Doutrina

ASPECTS OF BRAZILIAN COMPETITION POLICY*

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Nota:

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Introduction; 2. Structural reforms and stabilization: the preconditions for an active competition policy in Brazil; 3. The three phases of Brazilian competition policy; 4. Challenges and peculiarities of implementing competition policy in developing economies; 5. Challenges and peculiarities of implementing competition policy in developing economies: aspects of the Brazilian case; 5.1. Conduct control: settling accounts with the past, prevalence of the rule of reason, and recent anticartel activity; 5.2. Merger control; 5.3. Prospects for competition policy in Brazil; 6. Conclusions; 7. References.

INTRODUCTION

The purpose of this article is to discuss the evolution of competition policy in Brazil from a historical and comparative perspective. In contrast with the experience of various OECD countries and the United States in particular, competition policy

has only recently become relevant in Brazil. Its increasing importance for public policy has not been preceded by a gradual development of competition culture and institutions. This fact has several implications for policy making. Best practices in the OECD countries cannot be automatically imported without due attention to the peculiarities of a developing economy.

The paper is divided in five sections, including this introduction. Section 2 underlines the structural transformations of the Brazilian economy as well as the international circumstances which made competition policy relevant. This permits a contrast with the evolution of other competition regimes. Section 3 describes the different phases of competition policy in Brazil . Section 4 discusses the challenges and peculiarities of implementing competition policy in a developing economy. Section 5 describes how such challenges were coped with in the Brazilian case. A final section contains the major conclusions.

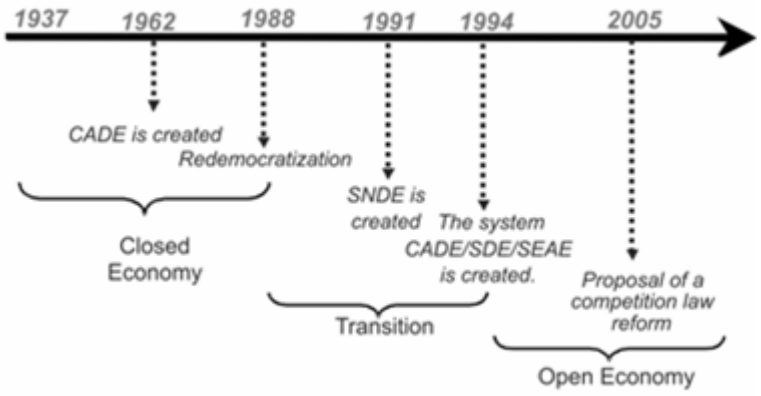
Nota:

1 Sections 2 and 3 rely heavily on Oliveira & Fujiwara (2006), forthcoming in Northwestern Journal of International Law & Business.

2. STRUCTURAL REFORMS AND STABILIZATION: THE PRECONDITIONS FOR AN ACTIVE COMPETITION POLICY IN BRAZIL [1]

The motivation for implementing competition policy in Brazil has been totally different from the cases of the U.S. , E.U. and other developed jurisdictions. As in many other developing economies, competition policy has not been a consequence of the natural evolution of a market economy. Initially it was an instrument to disseminate market institutions after decades of import substitution during which the state played a predominant role in capital accumulation. In the U.S. , competition policy was a natural outcome of the market economy. In Brazil it has been conceived as a policy input to strengthen market institutions. Chart 1 summarizes the evolution of competition policy in Brazil .

Chart 1
Evolution of the competition policy in Brazil



Source: various documents and legal texts.

Although Brazilian competition legislation dates back to the thirties, its implementation did not become relevant until the mid-nineties. Under the import-substitution model, the Brazilian state intervened in a number of sectors in order to induce industrialization. In addition to the prominent presence of the state, the model was also characterized as a closed economy producing mainly for the domestic market. On the basis of this structure, the Brazilian economy showed high growth rates that were sustained until the mid-seventies.

Nota:

2 Data from the Brazilian Institute for Geography & Statistics (local acronym IBGE).

3 The average annual inflation rate in the eighties was 237%. Inflation reached 1,783% and 1,477% in 1989 and 1990 respectively.

After the oil shock, however, this model presented several limitations due to lack of external funds and a fiscal crisis of the Brazilian state. In the period 1980-89, the annual growth rate fell to 1%, well below the average of 7% sustained during the period 1970-79 [2] . By the eighties inflation had already soared to triple digits and in 1989-90 Brazil experienced hyperinflation [3] . These factors, combined with falling productivity in the state sector, led to major changes in the policy regime.

Nota:
4 See Kume et al. (2000).

Five changes in particular explain the increasing importance of competition policy. The first change was represented by *trade liberalization* . This process had been initiated under the Sarney administration (1985-89) but was accelerated by the Industrial & Trade Policy (PICE) introduced during Collor's term (1990-92). Trade liberalization was a relatively gradual process. Chart 2 shows the decline in import tariffs. The Industrial & Trade Policy eliminated special import regimes and reduced non-tariff barriers. The average import tariff dropped from 57.5% in 1987 to 13.4% in 1998, while the maximum tariff dropped from over 100% to 38.1% in the same period [4] .

Chart 2
Evolution of the import tariff rate

Source: WTO, Silber (2002) and Kume et al. (2000).

Second, *privatization* reduced direct state intervention. Federal Law 8031/90 [5] enacted the privatization program, which began the process of reducing direct state intervention in the economy. Some companies were privatized during the eighties but this did not produce a major change in the size of the state. The enterprises privatized during that period had been acquired by the state owing to financial difficulties, and their privatization simply meant resale to the private sector. The total value of these transactions was relatively small: US$780 million.

Nota:
5 Published April 12, 1990 .

The privatization program was accelerated by the Collor administration and continued under Itamar Franco. During these two administrations (1991-94) the program focused on privatizing enterprises in steel, petrochemicals and fertilizers that did not require major regulatory changes. Receipts from privatization totaled US$8.6 billion.

Nota:
6 See Oliveira (1996, p. 88-92).

In the following period, under the first Cardoso administration (1995-98), the program comprised the sale of the state-owned enterprises most directly active in infrastructure sectors such as telecommunications, electricity and railroads. Receipts totaled US$86.9 billion, of which US$70.3 billion corresponded to actual revenue from sales [6] . Given the importance of this program and the elements of natural monopoly involved in many of the affected markets, regulatory issues became central to the public policy agenda.

Nota:

7 Such as the Central Bank (BACEN), created by Law nº 4595, December 31, 1964 , the Private Insurance Superintendency (SUSEP), created by Law nº 73, November 21, 1966 , or the Securities & Exchange Commission (CVM), created by Law nº 6385, December 7, 1976 .

8 See Viscusi, Vernon & Harrington Jr. (1995).

Thus the third change had to do with *regulation* . As part of the infrastructure was privatized, it became clear that the state would have to design specific regulatory frameworks. Brazil already had some government agencies with regulatory powers [7] , but they did not have the same characteristics as the bodies created in the second half of the nineties as part of the process of transforming the role of the state in the economic sphere. In this context, competition authorities became important to complement the process and interact with the regulatory agencies. Note that in the U.S. many regulatory agencies preceded the antitrust authorities. In contrast, in Brazil they were created after a competition law was in place [8] . Antitrust bodies were the ones with certain expertise to deal with the vertical and horizontal problems which typically arise in regulated industries.

Another interesting contrast relates to the role of subnational governments. In the U.S. the states were active in regulation. In Brazil the initiative was mainly federal. A few Brazilian states followed suit in the areas where they had powers to grant concessions, such as in natural gas and roads.

Nota:

9 See footnote 3 above.

The fourth change was *stabilization* . Indeed, when inflation was high and accelerating after the late seventies, there was no room for microeconomic policies. Concerns with deadweight losses seemed superfluous when prices were rising at more than 20%-30% per month [9] .

Nota:

10 Source: Getúlio Vargas Foundation.

Indeed, inflation became the main concern after the mid-eighties. A dozen stabilization plans were implemented between 1986 and the Real Plan in 1994. Coordination of inflationary expectations through monetary reform, use of the exchange rate as a nominal anchor and some effort to control the fiscal accounts succeeded in lowering the inflation rate. Inflation averaged 8.17% in the period 1995-2005. Most forecasts point to single-digit levels for the next few years [10] .

The fifth change related to the *international environment* . In different forms, competition policy became more important among policy recommendations. UNCTAD had always been active in disseminating competition issues in developing countries. The World Bank prescribed competition during the eighties as one of the conditionality requirements for structural adjustment loans. Competition was also included as one of the Singapore Ministerial issues in 1996 and a working group on trade and competition was created at the World Trade Organization (WTO) [11] . This group was very active until the Cancun meeting in 2001 when competition was no longer a negotiation item in the Doha Round. Finally, the creation of different multilateral fora such as the International Competition Network (http://www.internationalcompetitionnetwork.org) or the Global Competition Forum (http://www.globalcompetitionforum.org) stimulated the adoption of national competition laws as well as emulation of so-called “best practices” derived from international experience.

Nota:

11 For information on WTO actions relating to competition policy, see the WTO website (http://www.wto.org/english/tratop_e/comp_e/comp_e.htm).

The roles and characteristics of competition policy have varied according to the stage of development of a particular country. In the case of Brazil , competition policy became relevant only in the context of a more open and market economy in

the late twentieth century. The next section provides more details about the evolution of competition policy in Brazil .

3. THE THREE PHASES OF BRAZILIAN COMPETITION POLICY

Three phases of competition policy in Brazil can be identified, as indicated in Chart 1 above. Chart 3 contains a list of the relevant legislation. The division is, of course, arbitrary. A few competition cases occurred even when the policy regime was characterized by strong state intervention, while the traits and vices of interventionism persisted after a more modern competition law had been put in place. Chart 4sums up the historical development of Brazil 's competition legislation.

The *first phase* extends from enactment of the 1937 Constitution under the Vargas dictatorship to the 1988 Constitution when the first steps towards a more open economy were taken [12] . This phase was characterized by a high degree of state intervention in the economy and a marginal role for competition policy. Indeed, during import substitution, in which the state played a crucial role in production and intervened directly in the markets, antitrust was not important at all.

Nota:

12 The 1988 Constitution is seriously defective in respect of macro policy and fiscal equilibrium but laid the legal foundations for a more regulatory and less interventionist role of the state in the economy.

During this first phase, there was no competition legislation in Brazil . Instead of market protection, several initiatives aimed at providing instruments for the state to intervene. Market protection in reality meant the legal possibility of state intervention.

Note that despite the difficulties of implementing competition in this phase, a more modern competition law was enacted in 1962 [13] . A national competition authority, Conselho Administrativo de Defesa Econômica (CADE), was created the same year [14] . The number of cases brought before CADE in the following three decades was relatively small, as shown in Section 5 below. But even this limited activity fostered the rise of certain professional circles dedicated to antitrust in a few major cities [15] . Nevertheless, CADE was not involved in policy making. The state sector remained dominant and most markets were under some kind of direct or indirect government control. The price control bodies Conselho Interministerial de Preços (CIP) and Superintendência Nacional de Abastecimento e Preços (SUNAB) had much more power than CADE.

Nota:

13 Law nº 4137, October 9, 1962 .

14 Law nº 4137, October 9, 1962 .

15 Farina (1990) pioneered in discussing the economic aspects of the early CADE experience. IBRACC documents and various other publications reveal that a few scholars and professionals became active in São Paulo , Rio de Janeiro , Belo Horizonte and Porto Alegre in the seventies and eighties.

The *second phase* started in the late eighties. The 1988 Constitution recognized the central role of the private sector and the first trade liberalization measures were introduced [16] . However, many sectors of the economy were still under direct government control and price controls were not totally eliminated. This phase therefore marks a transition period.

Nota:

16 Between 1988 and 1989, the average import tariff fell from 51% to 34%, and import procedures were simplified with the reduction of some non-tariff barriers and the unification of some import taxes (Averbug, 1999, p. 46).

The transition was characterized by a change of direction to a more open economy with greater exposure to the world economy and less state intervention in comparison with the import substitution period [17] . This process of structural transformation brought about several other changes and made the previous price control system obsolete [18] .

Nota:

17 See, for example, Oliveira & Turolla (2004).

18 Oliveira (1996).

Another feature of this phase was the continuing macroeconomic crisis represented by hyperinflation. For an indexed economy like Brazil 's to achieve stability, a specific strategy was necessary to coordinate economic agents so as to reduce the extremely high rate of inflation to a single-digit annual rate. Thus some kind of coordination mechanism was needed as part of the new policy regime. This explains why it took some time to eliminate the price control bodies. On the contrary, in fact, the government created a secretariat linked to the central administration (the National Economic Law Secretariat, local acronym SNDE, later renamed SDE) in 1990 and also resisted immediate extinction of the price monitoring agencies [19] . Reluctance to eliminate old bureaucratic functions is usually attributed exclusively to lobbying and political resistance on the part of the bureaucracy. Such resistance in fact occurred in the Brazilian case, but there was an additional reason for the gradual phasing out of the old price control regime [20] .

Nota:

19 Conselho Ministerial de Preços was extinguished in 1990 but the popular Superintendência Nacional de Preços e Abastecimento (SUNAB) persisted until 1997.

20 Oliveira (1996, p. 59-73) discusses price policy in this phase of the transition.

It became clear that the state would not be able to continue to lead the investment and production process because of the profound fiscal crisis that characterized this period. The economy was ravaged by hyperinflation in 1989-90. After a series of failed attempts at stabilization, the 1994 Real Plan finally stamped out hyperinflation [21] .

Nota:

21 Among others, Oliveira (1996, Section II) discusses the implementation of the Real Plan.

Thus the *third phase* begins with the success of this stabilization program, the Real Plan, prepared in 1993-94. Law 8884 of June 1994 was a landmark in this transformation. Curiously, the political motivation for Law 8884 drew inspiration from the notion of state intervention in the market, inherited from previous stages. President Itamar Franco hoped the law would permit fast punishment of price abuses in the pharmaceutical sector and demanded approval of what became the new competition law as a condition for implementing the stabilization plan [22] .

Nota:

22 Based on informal reports from different sources in the Brazilian government at the time of the elaboration of the Real Plan.

Law 8884 introduced three major changes. First, it gave more power to a technical body, CADE, which was made the last instance at the administrative level, i.e. without appeal to any other body in the Executive branch. Second, it transformed CADE into an independent council whose members served a fixed term for the first time (two years). Third, it introduced merger control [23] .

Nota:

23 Article 54 of Law 8884 retained part of the structure of art. 13 of Law 8158/91, which in turn was taken over from art. 74 of Law 4137 (1962). The changes of Law 8884/94 may seem trivial nowadays. But at the time they generated considerable resistance. The fact that a brilliant and liberal economist, Mário Henrique Simonsen, considered the law a major threat to

capitalism gives an idea of how the country lacked familiarity with competition culture and legislation.

Chart 3
The Three Phases of Competition Policy in Brazil

Law	Date	Reference to the federal constitution (FC)	Governmental body involved
Closed economy			
LD 869	11/18/38	FC 1937, art. 141	
LD nº 7,666 "Malaia Law"	06/22/45		Comission for economic defence (CADE)
Law nº 1,521	12/26/51		
Law nº 1,522	12/26/51		Federal Price and Supply Commission (COFAP)
Law nº 4,137	09/10/62	FC 1946, art. 148	(CADE)
Law nº 4	09/26/62	FC 1946, art. 146	National Supply Superintendence (SUNAB)

Source: various documents and legal texts.

LD nº 52,025	05/20/63	Law nº 4137	
Decree nº 63,196	08/29/68	FC 1967, art. 83, II Repealed in 04/25/91	Price Inter State Department Commission (CIP)
LD nº 92,323	01/23/86	Repeals DL 52,025 Regulates 4,137 law	
Transition Phase			
1988 Constitution			
Law nº 8,137	12/02/90	FC 1988, art. 170 and 173	
LD nº 99,244	05/10/90	FC 1988, art. 170 and 173	SNDE
Law nº 8,158 (PM 204/90)	01/09/91	FC 1988, art. 170 and 173	SDE
Open economy			
Law nº 8,884	06/11/94	FC 1988, art. 170 and 173	CADE becomes an autarchy
Law nº 9,021	03/30/95	FC 1988, art. 170 and 173	
Law nº 9,069	06/29/95	FC 1988, art. 170 and 173	
Law nº 9,470	07/10/97	FC 1988, art. 170 and 173	
Resolution nº 15	08/19/98	FC 1988, art. 170 and 173	CADE
Resolution nº 20	06/03/99	FC 1988, art. 170 and 173	CADE
PM nº 2.055	08/11/00	FC 1988, art. 170 and 173	SEAE/SDE/CADE
PM nº 2.056	08/11/00	FC 1988, art. 170 and 173	SEAE/SDE/CADE/ ANP
Law nº 10.149	12/21/00	FC 1988, Art. 170 and 173	SEAE/SDE/CADE
Ordinance 50 of 2001	08/01/01	FC 1988, Art. 170 and 173	SEAE/SDE
Resolution nº 28	07/24/02	FC 1988, art. 170 and 173	CADE
Joint Ordinance nº 1	02/18/03	FC 1988, art. 170 and 173	SEAE/SDE/CADE
SDE Ordinance nº 4	01/05/06	FC 1988, art. 170 and 173	SDE

Chart 4
Evolution of Antitrust Legislation in Brazil

	LAW		
	4,137 *(1962)*	8,158 *(1991)*	8,884 *(1994)*
ORGANISM	CADE	CADE SNDE	CADE SDE SEAE
SCOPE	Conduct	Conduct	Structure Conduct
AUTONOMY RATE	None	None	CADE gets more independent, members have a two-year mandate

Source: various documents and legal texts.

Several provisions of Law 8884 were designed to promote competition. For example, CADE is charged with " *instructing the public on the forms of infringement of the economic order* " [24] . However, a careful analysis shows the need for enhancements in case preparation and merger control, less bureaucracy and more transparency, and swifter decision making.

Nota:

24 From article 7, clause XVIII, of Law 8884 (1994), itself a minor amendment to art. 17, subclause (r), of Law 4137 (1962).

In conclusion, the Brazilian economy experienced profound changes after the late eighties. It was opened up to international goods and capital inflows. Direct state intervention in production was replaced by regulation. Price controls aimed at combating high inflation were replaced by competition policy. These changes should have placed competition policy at the center of public policy. However, the usual obstacles to effective implementation of competition policy tend to be even more severe in a developing country, as the following section shows.

4. CHALLENGES AND PECULIARITIES OF IMPLEMENTING COMPETITION POLICY IN DEVELOPING ECONOMIES

Seven peculiarities of developing economies require technical attention when implementing competition law. In econometric language, there is no need for a new structural model, but the parameters are significantly different. Generally speaking competition problems in developing countries are more severe and authorities have fewer resources to cope with them.

First, the *large informal sector* has important implications. Chart 5 puts the Brazilian informal sector in comparative perspective. Widespread informality creates dual markets in several sectors and this may distort the analysis of formal markets on which competition authorities focus. Three consequences for antitrust analysis are especially pertinent:

i) The market power of dominant formal firms may be overestimated owing to underestimation of the price elasticity of demand;

ii) Additional noise in price information makes cartels more unstable and cartel analysis even more difficult;

iii) Predatory pricing analysis may involve reviewing a broader set of policies and in particular examining the ways in which imperfect enforcement of the legislation may distort competition.

It is important to be clear about the definition of the informal sector which is relevant at this point. The informal sector is defined here as a segment of the economy where there is sufficiently high degree of non compliance with the various types of legislation in order to affect relative prices in the market. It is different from the informal sector discussed in part of the literature regarding the subsistence economy which may be relevant for other purposes [25] .

Nota:

25 A more rigorous definition in line with this concept has benn proposed by Guedes and Ferres (2006).

Chart 5
The size of the informal sector in selected countries

Country	Informal economy (% GNP)
Argentina	25.4
Australia	15.3
Austria	10.2
Brazil	39.8
Canada	16.4
Chile	19.8
China	13.1
France	15.3
Germany	16.3
India	23.1
Mexico	30.1
South Africa	28.4
United States	8.8

Source: World Bank.

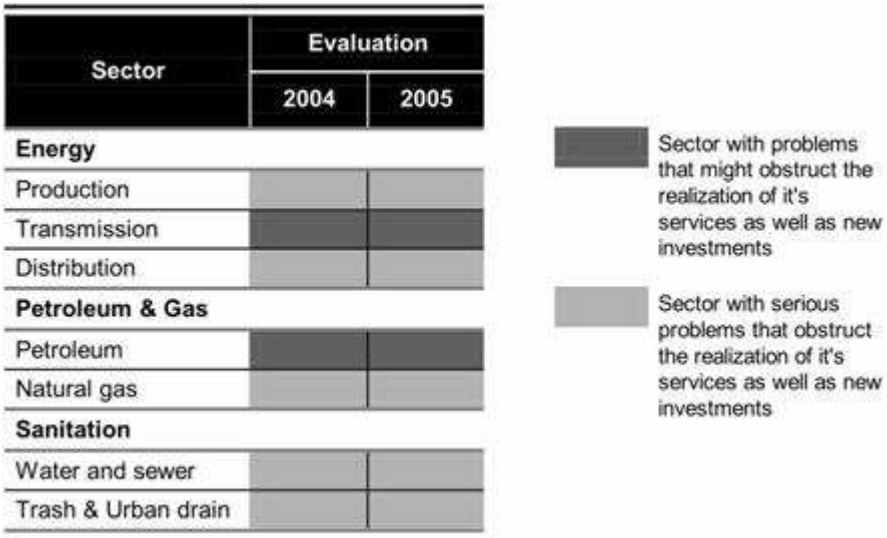
Second, the *size of the market* matters in antitrust analysis. As a medium-sized economy with many prominent multinational corporations, Brazil has been affected by cross-border mergers and international cartels. The Kolynos-Colgate

case in 1996 and the more recent vitamin cartel are illustrative. This requires cooperation with other national competition authorities. Another consequence of a relatively smaller market is the tendency for concentration ratios to be higher in most relevant markets. Moreover, in liberalized markets whole sectors may have to be consolidated in order to gain economies of scale.

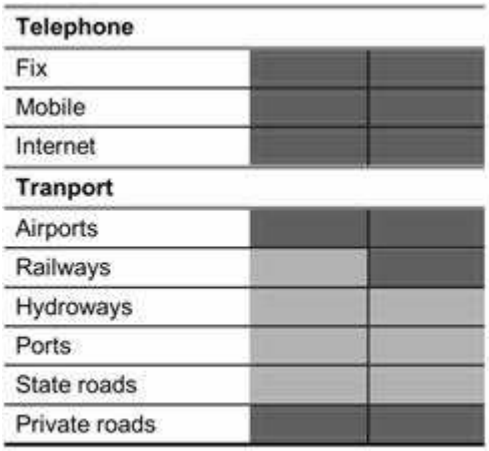
Third, the transition toward a more liberalized economy has implications for the order of magnitude of the *efficiencies* that can be obtained through mergers. In mature economies authorities tend to be skeptical about the magnitude of such efficiencies, whereas for developing economies with a history of significant inefficiencies due to price control and other distortions, certain transactions may offer very large efficiency gains. The merger between the two largest Brazilian breweries which led to the creation of Ambev in 1999 is illustrative.

Fourth, *the infrastructure is precarious* , as illustrated in Chart 6. Few firms have access to and/or can afford the cost of certain port terminals, railroads services and other facilities.

Chart 6
Precarious infra-structure



Note: **Evaluation criteria** : Regulatory paradigm, legal matters, taxation, institutional matters and investment level. Based on a sample of interviews conducted by the Brazilian business publication Exame.



Fifth, *higher transaction costs* prevent new firms from contesting quasi-monopolies. Transaction costs are relatively high in Brazil , as shown in Chart 7.

Chart 7
High transaction costs

Economy	Starting a Business	Hiring and firing		Taxes	Closing a business	
	Duration (days)	Hiring cost (% of salary)	Firing costs (weeks of wages)	Total tax payable (% gross profit)	Time (years)	Recovery Rate (cents on the dollar)
Brazil	152	26.8	165.3	147.9	10.0	0.5
Russian Federation	33	35.8	16.6	40.8	3.8	27.6
India	71	12.3	79.0	43.2	10.0	12.8
China	48	30.0	90.0	46.9	2.4	31.5
Canada	3	12.0	28.0	32.5	0.8	90.1
United States	5	8.5	0.0	21.5	2.0	76.3
East Asia & Pacific	52.6	8.8	44.2	31.2	3.4	24.0
Europe & Central Asia	36.5	29.6	32.8	50.2	3.5	29.8
Latin Amer & Caribbean	63.0	15.9	62.9	52.8	3.5	28.2
Middle East & North Africa	45.5	15.9	62.4	35.1	3.8	28.8
OECD: High income	19.5	20.7	35.1	45.4	1.5	73.8
South Asia	35.3	5.1	75.0	35.3	4.2	19.7
Sub-Saharan Africa	63.8	11.8	53.4	394.0	3.3	16.1

Source: World Bank.

The combination of the above two characteristics – precarious infra-structure and higher transaction costs – leads to higher entry barriers and severe difficulties in reallocating resources in the economy. Even after trade liberalization, several input prices show little degree of sensitivity to international prices. Econometric evidence for segments of fertilizer markets is revealing.

Sixth, unlike mature economies, *developing economies lack a competition culture* . Markets and market institutions are in the process of being created. This is one of the reasons competition advocacy becomes crucial in these countries [26] .

Nota:

26 See, for example, Kovacic (1997) and Oliveira (2001).

Seventh, *political market failure is more severe* in developing economies. Relatively new and fragile agencies have to fight for a share of the budget to enforce laws that may erode the power of vested interests. In contrast with trade policy, no specific groups will benefit from successful antitrust enforcement whereas gains will be diffused among millions of consumers. Constituencies to support active competition policy are conspicuous by their absence. Disputes over CADE cases very often reflect private interests, rather than public competition concerns. In contrast with consumer protection, competition issues are often distant from the consumer's experience. It is no small task to show how certain cases of abuse of market power in intermediary and capital goods will eventually affect the final consumer. Thus it is not surprising that almost all political parties have given little attention to competition policy in a context of pressing social problems, poverty and inequality.

In sum, developing countries have more competition problems and fewer resources. The next section illustrates how such difficulties have been dealt with in the Brazilian case.

5. CHALLENGES AND PECULIARITIES OF IMPLEMENTING COMPETITION POLICY IN DEVELOPING ECONOMIES: THE BRAZILIAN LEARNING CURVE

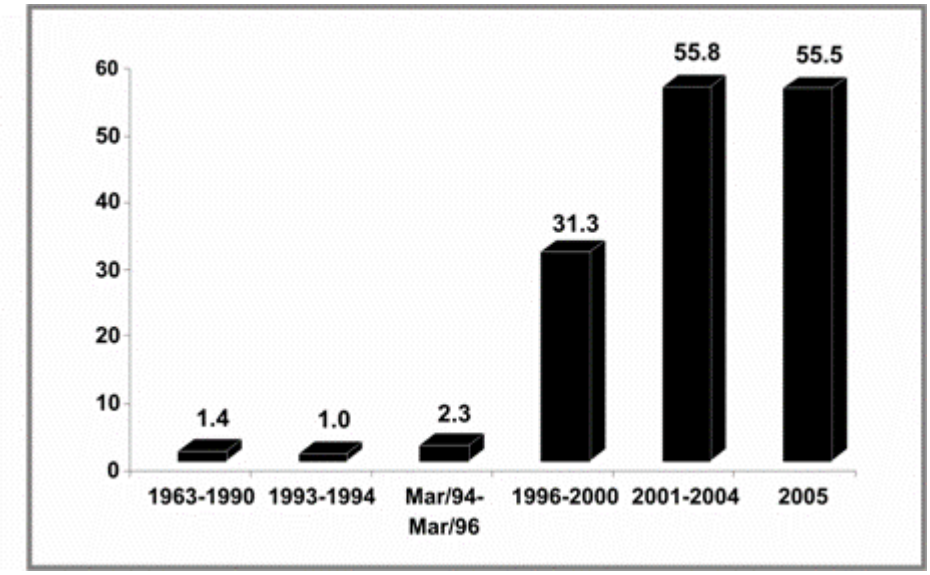
In contrast to most emerging countries, Brazil had early experience with competition policy. CADE has acquired a certain tradition since its creation in 1962 (Law 4137) [27] , although it became much more active only after 1994 when the present legislation was approved. As shown by Chart 8, the evolution of CADE's caseload is illustrative:the number of cases adjudicated per month averaged just over 1 until the beginning of the nineties, increasing to 55.8 in 2001-03.

Nota:

27 See Farina (1990) for a discussion of Brazilian competition policy before the nineties.

One of the important lessons of the reforms of the nineties is that the results do not appear immediately after the formal enactment of the new legislation. Success of a new legislation depends on a whole set of new procedures which have to be developed by a group of civil servants and a new professional community who have understood the spirit of the new legislation and are engaged in implementing it.

Chart 8
Historical Development of Cases Judged by CADE
(in cases by month)



Source: CADE and Farina (1990).

CADE's decisions on mergers and acquisitions, such as the rulings on Colgate-Kolynos in 1996, AmBev in 2000 and Nestlé-Garoto in 2004 have increased its visibility. This did not necessarily result from a decision on the part of the authority to prioritize mergers to the detriment of other practices, notably cartels.

The relative importance of merger cases in the nineties had to do with three factors:

i) a sharp increase in cross-border mergers affecting developing countries and as a form of foreign direct investment;

ii) the time taken to eliminate the backlog of conduct cases inherited from the old price control period and develop new investigative tools against cartels;

iii) excessive control by the state of all transactions of the private sector.

The debate on whether conduct control is more or less important than merger control has no real content. The goal should be to balance the various fronts on which an antitrust agency operates at each stage of institutional development. If the agency were perpetually restricted to conduct control, the formation of non-competitive market structures would increase the frequency of infringements, partially or totally frustrating enforcement actions. On the other hand, prioritizing merger control and neglecting conduct control would contradict the reason for controlling mergers in the first place, which is to prevent the abuse of economic power.

Indeed, the challenge is to achieve a proper balance between these two fronts while also achieving productivity gains so that this can be done with the limited budget available. The next two subsections discuss how the two areas evolved in Brazil .

5.1. Conduct control: settling accounts with the past, prevalence of the rule of reason, and recent anticartel activity

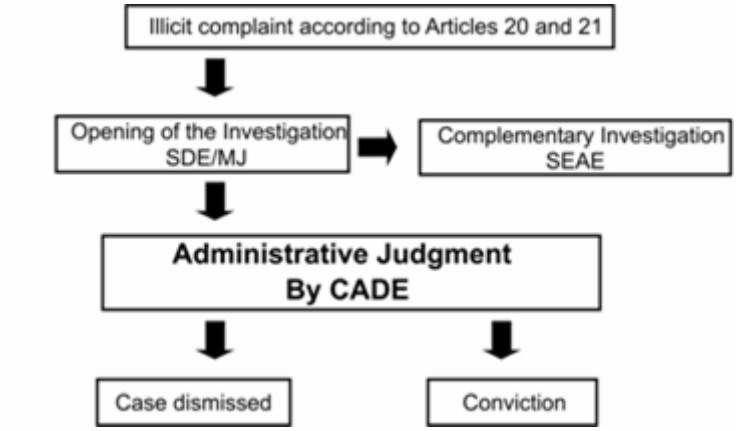
The application of the usual concepts of antitrust in a developing economy is not a trivial matter. This is particularly true with anticartel activity which requires specific investigative techniques and well-designed incentives to get cooperation from the private sector.

Conduct cases accounted for a majority of the total brought before CADE in the initial period following the passage of Law 8884. However, it is frequently argued that most cases related to past proceedings and ended up being set aside for lack of detailed information or arguments [28] . Chart 9 shows the procedure used for consideration of conduct cases.

Nota:

28 It is also argued that the main sources of case law continue to be rulings on acts of concentration. This is only partially true, as shown in the chapter on case law in CADE's 1997 Annual Report.

Chart 9
Procedure for consideration of conduct cases



Source: Law 8884/94.

However, the fact that most cases were held invalid and set aside represented a necessary step to eliminate uncertainty for the private sector. As discussed above, the circumstances of industrialization in Brazil created an environment in which government played a key role in controlling prices and market outcomes. Thus as more rigorous criteria began to be applied to antitrust analysis, it was only natural that a large proportion of cases should be dismissed. Indeed, this was a positive development because it relieved the private sector of the burden of pending administrative cases not supported by modern antitrust legislation.

Despite the slim chances of a verdict, these pending cases incur administrative costs, increase uncertainty, and have a negative impact on the reputation of the company involved and hence on its net asset value. Thus clearing the backlog reduces legal costs and risks, and enhances the security of capital as well as the return on capital, with positive effects on investment [29] .

Nota:
29 See Salgado (2004).

After this early phase, improvements had to be made in order to combat anticompetitive practices. First, CADE Resolution 20 (1999) contained an initial set of guidelines for dealing with various types of misconduct. Basic information of this kind was important after decades of price control and no repression of illegal business agreements [30] .

Nota:
30 As discussed above in Sections 2 and 3.

Second, the Resolution confirmed the interpretation that there is no such thing as a “per se” infringement in Brazilian law. Both vertical and horizontal practices must be analyzed case by case, taking into consideration not only the costs resulting from the impact, but also the possible efficiencies arising from the event, so as to arrive at the net effects on the market and on the consumer [31] .

Nota:
31 Appendix to CADE Resolution 20 (June 9, 1999).

Third, Law 10149 of 2000 provided important new instruments for conduct control [32] . It permitted the creation of a leniency program, which has proved useful in cartel enforcement, both in Brazil and other countries. It also gave powers to SDE to conduct inspections and dawn raids.

Nota:
32 Law 10,149 (December 21, 2000).

The new legal instruments permitted a number of initiatives on the part of the competition authorities. SDE created an antitrust compliance program; a few leniency agreements were sealed for the first time; and more important, a number of investigations of cartel activity were conducted. CADE decided on several cartel cases which have provided some guiding principles to the private sector. Chart 10 presents CADE's decisions in conduct cases for the period 2000-05.

Chart 10
CADE decisions in conduct cases 2000-2005

Year	Cases Decided	No violation	Violation		
			Horizontal	Abuse of Dominance	Total
2000	39	26	2	11	13
2001	34	18	16	0	16
2002	34	22	11	1	12
2003	23	13	9	1	10
2004	42	24	16	2	18
2005	63	37	-	-	25
Total	**235**	**140**	**54**	**15**	**94**

Source: IDB-OCDE (2005) and Cade.

5.2. Merger control

Merger control by antitrust agencies is a common practice in mature countries and has been gaining importance in emerging economies. Significant growth in the caseload during the nineties reflected reorganization of the Brazilian economy, as well as the old mentality of excessive control by the state of all transactions of the private sector. *As with the case of conduct control, there was a learning period during which authorities improved their operational procedures and a new mentality replaced the old interventionist view* .

The following aspects should be highlighted: (i) low rate of rejection of transactions submitted to CADE, with a declining rate of intervention in the transactions examined; (ii) absence of bias against foreign capital; (iii) de-bureaucratization of case preparation and procedures; (iv) development of basic criteria for merger review, including the issuance of guidelines for horizontal mergers in 1999-2000.

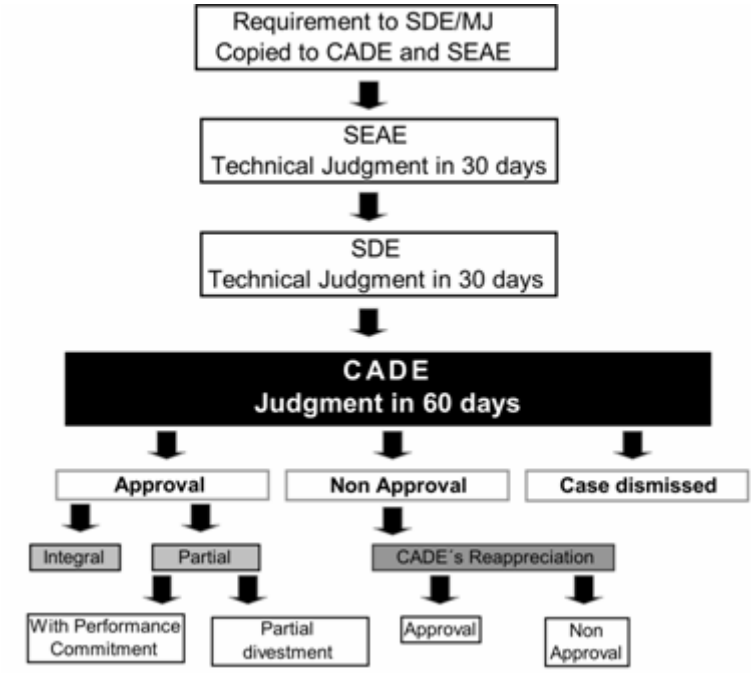
As in most jurisdictions, the percentage of cases in which conditions were imposed was small in Brazil . Experience with merger review led to an effort to reduce the bureaucratic burden on the private sector. At the outset, most approvals were accompanied by performance undertakings under article 58 of Law 8884. This changed after 1996. Mergers may now be approved by CADE as long as they do not have anti-competitive effects. In the period 1994-96, the notion had prevailed that in all cases approval of a transaction required a conclusion that it added efficiencies. Chart 11 summarizes the procedures involved.

As noted above, *the cost of merger control can be high immediately after its introduction, when there is usually a lack of trained staff and competition culture* . Because of this problem, changes were made to procedures to ensure that the analysis of acts of concentration produced faster and clearer results, and that simple cases would be treated differently from complex cases.

Resolutions 1/95 and 5/96, and subsequently Resolution 15/98, were steps in this direction because (i) they created a simplified procedure for analysis, and (ii) they integrated and coordinated CADE's activities with those of other governmental bodies with legal attributions in this area: SDE (the Justice Ministry's Economic Law Secretariat) and SEAE (the Finance Ministry's Economic Surveillance Secretariat) [33] .

Nota:
33 CADE Resolution 1 (May 21, 1992); Resolution 5 (August 28, 1996); Resolution 15 (August 19, 1998).

Chart 11
The Procedure for Examining Mergers



Source: Law 8884/94.

Article 54 of Law 8884 (1994) called for regulation to establish the universe and format of the information to be provided by economic agents [34] . The aim was to allow an analysis of market costs and benefits associated with an act of concentration. More recently, summary proceedings have been introduced [35] .

Nota:
34 Law 8884 (May 11, 1994).
35 Article 16, CADE Resolution 12 (May 31, 1998).

The situation improved with the application of Resolutions 5/96 and 15/98, although further changes were still necessary [36] . To these factors was added the peculiarity of Law No. 8884 which allows for "a posteriori notification" [37] , so that applicants may (and in most cases do) carry out a transaction and only then submit it for approval to CADE. The longer CADE takes to rule on a case, the more adverse the effects of this provision, because:

Nota:
36 CADE Resolution 5 (August 28, 1996); Resolution 15 (August 19, 1998).
37 Law 8884 (May 11, 1994).

i) any negative effects on competition caused by the transaction will tend to become more concrete while the transaction is under analysis;

ii) the cost of any divestment will be higher owing to the need to undo a growing group of transactions derived from the original transaction;

iii) it increases legal uncertainty for the private sector.

Important changes were introduced in the wake of the experience of the Ambev case. CADE's Resolution 28 introduced two mechanisms to suspend the consummation of the transaction: the "precautionary order" and the "Agreement to Preserve the Reversibility of the Transaction" (local acronym APRO). Both this instruments prohibits the merging parties to make irreversible actions in order to conclude the merger. The main difference between them is that, while the "precautionary order" is imposed by CADE (being issued *ex officio* or in response to a petition by SEAE, SDE, CADE's Attorney General or a third party), the APRO constitutes a consensual agreement between CADE and the merging parties and it was, from among these

two mechanisms, the most used procedure henceforth.

In addition, the introduction of a fast track procedure by SDE and SEAE to the analysis of acts that clearly have no impact on competition [38] lowered the amount of time necessary for the judgment of these cases.

Nota:

38 Such as (1) the purchase of franchisees by their franchisors, (2) cooperative joint ventures created to enter a new market, (3) corporate restructuring within a single business group that entails no change in control, (4) acquisition of a Brazilian firm by a foreign firm that has no (or insignificant) business interests in Brazil, (4) acquisition of a foreign firm that no (or insignificant) business interests in Brazil by a Brazilian firm, (6) replacement of an economic agent where the acquiring firm did not previously participate substantially in the target market or in vertically–related markets, and (7) acquisition of a firm with a market share small enough to be unquestionably irrelevant with respect to competition. See SEAE/SDE Joint Ordiance n. 1, of February, 2003 and IDB-OCDE (2005) for more details.

More recently, a debate about the reinterpretation of the meaning of the threshold has taken place in Brazil . The present threshold, which is a total annual turnover of R$ 400 million, has been widely criticized. CADE changed its earlier interpretation that the amount would refer to total sales in the world and not only to the Brazilian market [39] .

Nota:

39 See CADE's decision on ADC Telecommunications Inc. and Krone International Holding Inc.of January 19, 2005 .

Moreover the proposed bill to reform the competition law proposes to diminish the threshold to R$ 150 million and requires that the other part be a business of R$ 30 million at least. However, some exercises show that such criterion can increase and not diminish the number of cases and consequently increase the workload of competition agencies [40] .

Nota:

40 Based on a unpublished report by Tendencias prepared for the industry federation of the State of São Paulo.

Chart 12 presents CADE's decisions in merger cases for the period 2000-05.

Chart 12
CADE determination in merger cases 2000-2005

Year	Transaction Reviewed	Approved Without Conditions	Approved with conditions			Disapproved
			Structural	Ancillary	Total	
2005	497	449	-	-	48	0
2004	618	574	2	41	43	1
2003	491	484	1	6	7	0
2002	485	474	0	11	11	0
2001	571	559	0	12	12	0
2000	507	490	1	14	15	2
Total	**3169**	**3030**	**4**	**84**	**136**	**3**

Source: IDB-OCDE (2005) and Cade.

5.3. Prospects for competition policy in Brazil

Almost 12 years after Law 8884 was passed, it is possible to suggest a modest reform agenda. Indeed, a bill is currently before Congress for that purpose. The main feature is the reduction of bureaucracy. The three antitrust bodies would be reduced to two, CADE and SEAE, with SDE regulating consumer protection. Only CADE would investigate, prepare and adjudicate cases. SEAE would be in charge of the interaction between competition policy, regulatory agencies and competition promotion.

Chart 13 shows the changes proposed by the bill to the current competition law.

Chart 13
Competition law in historical perspective

	LAW			
	4,137 (1962)	8,158 (1991)	8,884 (1994)	8,884 *(proposed reform)*
COMPETITION BODIES	CADE	CADE SNDE	CADE SDE SEAE	CADE SEAE
SCOPE	Conduct	Conduct	Structure Conduct	Conduct Ex ante structure conduct
DEGREE OF AUTONOMY	None	None	CADE gets more independent, members have a two year mandate	CADE turns into a special autarky; 4-year mandate

Source: various documents and legal texts.

Another important instrument proposed by the bill is the possibility of pre-merger review. This could reduce transaction costs in principle, but if the decision-making process remains slow, pre-merger review could end up blocking important economic outcomes. The bill also gives CADE commissioners a longer term (four years instead of two) and stipulates that it is not to be concurrent with the president's term. Both changes should increase its autonomy. However, the bill still lacks greater attention to the peculiarities of developing economies mentioned in Section 4 [41] .

Nota:

41 A special report prepared by Tendências contains a number of concrete suggestions to the project law sent to Congress.

6. CONCLUSIONS

Competition policy in Brazil can best be understood as part of a process of market liberalization. In the U.S. competition policy became important as a consequence of evolution of the market economy. In Brazil it has been an instrument to promote the market economy and its institutions. Competition values and culture are already present in mature economies. They are still being created and disseminated in developing economies. As a consequence, *the positive effects of a competition law are not immediate and a learning period is necessary* .

The very existence of antitrust in Brazil was only possible as a result of these liberalizing reforms, since there is no role for competition policy in an economy with price controls and heavy state intervention in production. In turn, competition policy is essential in promoting competitive markets in developing countries, and its introduction is needed in order to face some issues of privatization and trade liberalization.

It is not possible to reproduce the typical competition law of a developed economy in the context of a developing economy. As the Brazilian experience suggests, a number of peculiarities of developing economies have to be taken into account.

Finally, although progress has been made in the last ten years, institution building is far from complete. Important changes must be made to guarantee greater efficiency, fair procedure and autonomy for the antitrust authorities. It will be necessary to contemplate the specific characteristics of a developing economy and, most of all, the particular consequences of a large informal sector for antitrust analysis.

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