

# Northwestern Journal of International Law & Business

---

Volume 26  
Issue 3 *Spring*

---

Spring 2006

## Competition Policy in Developing Economies: The Case of Brazil Symposium on Competition Law and Policy in Developing Countries

Gesner Oliveira

Thomas Fujiwara

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

 Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

Gesner Oliveira, Thomas Fujiwara, Competition Policy in Developing Economies: The Case of Brazil Symposium on Competition Law and Policy in Developing Countries , 26 Nw. J. Int'l L. & Bus. 619 (2005-2006)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# Competition Policy In Developing Economies: The Case Of Brazil

*Gesner Oliveira\* & Thomas Fujiwara\*\**

## I. INTRODUCTION

The objective of this article is to discuss the implementation of competition policy in Brazil through a historical perspective. In contrast with the experience of various OECD countries, including the United States in particular, competition policy in Brazil has only recently become relevant. However, its increasing prevalence has not been preceded by the development of a 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.

This paper is divided into five sections. Section II describes the different phases of competition policy in Brazil. Section III underlines the structural transformations of the economy as well as the international circumstances that made competition policy relevant. Section IV discusses the challenges and peculiarities of implementing competition policy in a developing economy. Section V describes how Brazil has coped with such challenges. Section VI contains the major conclusions.

## II. THE PHASES OF THE BRAZILIAN COMPETITION POLICY'S DEVELOPMENT

The role and characteristics of competition policy vary according to the stage of development of a particular country. In the case of Brazil, competition policy has only become relevant starting in the late twentieth century in the context of a more open market economy.

---

\* Fundação Getúlio Vargas – São Paulo

\*\* Instituto de Pesquisas Econômicas – Universidade de São Paulo. We wish to thank the members of Study Group on Regulation, Competition and Trade of Fundação Getúlio Vargas for the discussion and Cinthia Konichi for her research assistance. However, we alone are responsible for the opinions and any errors in this article.

One can identify three phases of competition policy in Brazil, as indicated in Chart 1. The division is, of course, arbitrary. Indeed, the evolution towards modern competition policy shows interesting nuances. A few competition cases occurred even when the policy regime was characterized by strong state intervention. The marks and vices of interventionism remained even when a more modern competition law was already in place.

CHART 1: THE THREE PHASES OF COMPETITION POLICY IN BRAZIL<sup>1</sup>

Law	Date	Reference to the federal constitution ("FC")	Governmental body involved
<b>Closed economy</b>			
LD 869	11/18/38	FC 1937, art. 141	
LD n° 7.666 "Malaia Law"	06/22/45		Brazilian Free Trade Commission (CADE)
Law n° 1.521	12/26/51		
Law n° 1.522	12/26/51		Federal Price and Supply Commission (COFAP)
Law n° 4.137	09/10/62	FC 1946, art. 148	(CADE)
Law n° 4	09/26/62	FC 1946, art. 146	National Supply Superintendence (SUNAB)
LD n° 52.025	05/20/63	Law n° 4.137	
Decree n° 63.196	08/29/68	FC 1967, art. 83, II Repealed in 04/25/91	Price Inter State Department Commission (CIP)
LD n° 92.323	01/23/86	Repeals DL 52025 Regulates 4137 law	
<b>Transition Phase</b>			
1988 Constitution			
Law n° 8137	12/2/90	FC 1988, art. 170 and 173	
LD n° 99.244	05/10/90	FC 1988, art. 170 and 173	SNDE
Law n° 8158 (PM 204/90)	01/09/91	FC 1988, art. 170 and 173	SDE
<b>Open economy</b>			
Law n° 8.884	06/11/94	FC 1988, art. 170 and 173	CADE becomes an autarchy
Law n° 9.021	03/30/95	FC 1988, art. 170 and 173	

<sup>1</sup> PAULA A. FORGIONE, OS FUNDAMENTOS DO ANTITRUSTE 100-35 (1998).

Law n° 9.069	06/29/95	FC 1988, art. 170 and 173	
Law n° 9.470	07/10/97	FC 1988, art. 170 and 173	
Resolution n° 15	08/19/98	FC 1988, art. 170 and 173	CADE
Resolution n° 20	06/03/99	FC 1988, art. 170 and 173	CADE
PM n° 2.055	08/11/00	FC 1988, art. 170 and 173	SEAE/SDE/CADE
PM n° 2.056	08/11/00	FC 1988, art. 170 and 173	SEAE/SDE/CADE/ ANP
Law n° 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 n° 28	07/24/02	FC 1988, art. 170 and 173	CADE
Joint Ordinance n° 1	02/18/03	FC 1988, art. 170 and 173	SEAE/SDE/CADE
SDE Ordinance n° 4	01/05/06	FC 1988, art. 170 and 173	SDE

The first phase extends from the enactment of the 1937 Constitution under Getúlio Vargas' dictatorship to the 1988 Constitution, when the first measures towards a more open economy were taken. This phase is characterized by a high degree of state intervention in the economy and only a marginal role for competition policy. Indeed, during import substitution, in which the state had a crucial role in production and direct intervention in the markets, antitrust was not important at all.

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

Note that despite the difficulties of implementing competition policy in this phase, a more modern competition law was enacted in 1962.<sup>2</sup> A national competition authority—the *Conselho Administrativo de Defesa Econômica* (“CADE”)—was formed that same year.<sup>3</sup> The number of cases

---

<sup>2</sup> Lei No. 4.137, de 10 de setembro de 1962, D.O.U. de 12.11.1962: 11717, col. 1. (Brazil).

<sup>3</sup> *Id.*

considered by CADE in the following three decades was relatively small, as shown later in Section V. However, even this limited activity created the rise of certain professional circles dedicated to antitrust in a few major cities in Brazil.<sup>4</sup> Nevertheless, CADE was not involved in policy making. The state sector continued its dominance and most markets were under some kind of direct or indirect control by the government.

The second phase started in the late 1980's. The 1988 Constitution recognized the central role of the private sector and the first measures of trade liberalization were undertaken.<sup>5</sup> However, many sectors of the economy were still under direct control of the government and prices were not totally liberalized.<sup>6</sup> That is why this phase marked a transition period. The second phase opened up a transition stage characterized by a change in direction to a new model of development with greater exposure of the country to the world economy and less state intervention in the domestic economy, in contrast to an industrialization by import substitution regime.<sup>7</sup> This process of structural change provoked several transformations and made the previously existing price controls obsolete.<sup>8</sup>

Another feature of this phase was the continued macroeconomic crisis represented by hyperinflation. For an indexed economy like Brazil to achieve stability, a specific strategy for coordination of economic agents was necessary to achieve a change from an extremely high rate of inflation to a single-digit annual rate. This implied that some kind of coordination mechanism was necessary to go with the new policy regime.

In turn, this explains why it took some time to eliminate the price control bodies. Indeed, the government created a secretariat linked to the Central Administration (*The National Economic Law Secretariat*, with the local acronym "SNDE") in 1990 and also resisted an immediate extinction of the price monitoring agencies.<sup>9</sup> Usually this resistance to eliminate old bureaucratic functions is attributed exclusively to lobbying and political resistance on the part of the bureaucracy, which in fact occurred. However,

---

<sup>4</sup> A few scholars and professionals became active in São Paulo, Rio de Janeiro, Belo Horizonte and Porto Alegre in the 1970's and 1980's.

<sup>5</sup> Between 1988 and 1989, the Brazilian average import tariff dropped from 51% to 34%; the importing process was also simplified, with the reduction of some non-tariff barriers and the unification of some import taxes. F. GIAMBIAGI & M.M. MOREIRA, *A ECONOMIA BRASILEIRA NOS ANOS 90*, 46 (BNDES 1999).

<sup>6</sup> See Chart 6 for some examples of sectors under state control in the late eighties.

<sup>7</sup> See Gesner Oliveira & Frederico Turolla, *Política econômica do Segundo governo FHC: mudança em condições adversas*, in *TEMPO SOCIAL REVISTA DE SOCIOLOGIA DA USP* (2004).

<sup>8</sup> GESNER OLIVEIRA, *BRASIL REAL: DESAFIOS DA POS-ESTABILIZAÇÃO NA VIRADA DO MILENIO* (1996).

<sup>9</sup> Conselho Ministerial de Preços was extinguished in 1990, but the popular Superintendência Nacional de Preços e Abastecimento (SUNAB) existed until 1997.

in the Brazilian case, there was an additional reason for a gradual phasing out of the old price control regime.<sup>10</sup>

It became clear that the state would not be able to continue to lead the investment and production process due to a profound fiscal crisis. A severe stabilization crisis characterized this period. The Brazilian economy experienced hyperinflation in 1989–90.<sup>11</sup> After a series of stabilization plans, the Real Plan of 1994 was created to deal with the inflationary crisis.<sup>12</sup>

The third phase began with the success of the stabilization plan prepared in 1993–94, the so-called Real Plan.<sup>13</sup> Law No. 8884 of June of 1994 was a landmark in this transformation. Curiously, the political motivation for the approval of Law No. 8884 of 1994 also drew some inspiration from the notion of greater state intervention in the markets, inherited from the previous stages. Indeed, President Itamar Franco hoped that the law would permit fast punishment of price abuses in the pharmaceutical sector and conditioned the implementation of the stabilization plan on the approval of the project which became Law No. 8884.<sup>14</sup>

The present Law No. 8884 introduced three major changes. First, it gave more power to a technical body—CADE—which was transformed into the final instance of decision at the administrative level, i.e., there was no appeal to the minister or to the President. Second, it gave a greater degree of autonomy to CADE, which transformed it into an independent authority and created a two-year term for its members. Third, it introduced merger control.<sup>15</sup>

The non-dominant current of legislation can always be detected even while the other is predominant. Thus, Brazil showed some progress in competition policy in spite of six decades of pronounced state intervention. Analogously, the inertia of bureaucracy explains the prolonged survival of the anachronistic provisions, such as Delegated Law No. 4 of 1962, which set the rules for price control and was only abandoned in 1997. Chart 2 sums up the historical development of the second current of legislation in competition policy, including Law No. 8158/91.

---

<sup>10</sup> OLIVEIRA, *supra* note 8, at 59 (discussing price policy at this phase of the transition)

<sup>11</sup> *See infra* note 17.

<sup>12</sup> OLIVEIRA, *supra* note 8, at Section II (discussing the implementation of the Real Plan).

<sup>13</sup> *Id.*

<sup>14</sup> Based on informal reports from different sources in the Brazilian government at the time of the elaboration of the Real Plan.

<sup>15</sup> This Article maintained part of the structure of Article 13 of Law No. 8158/91 which, in turn, originated from Article 74 of Law No. 4137, of 1962.

CHART 2: 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

Law No. 8884/94 includes provisions that highlight competition promotion. The legislature attributed to CADE the role of “instructing the public on the forms of infringement of the economic order.”<sup>16</sup> However, a careful analysis reveals the need for progress in the way proceedings are conducted, for improved merger control, for de-bureaucratize proceedings, and for transparency and celerity in decision-making.

### III. STRUCTURAL REFORMS AND STABILIZATION: THE PRECONDITIONS FOR AN ACTIVE COMPETITION POLICY IN BRAZIL

As discussed in the previous section, although the Brazilian legislation on competition dates back to the 1930’s, its implementation did not become relevant until the mid-1990’s. Under the import-substitution model, the Brazilian state intervened in a number of sectors in order to induce industrialization.<sup>17</sup> In addition to the prominent presence of the State, the model was also characterized by 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-1970’s.<sup>18</sup>

After the oil shock, however, this model presented several limitations due to the lack of external funds and a fiscal crisis in Brazil. From 1980 to

<sup>16</sup> Under Item XVIII of Article 7 of Law No. 8884 of 1994, which constitutes a slight change to line *r* of Article 17 of Law No. 4137 of 1962. Lei No. 8.884 de 11 de junho de 1994.

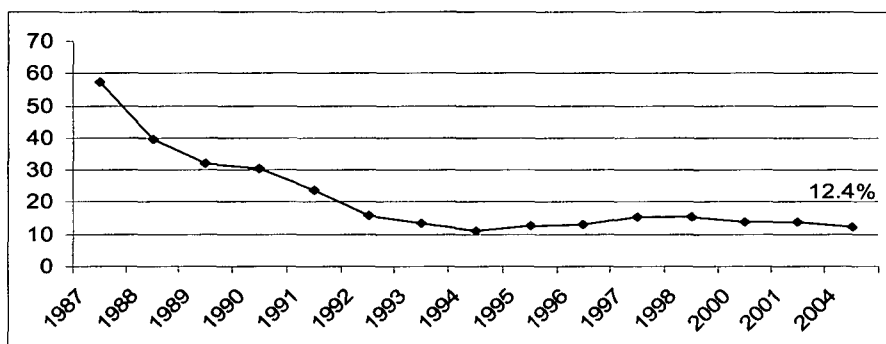
<sup>17</sup> See Albert Fishlow, *Brazilian development in Long Term Perspective*, 70 AMERICAN ECONOMIC REVIEW 102 (1980).

<sup>18</sup> From 1940 to 1980, the Brazilian *per capita* GDP grew at an average rate of 4% per year (achieving the average rate of 6.1% per year during the seventies). However, in the 1980s this rate fell below 1% per year according to data from the Brazilian Institute for Geography and Statistics (IBGE).

1989, the annual growth rate fell to 1%, which was far below the average of 7% sustained during the period of 1970–79.<sup>19</sup> By the 1980's inflation had already soared into the triple digits and in 1989–90 Brazil experienced hyperinflation.<sup>20</sup> These factors, combined with falling productivity in the state sector, led to major changes in the policy regime.

Five changes explain the increasing importance of competition policy. The first change was represented by trade liberalization. This process had been initiated under José Sarney's government but was accelerated with the Industrial and Trade Policy ("PICE") during Fernando Collor's mandate (1990–92). Trade liberalization was a relatively gradual process. Chart 3 shows the decline in the import tariff rate. The Industrial and Trade Policy eliminated special import regimes and reduced non-tariff barriers. The Brazilian 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.<sup>21</sup>

CHART 3: EVOLUTION OF THE IMPORT TARIFF RATE<sup>22</sup>



Federal Law No. 8031/90<sup>23</sup> enacted the Privatization Program, which

<sup>19</sup> Data from the Brazilian Institute for Geography and Statistics (IBGE), <http://www.ibge.gov.br/english/>.

<sup>20</sup> The average annual inflation rate in the 1980's was 237%, and the inflation rate in 1989 and 1990 was, respectively, 1783% and 1477%. Getúlio Vargas Foundation, [http://www.fgv.br/principal/idx\\_principal.asp](http://www.fgv.br/principal/idx_principal.asp).

<sup>21</sup> See H. KUME, G. PIANI, & C.F.B. DE SOUZA, *A POLITICA BRASILEIRA DE IMPORTACAO NO PERIODO 1987–98: DESCRICAO E AVALIACAO* (2000).

<sup>22</sup> Simão Davi Silver, *Mudanças Estruturais na Economia Brasileira (1988-2002): Abertura, Estabilização e Crescimento*, available at <http://www.usp.br/prolam/simao.pdf>; Trade Profile of Brazil by the World Trade Organization, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=BR>.



began the process of reducing direct state intervention in the Brazilian economy. Its first phase covered the 1991–94 period and focused on privatizing state enterprises (steel, petrochemicals, and fertilizers) that did not require the introduction of specific regulatory frameworks. Receipts from privatization totaled US \$8.6 billion during this period.<sup>24</sup>

The second privatization phase (1995–98) included the sale of the state-owned companies most directly involved in infrastructure sectors such as telecommunications, electricity, and railroads. In all, the program represented gains of US \$86.9 billion of which US \$70.3 billion corresponded to actual revenue from sales.<sup>25</sup>

The third change dealt with regulation, which in turn was a consequence of the progress of the privatization process. When the privatization process reached the infrastructure, it became clear that the state would have to be prepared to regulate private monopolies.

Given the nature of the sectors involved in the second phase of the privatization program, specific regulatory frameworks were required. Brazil already had some government agencies with regulatory powers,<sup>26</sup> but they did not have the same characteristics as the ones created in the second half of the 1990's as part of the process of transforming the role of the State in the economic sphere. In this context, competition authorities became important, as they were needed to complement the work of and to interact with regulatory agencies. Vertical and horizontal agreements, as well as cartels in regulated industries, required the participation of the antitrust bodies.

The fourth change was stabilization. Indeed, when inflation was high and accelerating after the late 1970's, there was no room for microeconomic policies. Concerns with deadweight losses seemed superfluous when prices were growing at more than 20–30% a month.<sup>27</sup>

Inflation became the main concern after the mid-1980's. A dozen stabilization plans were implemented from 1986 until the Real Plan in 1994.<sup>28</sup> The coordination of inflationary expectations through monetary reform, the utilization of the exchange rate as a nominal anchor, and some effort to control the fiscal accounts succeeded in lowering the inflation rate.

---

<sup>23</sup> Lei 8.031, de 12 de abril de 1990.

<sup>24</sup> OLIVEIRA, *supra* note 8, at 96.

<sup>25</sup> *See id.* at 88.

<sup>26</sup> Such as the Central Bank (“BACEN”)—created by Law No. 4595 of December 31, 1964, or the Superintendence of Private Insurance (“SUSEP”)—created by Law No. 73 of November 21, 1966—or the Securities and Exchange Commission (“CVM”)—created by Law No. 6385 of December 7, 1976.

<sup>27</sup> *See supra* note 20.

<sup>28</sup> OLIVEIRA, *supra* note 8 (contains a list of the Brazilian stabilization plans of the 1980s and 1990's).

The average inflation in the period 1995–2005 was 8.17%.<sup>29</sup> Most forecasts indicate a one-digit level for the next few years.<sup>30</sup>

The fifth change was related to the international environment. Under different forms, competition policy increased in importance among policy recommendations. Multilateral organizations started to emphasize competition policy during the 1980's as one of the conditionality requirements. Competition was also included as one of the Singapore WTO Ministerial issues in 1996, and a working group on trade and competition was created at the World Trade Organization ("WTO").<sup>31</sup> This group was very active until 2001. The creation of the International Competition Commission ("ICN") in 2001 offered a natural benchmark for developing countries and a mechanism of soft convergence among the different national policies.

In conclusion, the Brazilian economy experienced profound changes after the late 1980's. The economy was opened to international goods and capital inflows. Direct state intervention in production was replaced by regulation. Price controls aimed at controlling high inflation were replaced by competition policy.<sup>32</sup> Such transformations should put competition policy at the center of public policy concerns. However, obstacles exist that impede the effective implementation of competition policy. Such obstacles tend to be more severe in a developing country context, as the following section shows.

#### IV. CHALLENGES AND PECULIARITIES OF IMPLEMENTING COMPETITION POLICY IN DEVELOPING ECONOMIES

Certain peculiarities in developing economies require technical attention when implementing competition law. Speaking in econometric language, there is no need for a new structural model but the parameters are significantly different. In general, competition problems in developing countries are more severe than in developed nations because authorities in developing countries have fewer resources. We list below six important peculiarities of competition policy in developing countries.

First, resources cannot be reallocated easily within the economy. Entry barriers are higher because the infrastructure is precarious, as illustrated in Chart 4. Few firms can have access to and/or afford the cost of certain port terminals, railroads services, and other facilities.

---

<sup>29</sup> Getúlio Vargas Foundation, [http://www.fgv.br/principal/idx\\_principal.asp](http://www.fgv.br/principal/idx_principal.asp).

<sup>30</sup> *Id.*

<sup>31</sup> Information on WTO actions on competition policy can be found at the WTO website, [http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm).

<sup>32</sup> OLIVEIRA, *supra* note 8, at Section II.

CHART 4: PRECARIOUS INFRASTRUCTURE<sup>33</sup>



Sector with problems that might obstruct the realization of its services as well as new investments



Sectors with serious problems that obstruct the realization of its services as well as new investments

Sector	Evaluation	
	2004	2005
Energy		
Production		
Transmission		
Distribution		
Petroleum & Gas		
Petroleum		
Natural Gas		
Sanitation		
Water & Sewer		
Trash & Urban Drain		
Telephone		
Fix		
Mobile		
Internet		
Transport		
Airports		
Railways		
Hydroways		
Ports		
State Roads		
Private Roads		

<sup>33</sup> Note that the evaluation criteria to determine precarious infra-structure are: regulatory paradigm, legal matters, taxation, institutional matters and investment level. Source: REVISTA EXAME. *Anuario Exame de Infra-estrutura 2005/2006* (2005).

In addition, higher transaction costs prevent new firms from contesting quasi-monopolies. Chart 5 shows how transaction costs are relatively high in Brazil.

**CHART 5: HIGH TRANSACTION COSTS<sup>34</sup>**

Economy	Sharing a Business	Hiring & 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	46.8	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	28.2
Latin America & 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

<sup>34</sup> Source: World Bank. This data is available at <http://www.doingbusiness.org/ExploreEconomies/EconomyCharacteristics.aspx>.

Second, although the Brazilian privatization program was one of the largest in the world in absolute terms, state companies have maintained dominant positions in various markets.<sup>35</sup> Chart 6 informs the degree of privatization in different sectors.

CHART 6: DEGREE OF PRIVATIZATION IN DIFFERENT SECTORS

High	Medium	Low
<i>Petrochemical</i>	<i>Electric</i>	<i>Financial Systems</i>
<i>Fertilizers</i>	<i>Natural Gas</i>	<i>Oil</i>
<i>Metallurgy</i>		
<i>Communication</i>		

Third, as an average-sized economy with a prominent presence of multinational enterprises, the Brazilian economy has experienced cases of cross-border mergers and international cartels. This requires cooperation with other national competition authorities. Another consequence of a relatively smaller market is the observation of higher concentration ratios for the majority of relevant markets.

Fourth, the transition towards a more liberalized economy has implications for efficiency measurements. Competition authorities of mature economies tend to be skeptical about the magnitude of efficiencies which can be obtained through mergers. However, in transition economies with great inefficiencies due to price control and other distortions, certain transactions may present extremely large efficiency gains. In liberalized markets, whole sectors may have to be consolidated in order to gain scale economies which could not be captured under the old policy regime.

Fifth, the large informal sector has important implications. Chart 7 puts the Brazilian informal sector in comparative perspective. The presence of large informal sectors creates dual markets and may distort the analysis authorities conduct for the formal markets. Market power of dominant formal firms may be over-estimated due to an under-estimation of the price elasticity of demand. The existence of a large informal sector also creates additional noise in price information, making cartels more unstable and cartel analysis more difficult. Lastly, some investigations about predatory pricing may involve reviewing a broader set of policies and in particular how imperfect enforcement of the legislation may distort competition.

---

<sup>35</sup> State companies still maintain dominant positions in sectors such as postal services, water and sewage, banking, and oil.

CHART 7: THE SIZE OF THE INFORMAL SECTOR IN SELECTED COUNTRIES<sup>36</sup>

Economy	Informal economy (% GNP)	Economy	Informal economy (% GNP)	Economy	Informal economy (% GNP)
Albania	33.4	Greece	28.6	Norway	19.1
Algeria	34.1	Guatemala	51.5	Pakistan	36.8
Argentina	25.4	Honduras	49.6	Panama	64.1
Armenia	46.3	Hong Kong, China	16.6	Peru	59.9
Australia	15.3	Hungary	25.1	Philippines	43.4
Áustria	10.2	Índia	23.1	Poland	27.6
Azerbaijan	60.6	Indonésia	19.4	Portugal	22.6
Bangladesh	35.6	Iran	18.9	Romania	34.4
Belarus	48.1	Íreland	15.8	Russian Federation	46.1
Belgium	23.2	Israel	21.9	Saudi Arabia	18.4
Benin	45.2	Italy	27	Senegal	43.2
Bolivia	67.1	Jamaica	36.4	Serbia and Montenegro	29.1
Bosnia and Herzegovina	34.1	Japan	11.3	Singapore	13.1
Botswana	33.4	Jordan	19.4	Slovak Republic	18.9
Brazil	39.8	Kazakhstan	43.2	Slovenia	27.1
Bulgaria	36.9	Kenya	34.3	South Africa	28.4
Burkina Faso	38.4	Korea	27.5	Spain	22.6
Cameroon	32.8	Kyrgyz Republic	39.8	Sri Lanka	44.6
Canada	16.4	Latvia	39.9	Sweden	19.1
Chile	19.8	Lebanon	34.1	Switzerland	8.8
China	13.1	Lithuania	30.3	Syria	19.3
Colombia	39.1	Madagascar	39.6	Tanzania	58.3
Costa Rica	26.2	Malawi	40.3	Thailand	52.6
Cote d'Ivoire	39.9	Malaysia	31.1	Tunisia	38.4
Croatia	33.4	Mali	41	Turkey	32.1
Czech Republic	19.1	Mexico	30.1	Uganda	43.1
Denmark	18.2	Moldova	45.1	Ukraine	52.2
Dominican Republic	32.1	Mongolia	18.4	United Arab Emirates	26.4

<sup>36</sup> Source: World Bank. This data is available at <http://www.doingbusiness.org/ExploreEconomies/EconomyCharacteristics.aspx>.

Ecuador	34.4	Morocco	36.4	United Kingdom	12.6
Egypt	35.1	Mozambique	40.3	United States	8.8
Ethiopia	40.3	Nepal	38.4	Uruguay	51.1
Finland	18.3	Netherlands	13	Uzbekistan	34.1
France	15.3	New Zealand	12.7	Venezuela	33.6
Geórgia	67.3	Nicaragua	45.2	Vietnam	15.6
Germany	16.3	Niger	41.9	Yemen	27.4
Ghana	38.4	Nigeria	57.9	Zambia	48.9
				Zimbabwe	59.4

Sixth, the Olsonian<sup>37</sup> political economy's problems of implementing competition policy are even more difficult in developing countries. Relatively new agencies have to fight for a share of the budget to enforce a law that may reduce the power of entrenched interests. In contrast to trade policy, no specific groups will benefit from successful antitrust enforcement and gains will be diffused among millions of consumers. In contrast to consumer protection, the issues are often distant from the consumers' experiences. It is a difficult task to "explain" to final consumers how certain discussions of abuse of market power in intermediary and capital goods will affect them. Thus, it is not surprising that all political parties have given little attention to competition policy in the context of pressing social problems and high degrees of poverty and inequality.

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

#### V. CHALLENGES AND PECULIARITIES OF IMPLEMENTING COMPETITION POLICY IN DEVELOPING ECONOMIES: ASPECTS OF THE BRAZILIAN CASE

In contrast to the majority of the emerging countries, Brazil has had early experience with competition policy. Since its creation by Law No. 4137 of 1962, CADE has developed a certain jurisprudence.<sup>38</sup> However, it only became more active after 1994. The historical evolution of the number of cases judged by CADE, shown in Chart 8, is illustrative: until the beginning of the 1990's, the number of cases judged per month was only

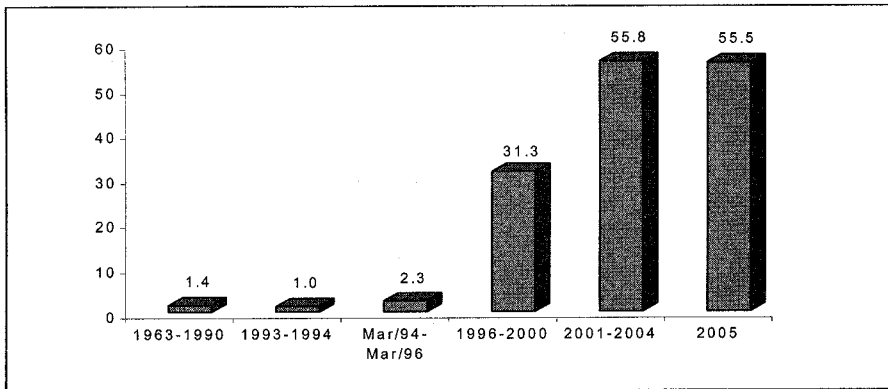
---

<sup>37</sup> Mancur Olson's "collective action problem" pointed out that state policies that generated diffuse benefits for a large group of people would not receive as much funds as policies generating concentrated benefits for a small group, as in the latter case it is more difficult for a strong lobby for the policy to occur. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>38</sup> See E.M.M.Q. FARINA, *ANAIS DO XVIII ENCONTRO NACIONAL DE ECONOMIA* (1990) (discussing the Brazilian competition policy before the 1990s).

slightly more than one, increasing to 55.8 in 2001–03.

CHART 8: HISTORICAL DEVELOPMENT OF CASES JUDGED BY CADE (IN CASES PER MONTH)<sup>39</sup>



CADE's decisions on mergers and acquisitions, such as the decisions regarding Colgate-Kolynos in 1996, AmBev in 2000, and Nestlé/Garoto in 2004, gave more visibility to the institution. This fact does not result necessarily from the authority's decision to prioritize one area of antitrust to the detriment of others.

The relative importance of the merger cases in the 1990's has to do with two factors: 1) a sharp increase in the number of cross-border mergers impacting developing countries' markets and operating as a form of entry of foreign direct investment; and 2) the time necessary to eliminate the old stock of conduct cases inherited from the old price control period and develop new investigative tools against cartels.

The debate over whether control of conduct is more or less important than merger control has no real content. It is more a question of balance between the different fronts on which an antitrust agency operates in the various stages of institutional development.

If the activity of the agency were to be perpetually restricted to

<sup>39</sup> See CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 1996; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 1997; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 1998/1999; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2000; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2001; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2002; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2003; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2004; CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA RELATÓRIO ANUAL 2005.



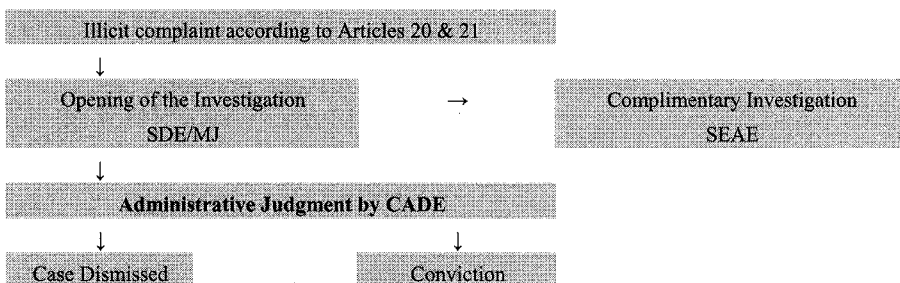
repression of conduct, the non-existence of merger review could lead to the formation of non-competitive market structures. However, these non-competitive market structures would increase the frequency of infringements of the economic order, partially or totally frustrating the repression of conduct of the authority. On the other hand, to neglect the repression of conduct is equivalent to abandoning the very reason for merger control exists, which is to prevent the abuse of economic power.

Indeed, the challenge is to properly balance the work on the two fronts and to achieve gains in productivity in such a way as to enable both to be achieved with the limited budget available. The next two subsections discuss how each of these two areas evolved in Brazil.

#### A. Control of Conduct: Settling Accounts with the Past, the Prevalence of the Rule of Reason, and the Recent Anti-Cartel Activity

In the first years of Law No. 8884/94, conduct cases represented the majority of cases considered by CADE. However, many argue that the majority of cases were related to proceedings in the past, which were set aside for lack of detailed information.<sup>40</sup> Chart 9 shows the procedure used for consideration of conduct cases.

#### CHART 9: PROCEDURE FOR CONSIDERATION OF CONDUCT CASES



However, the fact that the majority of the cases were judged invalid and set aside represented a necessary step to eliminating uncertainty for the private sector. As discussed before, the circumstances of Brazilian industrialization created an environment in which authority took a role in controlling market variables and in which the so-called “protection of the popular economy” was prevalent. It was thus natural that, as more rigorous criteria of antitrust analysis were applied, a large proportion of the

---

<sup>40</sup> It is also argued that the main sources of formation of case law continues to be in rulings on acts of concentration. This is only partially true. See CADE Annual Report of 1997, <http://www.cade.gov.br/>.

proceedings should be dismissed. Indeed, this is positive because it relieves the private sector of the burden of pending administrative cases that are not supported by a more modern antitrust legislation.

In spite of the slim chances of a sentence, these pending matters involved administrative costs, increased uncertainty, and a negative impact on the reputation of the company to the detriment of its net asset value. The “cleaning up of the shelves” thus reduced legal costs and risks while increasing the safety of and return on capital, with a positive effect on investment.

After this early phase, there had to be a number of improvements in order to combat anti-competitive practices. First, there was the issuance of CADE Resolution No. 20 in 1999, which contained a preliminary guide for dealing with various types of misconduct.<sup>41</sup> Basic information of this kind was important after decades of price control and no repression of illegal business agreements.<sup>42</sup>

Second, Resolution 20/99 confirmed the interpretation that there was no infringement *per se* in the Brazilian legislation.<sup>43</sup> Both vertical and horizontal practices must be analyzed on a case-by-case basis, taking into consideration not only the costs resulting from the impact, but also the group of benefits, if any, arising from the event so as to arrive at the net effects on the market and on the consumer.<sup>44</sup>

Third, Law 10.149 of 2000 provided important new instruments for conduct control.<sup>45</sup> It permitted the creation of a leniency program, which has proven useful for cartel enforcement both in Brazil and other countries. It also gave powers to SDE to obtain conduct inspections and dawn raids.<sup>46</sup>

The new legal instruments permitted a number of initiatives for competition authorities. SDE created an antitrust compliance program; a few leniency agreements were sealed. More importantly, a number of investigations of cartel activity were conducted. Chart 10 presents CADE decisions in conduct cases for the 2000–04 period.

---

<sup>41</sup> See Annex 1 of CADE’s Resolution n. 20, of June 9th, 1999.

<sup>42</sup> *Supra* Sections II & III.

<sup>43</sup> See Annex 2 of CADE’s Resolution n. 20, of June 9th, 1999.

<sup>44</sup> Appendix to CADE’s Resolution n. 20, of June 9th, 1999.

<sup>45</sup> Lei No. 10.149, de 21 de dezembro de 2000.

<sup>46</sup> See Article 1 of Lei n. 10.149, de 21 de dezembro de 2000.

CHART 10: CADE DECISIONS IN CONDUCT CASES 2000–2004<sup>47</sup>

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
Total	172	103	54	15	69

### B. Merger Control

Control of the structure of markets by antitrust agencies is common practice in mature countries and has been gaining increased importance in emerging economies. The high rates of increase in the number of cases judged in the 1990's reflects the reorganization of the Brazilian economy as described in Section III.

The following aspects should be highlighted: 1) low rate of rejection of transactions submitted to CADE, with a reduced rate of intervention in the transactions examined; 2) absence of a bias against foreign capital; 3) de-bureaucratization of the procedures of examination of the proceedings; and 4) development of basic criteria for merger review, including the issuance of guidelines for horizontal mergers in 1999–2000.

As in most jurisdictions, in Brazil the percentage of cases in which conditions were imposed was small. Experience with merger review led to an effort to reduce the bureaucratic burden on the private sector. At the outset, the majority of approvals were accompanied by performance undertakings under Article 58 of Law No. 8884. This changed after 1996. The transaction may now be approved by CADE as long as the transaction does not have anti-competitive effects. In the period 1994–96, the notion that approval of transactions would in all cases require a conclusion of added efficiencies prevailed.

CADE has also indicated that structural remedies are superior relative to behavioral remedies. Beyond that, starting with Resolution 15 in 1998, there has been a continuous improvement in implementing a quick review of simpler transactions.<sup>48</sup> There has also been a change in the interpretation of the annual turnover threshold, which would now be considered with reference to the Brazilian market, not to the world market.

In line with the available information on strong growth of foreign

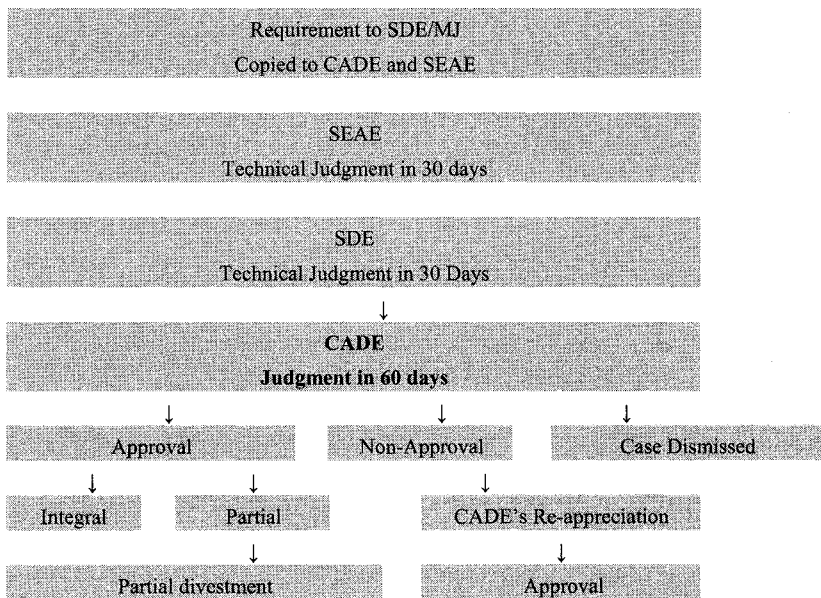
<sup>47</sup> Source: IDB-OCDE (2005).

<sup>48</sup> CADE Resolution No. 15, of Aug. 19, 1998.

investment in Brazil, there is a prevalence of companies with foreign capital. A significant proportion of the transactions reflected the local effects on the Brazilian market of transactions carried out on a worldwide basis, redefining strategies of international groups. The Brazilian case thus illustrates the strong structural change in domestic markets caused by globalization.

As noted above, merger control can consume a considerable amount of funds, especially immediately after its introduction, when the experience of the technical staff and private agents involved is limited. Chart 11 summarizes the proceedings involved.

**CHART 11: THE PROCEDURE FOR EXAMINING MERGERS**



Due to the scarce funds available to antitrust authorities in developing countries, changes were made in the procedures for analyzing acts of concentration, making the results faster and clearer and treating simple and complex cases differently.

The issuance of Resolutions 1/95 and 5/96, and subsequently Resolution 15/98, were steps in this direction because they: 1) created a simplified analysis procedure; and 2) integrated and coordinated the activities of CADE with the organs of government which also have legal attributions in this area—the SDE of the Justice Ministry and the SEAE of

the Finance Ministry, respectively.<sup>49</sup>

Article 54 of Law No. 8884 of 1994 called for regulation by the authority to establish the universe and format of the information to be provided by economic agents.<sup>50</sup> The aim was to allow an analysis of costs and benefits for the market that were associated with an act of concentration. More recently, the so-called summary proceedings, enabled by Article 16 of CADE's Resolution 12 of 1998, have been applied.<sup>51</sup>

The situation improved with the application of Resolutions 5/96 and 15/98, although further changes were still necessary.<sup>52</sup> Add to these factors the peculiarity of Law No. 8884 which allows for a *a posteriori* notification.<sup>53</sup> That is to say, under the current legislation, the applicants may—and in the majority of cases do—carry out the act and only after its conclusion submit it for approval to CADE. The slower the examination by the authority the more adverse are the effects of this type of action because it allows:

1. any negative effects on competition caused by the transaction to be made more concrete while the transaction is under analysis;
2. the cost of any divestment to be higher due to the need to undo a growing group of transactions derived from the original transaction; and
3. legal uncertainty for the private sector.

However, two recent developments were able to diminish this problem. The first was the introduction of a "Fast Track Procedure" by SDE and SEAE for the analysis of acts that clearly have no impact on competition,<sup>54</sup> lowering the amount of time necessary for the judgment of these cases. The second was CADE's Resolution n. 28, which introduced two mechanisms to suspend the consummation of the transaction: the

---

<sup>49</sup> CADE's Resolution No. 1, of May 21st, 1992; CADE's Resolution No. 5, of August 28th, 1996; and CADE's Resolution No. 15, of August 19th, 1998.

<sup>50</sup> Lei No. 8884, de 11 de maio de 1994.

<sup>51</sup> CADE's Resolution No. 12, of May 31st, 1998.

<sup>52</sup> CADE's Resolution No. 5, of August 28th, 1996; and CADE's Resolution No. 15, of August 19th 1998.

<sup>53</sup> Lei No. 8884, de 11 de maio de 1994.

<sup>54</sup> 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 has 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 Ordinance n. 1, of February, 2003 and IDB-OCDE (2005) for more details.

“precautionary order” and the “Agreement to Preserve the Reversibility of the Transaction” (known by the local acronym “APRO”). Both of these instruments prohibit the merging parties from taking 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. Chart 12 presents CADE’s determinations in merger cases.

CHART 12: CADE DETERMINATION IN MERGER CASES 2000–2004<sup>55</sup>

Year	Transaction Reviewed	Approved	Approved with conditions		Disapproved
		Without Conditions	Structural	Ancillary	
2004	618	574	2	41	1
2003	491	484	1	6	0
2002	485	474	0	11	0
2001	571	559	0	12	0
2000	507	490	1	14	2
Total	2672	2581	4	84	3

### C. Prospects for Competition Policy in Brazil

As with the majority of private sector transactions, analysis of privatization by CADE also takes place *a posteriori*. Law No. 8884 applies after the company has been inscribed in the program, the tender has been published and the sale has been made;<sup>56</sup> all steps are governed by Law No. 9491/97.<sup>57</sup>

This format raises doubts, from the point of view of the agent, about possible objections to the transaction due to anti-competition effects. This increases legal uncertainty, reducing the expected return from the investment, and, consequently, the attractiveness and value of the public assets to be sold.

Naturally, when it is a case of a transaction involving an auction of companies, the final acquirers are not known in advance, making inefficient an exclusively *a priori* analysis by the body responsible for competition policy. However, it would be desirable for the architecture of the

<sup>55</sup> Source: IDB-OCDE (2005).

<sup>56</sup> Law No. 9491, of September 9th, 1997, repealed Law No. 803, of April 12, 1990, was a landmark in the acceleration of the privatization program of the Collor administration.

<sup>57</sup> Lei No. 9491, de 9 de setembro de 1997.

transaction and, especially, the tender bid announcement, to take into account any concerns on competition effects. This task could be carried out as early as at the stage of valuation by specialized companies (who are selected by a tender bidding process).

Currently, the Brazilian Congress is analyzing a project for a law reforming the country's competition law. The main feature is the reduction of bureaucracy. Of the previous three bodies—CADE, SEAE, and SDE—there would remain only two: CADE and SEAE. SDE would only regulate consumer protection. CADE alone would instruct and judge cases, while SEAE would be in charge of the interaction of competition policy with regulatory agencies and competition promotion. Chart 13 shows the evolution of the competition law as if the project was approved.

CHART 13: COMPETITION LAW IN HISTORICAL PERSPECTIVE

	LAW			
	4.137 (1962)	8.158 (1991)	8.884 (1994)	8.884 (revised)
ORGANISM	CADE	CADE SNDE	CADE SDE SEAE	CADE SEAE
SCOPE	Conduct	Conduct	Structure Conduct	Conduct Ex ante structure conduct
AUTONOMY RATE	None	None	CADE gets more independent, members have a two year mandate	CADE turns into a special autarky; 4-year mandate

Another important instrument foreseen by the project is the possibility of pre-merger review. Its implementation could in principle reduce transaction costs. However, if the decision-making process remains pessimistic the previous analysis would block important economic outcomes. The project also presents two changes that can increase the authority's autonomy. First, it would extend the mandate of CADE's commissioners to four years. Second, these mandates would not be simultaneous to the president's mandate.

## VI. CONCLUSIONS

Competition policy in Brazil can best be understood as part of a process of market liberalization. In the United States, competition policy has become important as a consequence of the evolution of the market economy. In Brazil, competition policy is an instrument to promote the

institutions of the market economy. Competition values and culture are already present in mature economies. In contrast, they must be created and disseminated in developing economies.

The very existence of antitrust in Brazil was only possible with the structural reforms of the 1990's (price stabilization, privatization of state-owned companies, and financial and trade opening), since there was 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 certain 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, there are a number of peculiarities to developing economies that have to be taken into account.

Finally, although there were several advances in the last ten years, the institutional building of Brazilian competition policy is far from complete. There are still important changes to be made in order to guarantee greater efficiency, fair procedures and autonomy of the antitrust authorities in Brazil.



