be proved that the collusive agreement would allow the firms to attain, maintain or reinforce dominance and abuse from it. According to the TDLC, there are several types of circumstantial evidence that may indicate the existence of price fixing and market division. Albeit, the value of indirect evidence will be ultimately determined by the fact that it allows conclusions beyond question. Additionally the Supreme Court’s case law establishes that the firms’ deliberate and joint intent to adopt a vicious practice must be proved.

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656 As noted before, 1) existence of high barriers of entry; 2) high (supracompetitive) profits; 3) reduction of demand; 4) few competitors; and 5) frequent interaction among firms (e.g. within a trade association). Furthermore, vertical integration may facilitate collusion since it allows to control the final price.

657 As noted before, 1) stable participation of the firms for long periods of time; 2) high dispersion of prices; 3) lack of transparency –asymmetry of information- regarding prices charged; and 4) concentrated markets with high barriers of entry.
Brazil, Colombia and Panama have adopted a less strict burden of proof than Argentina and Chile. The Brazilian case law adheres strictly to the plus factors doctrines and has established that tacit collusion may be proved when the circumstantial evidence demonstrates that there is no rational economic explanation for the firms’ parallel conduct besides the existence of collusion. The indicators of collusion consist of the following: i) the firms’ conduct must be parallel and identical; ii) the existence of facilitating devices (e.g. information exchange systems and frequent meetings); and iii) a market structure that makes the market prone to collusion (e.g. oligopolistic, highly concentrated and with low contestability).

As in Argentina, Brazilian case law has identified factors that discard the tacit collusion hypothesis, such as a tendency of decreasing profits and high costs for the firms of monitoring a supposed agreement.

The Colombian and Panamanian standards of proof applied by the CAs are less strict. As a consequence, in Colombia half of the cases ended with a settlement while the in the other half the SIC found the investigated companies guilty of tacit collusion through conscious parallelism. According to the SIC besides the parallel and similar conduct other indirect evidence must be present in order to prove that there is no economic justification for the conduct of the firms besides collusion.

In the case of Panama, the tribunal has also established that besides the proof of the parallelism other circumstantial evidence (in causal relation to the conduct) must prove that the investigated firms’ explanation is not credible. Moreover, as in Chile, the meeting of the

658 As noted before, the following is considered relevant indirect evidence: i) coordination managed or sponsored by trade associations or leading firms; ii) exchange of information that is vital for competition; iii) meetings of officers or other key employees; iv) no variation of market shares over time; v) excess of idle capacity; vi) propensity of the market’s structure towards collusion; vii) close collaboration among the firms; viii) the fact that the conduct doesn’t correspond to the logic of a competitive market; viii) the fact that the firms’ conduct is profitable only under cooperation but not if adopted unilaterally (without cooperation); ix) absence of independence of firms’ decision taking mechanisms; x) previous knowledge of competitors’ future actions; and xi) no economic explanation for the conduct or no other credible explanation for the conduct besides collusion.
minds among the firms for collusion must be proved, although it is possible to infer it from circumstantial evidence.

A detailed description of each jurisdiction’s attributes for successful prosecution is contained in the conclusions of the respective chapter of section 2. However, to illustrate the comparison of the standard of proof in each jurisdiction, the following chart identifies the attributes of successful prosecution, according to the most recent case law (from the highest ranked authority, in each jurisdiction:

<table>
<thead>
<tr>
<th>Attributes for successful prosecution</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Chile</th>
<th>Colombia</th>
<th>Panama</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Behavior is parallel</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>2. Market structure is prone to cartelization</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>2A. Dominance and/or possibility of abuse of dominance</td>
<td>*</td>
<td>*</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. No economic explanation besides collusion</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>4. Concurrence of wills to restrict competition</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>4A. Awareness of parallelism or knowledge of future decisions</td>
<td></td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>5. Practices that facilitate collusion</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Causal relation between circumstantial evidence and monopolistic practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>

* Controversy over attribute

To summarize, each jurisdiction has different criteria for the necessary elements for the assessment of the cases. However, it is possible to identify three basic characteristics, shared by the analyzed countries, of the proof of the law’s infringement through tacit collusion:
1. A parallel and homogenous (or very similar) behavior regarding any relevant variable of competition (e.g. prices and quantity produced)

2. A market structure that is prone to cartelization (e.g. close oligopolies)

3. That the evidence discards any economic explanation for the firms’ conduct besides collusion

3.3.3. Collective dominance and tacit collusion

A final topic that distinguishes the conceptual framework of tacit collusion cases in Latam is the relation between collective dominant position and collusive practices. The case law from Chile (although there are dissents in the TDLC) has clearly established the proof of collective dominance as a necessary requisite for the configuration of tacit collusion.

In Argentina and Brazil the determination of a dominant position of the firms is also assessed by the CAs but the concept of collective dominance as a necessary element for the configuration of tacit collusion is not explicitly established. In fact, there are several cartel cases in Brazil where CADE has been emphatic in the sense that according to the law it is not necessary to prove that an alleged collusion produced certain negative effect over the market. Hence, the issue of whether the firms had a collective dominant position and if the firms have the correlative capacity of causing damage is not necessary to typify an illegal conduct.

Finally, in Colombia and Panama the concept of collective dominance has been treated separately from the concept of tacit collusion and the proof of dominance is not an issue for the identification of collusive practices.

In the end the discussion is rooted on the definition of what are the elements are that determine whether a conduct configures an infringement to the law. In general, due to the wording of the competition laws, Latam CAs and Courts (with the noted exception of Chile) have established that a collusive practice will configure an illegal conduct.
whenever it has the “object” (subjective – intentional) of producing certain restriction to competition that the law lists (e.g. price –fixing and market division) or whenever it has the “effect” (objective) of producing the listed results.

From this point of view, shared by the European Court of Justice, the proof of damage or effect of the practice is not a necessary element for the configuration of the illegal conduct, since the “intention” of causing the effect is enough, according to the law, to typify the prohibited conduct.

3.3.4. Final remarks

Tacit collusion is a complex concept both from the legal and economic points of view. Its complexity has evident effects on legal and economic point of view. Its complexity has evident effects over the legal proceedings and poses great difficulties for the competent authorities. As a consequence there are important questions regarding its assessment that remain unanswered, which generates a problem of legal uncertainty that may even lead the firms to act irrationally to avoid prosecution.

In this sense, Latam’s jurisdictions have assessed similar questions that posed challenges for the proceedings, which are relevant to mention since their answers are still pending:

- How does one distinguish between behaviors that are product of tacit collusion from the firms’ strategic decisions in an interdependent oligopoly?

- How does one distinguish illegal price parallelism (especially a simultaneous increase of prices) from other phenomena of the market that may cause this behavior, such as a general increase in production costs or an increase in demand?

- Even if tacit collusion is proved, how does one distinguish participants from non-participants?
• Should collective dominance be considered a necessary condition for the configuration of an infringement?

• Should the intent of producing the anticompetitive effect be proved? If there is no direct evidence of the will of the firms to collude, from which evidence may it be inferred?

It is important to point out that Latam’s case law on tacit collusion is recent (in comparison to the US) and there is still space for its development and evolution. Furthermore, there are great expectations regarding the enforcement of the recently installed competition authorities, especially in Central America. These inexperienced jurisdictions will have to assess the same questions that have posed complex challenges for the jurisdictions analyzed in this document. As stressed above, many of these queries are still pending for definitive answers by CAs and courts.

An optimal enforcement of antitrust laws requires the minimization of costs borne by the authorities and the parties due to the proceedings, both in terms of administrative costs and enforcement errors. Due to the nature of the concept, tacit collusion cases are prone to these kinds of costs. Hence, it is necessary to evaluate whether enforcement efforts should be channeled to different activities besides the prosecution of firms for supposed tacit collusion.\(^{659}\)

Alternative enforcement policies, such as leniency programs or the focus of enforcement efforts on hard-core cartels, must be assessed and debated among Latam’s scholars, enforcers and stakeholders in the near future.

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\(^{659}\) In the future, normative studies based upon cost-benefit analysis could shed light upon the effectiveness of the different enforcement strategies in Latam to prosecute cartels.
4. Bibliography


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- Secretaría de Comercio Interior, Resolución No. 442 de 1986 (Silos Areneros de Buenos Aires v. Arenera Argentina and others).
- CNDC, Dictamen No. 110 de 1989 (*La Casa del Grafito v. Rich Klinger and Bruno Cape*).

- Secretaría de Comercio Interior, Resolución No. 70 de 1989 (*La Casa del Grafito v. Rich Klinger and Bruno Cape*).

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- CNDC, Dictamen No. 160 de 1994 (*Secretaria de Energía vs YPF, Esso and Shell*).

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- CNDC, Dictamen No. 233 de 1995 (*René Veder Diez v. Agip and others*).

- Secretaría de Comercio e Inversiones, Resolución No. 128 de 1995 (*René Veder Diez v. Agip and others*).

- CNDC; Dictamen No. 209 de 1995 (*Alberto Dupuy v. VCC and Cablevisión*).

- Secretaría de Comercio, Industria y Minería, Resolución No. 382 de 1996 (*AGP v. CCAP and others*).

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- CNDC; Dictamen No. 284 de 1998 (*Fecliba v. Roux Ocefa, Rivero and Fidex*).


5.2. Brazil

- Asbeg v. Sitran and others (1988)

- Codima v. Ibemep and others (1990)


5.3. Chile

- Tribunal de Defensa de la Libre Competencia (TDLC), **Fiscalía Nacional Económica (FNE) v. Nestlé Chile S.A. and others** and


5.4. **COLOMBIA**

- Superintendencia de Industria y Comercio (SIC), Resolución No. 17464 de 1999.

- SIC, Resolución No. 10005 de 1999 (**SIC v. Lonja de Propiedad Raíz de Medellín and others**).

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- SIC, Resolución No. 25983 de 2000 (**SIC v. Alaico and others**).

660 Most of the Resolutions of the SIC are available at: [http://200.91.231.203/ConsultaActos/NavegacionDocsIfx/VerDocsInternet.php](http://200.91.231.203/ConsultaActos/NavegacionDocsIfx/VerDocsInternet.php)
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- SIC, Resolución No. 15645 de 2001 (SIC v. Unión de Arroceros S.A. and others).
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- SIC, Resolución No. 05613 de 2002 (SIC v. La Cooperativa Tolimense de Transportadores Expreso Ibagué Ltda. and others).
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- Juzgado Noveno de Circuito, Ramo Civil, del Primer Circuito Judicial, Sentencia No. 59 del 29 de septiembre de 2004. (CLICAC v. Aceti-Oxígeno S.A. and others)
5.6. PERÚ


5.7. VENEZUELA


- Corte Primera de lo Contencioso Administrativo, Sentencia del 5-6-1997 *Aga de Venezuela/Gases Industriales*. 
5.8. EU


5.9. US


- *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002)

ANNEX 1- GRAPHS AND TABLES FROM THE CASES

1. ARGENTINA


CNDC, Dictamen 160 de 1994, p. 22

Fuente: elaboración propia con base a datos de la Sec. de energía

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Rev. Derecho Competencia. Bogotá (Colombia), vol. 5 N° 5, 307-497, enero-diciembre 2009

CNDC; Dictamen 284 de 1998, p. 23
2. Brazil

1. SDE v. CSN, Usiminas and Cosipa (1999)


<table>
<thead>
<tr>
<th></th>
<th>Usiminas</th>
<th>CSN</th>
<th>Cosipa</th>
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<tr>
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<td>LQ</td>
</tr>
<tr>
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<td></td>
<td>3.63%</td>
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<td></td>
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<td>R$ 348.25</td>
<td>R$ 491.55</td>
<td>R$ 718.75</td>
</tr>
</tbody>
</table>

* Os preços informados são por tonelada.
LQ - laminados a quente
LF - laminados a frio
EG - eletrogalvanizados
LZ - laminados zincados (galvanizados)
CG - chapas grossas
Fonte: empresas produtoras

CADE, P.A. 08000.015337/1997-48, Relatório, pp. 7-8

Reajustes de preços dos aços planos comuns
1995/1997
(%)
(Continuación)

<table>
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<tr>
<th>Fecha</th>
<th>Usiminas</th>
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<th>COSIPA</th>
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<td>LQ/LF</td>
<td>C G</td>
<td>EG</td>
</tr>
<tr>
<td>01/08/96</td>
<td>4.09/4.46</td>
<td>8.02/12.20</td>
<td>3.63</td>
</tr>
<tr>
<td>05/08/96</td>
<td>8.43</td>
<td>7.73/12.20</td>
<td>9.70</td>
</tr>
<tr>
<td>08/08/96</td>
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<td>8.02/12.20</td>
<td>3.63</td>
</tr>
<tr>
<td>27/06/97</td>
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</tbody>
</table>

Obs: LQ - laminados a quente; LF - laminados a frio; EG - electrogalvanizados; LZ - laminados zincados (galvanizados) e CG - chapas grossas.
Fonte: notas técnicas SEAE/COGPI e clientes (fls. 651-722).


CADE, P.A. Nº 08012.000677/1999-70, Relatório, p. 4.

<table>
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<tr>
<th>Empresa aérea</th>
<th>05.08.99</th>
<th>06.08.99</th>
<th>09.08.99</th>
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<th>Percentual de acréscimo entre 06.08 e 09.08</th>
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<td>VARIG</td>
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<td>10%</td>
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<tr>
<td>TRANSBRASIL</td>
<td>R$ 108,00</td>
<td>R$ 108,00</td>
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<td>VASP</td>
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Fonte Seae: Calculado com base nos dados fornecidos pelas empresas (fls. 622).
3. CHILE


TDLC, Sentencia Nº 18 de 2005, p. 74.

![Graph showing gasolina 93 octanos margins](image)


TDLC, Sentencia Nº 38 de 2006, p. 34.

<table>
<thead>
<tr>
<th>Agencia</th>
<th>Nombre servicio</th>
<th>Valor neto</th>
<th>En US$ abril 2002</th>
<th>Vigencia desde</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ultramar</td>
<td>Tramitación integral de exportación</td>
<td>US$ 28</td>
<td>US$ 28</td>
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<td>Ian Taylor</td>
<td>Tarifa de exportaciones agencia</td>
<td>US$ 25</td>
<td>US$ 25</td>
<td>Marzo de 2002</td>
</tr>
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(Continúa)

TDLC, Sentencia Nº 57 de 2007, p. 77.

**Cuadro 6**

Afiliaciones mensuales por tipo de carátula como % del Total mensual de planes vendidos*

<table>
<thead>
<tr>
<th>Período</th>
<th>Colmena %</th>
<th>Consalud %</th>
<th>Vida Tres %</th>
<th>Banmédica %</th>
<th>ING %</th>
<th>Total %</th>
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<td>0.1</td>
<td>0.0</td>
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<td>0.0</td>
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<td>21.2</td>
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(Continuación)

### 90/70

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<td>jul-02</td>
<td>15.7</td>
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* Cabe notar que la suma de la participación en las ventas de los planes 100/80 y 90/70 no representa necesariamente el 100%, por cuanto en esta tabla no se explicitan otras coberturas comercializadas.

** La columna “Total”, respecto de cada tipo de plan, se refiere al número total de nuevos planes vendidos cada mes, de cada tipo, por el conjunto de las requeridas, y esto como porcentaje del total agregado de nuevos planes mensuales vendidos por todas las requeridas.

**Participación ventas de planes 90/70 en la oferta mensual total de cada requerida (％)**

TDLC, Sentencia No 5/ de 2007, p. 78.
4. COLOMBIA


Resolución No. 7950 de 2002, p. 17

**Gráfica 1**

*Fuente:* Información suministrada por las Estaciones de Servicio investigadas, en respuesta a los requerimientos de Fecha 02/05/01, Folios 7 a 14. Cuaderno General.

Resolución No. 7950 de 2002, p. 19
Fuente: Información suministrada por las Estaciones de Servicio investigadas, en respuesta a los requerimientos de Fecha 02/05/01, Folios 7 a 14. Cuaderno General.


Resolución No. 22625 de 2005, p. 19

Resolución No. 22625 de 2005, p. 26
Gráfica 3

Comportamiento del precio/carga de 126 kilos de arroz paddy verde grupo2
enero a junio de 2004

Fuente: Información aportada por las investigadas al expediente