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OECD Global Forum on Competition

**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

CONTRIBUTION FROM BRAZIL (CADE)

-- Session II --

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CHALLENGES/OBSTACLES FACED BY THE BRAZILIAN COMPETITION DEFENCE SYSTEM FOR THE ATTAINMENT OF GREATER ECONOMIC DEVELOPMENT THROUGH COMPETITION

I. Introduction

1. This paper seeks to provide a general overview of national competition policy promotion and the related challenges faced by Brazil in furthering economic development. A brief description in section II of how competition is situated within the government's overall economic development goals will be complemented in a later section by noting the need for balancing of other public policy goals. Also included is a discussion of institutional obstacles, detailing challenges both within the competition defence system as well as within the general macroeconomic and political policy framework. Progress on implementing effective competition promotion is highlighted in a final section addressing challenges and progress in fostering creation of a "competition culture".

II. Competition promotion and the pluriannual plan 2004-2007

2. The Pluriannual Plan 2004-2007 (PPA)¹ attributes a key role for competition promotion in the government's policy planning goals as evidenced by the objective: "To promote the increase of supply and the price reduction of prices of goods and services for popular consumption". It more specifically targets competition challenges in: "Another set of actions must be directed to the search for the reduction of the damages caused by the elevated degree of market oligopolization, which makes difficult the transference of productivity gains to prices and wages, to protect the citizen from abusive practices, in addition to developing responsible behaviours on the part of companies, in the production of adequate goods and services for the necessities of citizens." Amongst the measures proscribed for the achieving of this objective is the specific reference "to fight, effectively, the formation of cartels and monopolistic practices".

3. Furthermore, Mega objective II of the Pluriannual Plan seeks: "Growth with the generation of jobs and income, environmentally sustainable, and with reduction of social inequalities", this to be obtained by ... "coordinating productive investment and increasing of productivity with the objective of reducing external vulnerability". Undoubtedly competition promotion has a fundamental role to play in stimulating the propensity for investment and innovation in the economy. One of the key guidelines of the PPA for the Ministry of Justice (to which CADE is linked) is to improve the control of enterprise concentrations, with emphasis on the speed and transparency in these actions.

4. One of the perverse aspects of the history of Brazilian economic development has been the resultant inequality in several dimensions - social, sectorial and regional. Within the long-term development strategy of the new government, competition policy is an important element for the attainment of the social inclusion objective, given that competition reduces prices, creates chances for the realization of new investments and, consequently, the generation of greater social welfare.

¹ Objective included in "Mega Objective I: Social Inclusion and the Reduction of Inequalities" of the Pluriannual Plan. The Pluriannual Plan is available on the website: < <http://www.planobrasil.gov.br> >.

III. Institutional obstacles/ challenges

5. Although in the government's pluriannual plan competition policy has an important role for Brazil's long-term development strategy, the full consolidation of the role of CADE in guarantying the right to competition and contributing to the country's further economic development and efficiency depends on the overcoming of various fundamental challenges. There are both internal obstacles in the sense of structural and resource problems as well as legal and coordination issues within the Brazilian Competition Defence System, and also larger issues related to the overall macroeconomic and political environment within which competition policy must operate.

Resource and Structural Constraints

6. A critical limitation to competition promotion in Brazil is the low number of employees involved in promoting competition, particularly in relation to the number of cases considered. Especially serious is the lack of adequate personnel in the administrative tribunal for competition (CADE). For example, in 2001, excluding the administrative area, CADE had 52 employees for a total of 711 cases (including 584 mergers). To make a comparison, the two North American competition agencies, FTC² and DOJ³, had, in the same period, 1,010 and 400 employees, respectively, for 275 cases. Despite the Brazilian Competition Defence System being made up of three entities (in addition to CADE, the agencies SEAE -Secretariat for Economic Accompaniment of the Finance Ministry, and SDE – Secretariat for Economic Law of the Justice Ministry), it is clear that the competition promotion structure requires a larger number of employees, considering the number of cases which are handled.

7. Another problem is the inexistence of a specific career track for public servants involved in competition work, despite the fact that the current competition law has envisaged such a defined career since its passage in 1994⁴. The lack of a career perspective discourages the permanence of employees staying over a long period of time. Additionally, there are quite low wages and the further reduced availability of commissioned government positions, both factors unfortunately a result of the severe budgetary restrictions that the Brazilian public sector faces. Optimal efficiency is further hampered by the frequent turnover at the highest levels of CADE, where the President, Commissioners and Attorney General remain for a very brief period in the agency, due to their short mandates (two years which can be politically renewed for another two years).

8. An interim solution for staff limitations, which was recently promulgated, is the edition of the Provisional Order n° 136, of 17.11.2003, which authorizes CADE to contract new technicians for a determined time (up to two years). Although this measure is important, there is still the necessity to create a permanent career staff, with wages reasonably compatible with those supplied by the private sector, a vital condition for the retention of employees inside of the government in order to enhance the technical expertise in competition in the public sector.

9. A major obstacle to effective competition policy promotion as an effective instrument of economic development is its historically low budgetary appropriation. In illustration, the box below presents the evolution of the available budget for the CADE since 1998, a period of intensive growth in competition promotion activity.

² Federal Trade Commission website: < <http://www.ftc.gov> >

³ United States Department of Justice website: < <http://www.us.doj.gov> >.

⁴ Section 81 of the Law n° 8.884/94: "Executive, in the stated period of sixty days, will send to Congress, a bill regarding on the permanent staff of the new Autonomous Authority, as well as on the nature and the remuneration of the positions of President, Council members and Attorney General of CADE".

Box - Budgetary Resources - Evolution (in millions of Reais - R\$)⁵

1998	1999	2000	2001	2002	2003
2.8	9.8	7.4	12.8	15.7'	14.7

10. Fortunately, the promulgation of Law n° 9.781/99 was an important advance in the last few years, given that it establishes the procedural and services fees allotted to CADE. These fees are related to the costs of the rendering of public services relevant to the analysis of mergers and consultations. The result has been a significant growth in the level of budgetary resources available to CADE since 1999.

11. Nevertheless, considering the strategic importance of CADE's role in judging competition cases, its budget continues to be very low, particularly if compared with the budgets and caseload levels of other countries. For example, in 2002, the U.S. Federal Trade Commission (FTC) had at its disposal a budget of around US\$ 160 million dollars or 32 times the CADE budget (more or less 5 million dollars). And finally, there are serious lacks in all three agencies of the Brazilian competition system in their informatics structures, furniture and equipment allotments, physical space, and also archives of materials and resources available for research, all which can compromise the productivity of employees in the work of the competition defence system.

Legal and Procedural Aspects

12. The advent of Law n° 8.884 of June 11, 1994 was essential for increasing the effectiveness of antitrust policy in Brazil, which had been essentially inoperative since the initial law promulgated in 1962. With the new law, CADE was transformed into an independent authority, linked to the Ministry of Justice, thus acquiring functional autonomy and extended authority, including being able to veto or create restrictions to the operations of merger and acquisitions considered as anticompetitive.

13. However, with the passage of Law n° 8.884/94 the number of cases entering the Brazilian Competition Defence System also grew exponentially. In response to the unprecedented increase of workload, the three agencies comprising the Competition System have undertaken several actions in the few last years in order to speed the analysis process. Significant contributions to this effort included CADE's resolution n° 15/98 which created various instruments simplifying the procedures for merger analysis and also new guidelines for the two investigative agencies to coordinate joint analysis of mergers (SEAE/SDE n° 50/2001). In February of 2003, SEAE and SDE also created a new "fast-track" procedure for processing merger cases in 15 days, which significantly reduces delays.

14. Until 1999, the average time for merger analysis required by the combined efforts of the three competition entities was almost two years. Following the various efforts mentioned above, the average time diminished by more than 50%. Nonetheless, the existing delays in the total processing time still, in many cases, extend beyond the 120 days defined in the law.

⁵ Average exchange rate (reais per 1USD\$) according to Boletim do Banco Central do Brasil, September 2003

1998 - 1.16 2001 - 2.35
 1999 - 1.82 2002 - 3.16
 2000 - 1.83 2003 - 3.18 (January-July)

15. In Brazil, the notifications of merger and acquisition operations follow two criteria: participation of the company (or group of companies) in 20% or more of the relevant market or the fact of any of the participants having registered an annual gross in the last balance sheet corresponding to an equivalent of R\$ 400 million (about US\$ 133 million). The invoicing criterion offers a measure of objective nature, in contrast of the criterion of market-share. However, this value is considered excessively low. The local jurisprudence has therefore defined that the invoicing is of the entire group, thus in effect, its worldwide operations. Consequently, the agency spends too much time with many operations involving companies with little participation in local sales and which do not involve effects of a horizontal or vertical nature.

16. One of the most common criticisms of the system refers to the low number of condemned cartels. The major problem in Brazil - which is also common in other jurisdictions - resides in the difficulty of getting material evidences of the behaviour. Law n° 8.884/94, when promulgated, it did not provide sufficient powers to the competition authorities for the adequate realization of efficient investigations. The result is that, between 1994 and 2000, CADE has condemned only one case of a cartel, involving the metallurgical sector. In 2000, the Provisional Order n° 2055/00, later, transformed into Law n° 10.149/00, supplied greater powers of investigations to SEAE and SDE, and additionally instituted the possibility of granting leniency, a measure inspired by the success of the leniency program of United States. Nevertheless, between 2000 and 2003, only two cartels, involving gas stations, have been condemned.

17. Clearly, major efficiency in the combat of cartels depends, beyond the development of legal instruments for investigation and for imposing sanctions (by both the competition agencies and the Public Prosecutor's Office), on the creation of effective mechanisms for cooperation among competition authorities of different jurisdictions, since cartels are usually international in nature, and therefore demand a greater amount of human and budgetary resources. It is commonly held that the most efficient way to discourage cartels is through the application of severe criminal punishments, but although the constitution of a cartel is a crime in Brazil, CADE can only apply penalties of administrative nature. A complicating factor is the tradition of tolerating cartels - which has historical and cultural origins - and which is an obstacle to the success of the Brazilian program of leniency, as the company does not have an incentive to leave the cartel and to collaborate with the authority, preferring a legal battle which, without defections among cartel members, rarely produces definitive evidence for condemnations.

18. However, it should be noted that the competition authorities have signed technical cooperation agreements with various regulatory agencies and also the public prosecutor's office, which have assisted in investigations of cartels currently being undertaken. More effective participation in international fora on competition policy have also allowed the exchanges of experiences and information and contributed to the pursuit of some cases, such as in the cartel of vitamins and lysine, which has already been judged in the United States.

19. Perhaps ultimately, a key weakness of the system is also related to the relative newness of jurisprudence in this area. Although competition law has existed since 1962, the demand for antitrust activity only effectively began to appear from 1994 onwards with the passage of law 8.884. The low level of existing jurisprudence to date does not currently allow the consistent formularization of objective criteria in the application of diverse situations. The problem is evident from observing the lack of an appropriate method of calculations the level of fines applied by CADE. However, institutions must inevitably pass through learning processes - which implies some trial and error - and the accumulated experience and knowledge gained are slowly improving the system. Undoubtedly, additional resources and incentives for individuals to continue deepening their learning and experience are essential.

Coordination and Cooperation within the Competition Defence System

20. The traditional division of the Brazilian merger analysis process among the three entities of the competition system has unfortunately generated a certain duplicity in tasks and often unnecessary delays. A further complication has often arisen in more complex cases as the agencies do not necessarily agree on the analysis of the operation's effects and sometimes tend to proceed individually on different tracks, which further delays the investigations. However, as mentioned earlier, there is increasingly a joint effort to harmonize and coordinate the agencies procedures.

21. Another area of coordination needed is between the competition authorities and the regulatory agencies. While the decentralization and privatization of the economy has led to a less monolithic decision-making process, the advent of a dispersed regulatory framework necessitates the rethinking of the structure and relationship of competition and regulation in the economy. Often lack of clearly defined boundaries or overlapping jurisdictions of regulatory agencies can impede governmental and economic efficiency and may create the risk of regulatory capture by dominant players in industrial groups. There is undoubtedly a need for reconciling varying objectives and procedures as well as formulation of agreements on technical cooperation and integrated training on regulatory techniques and competition policy.

22. One of the key challenges is to establish an appropriate balance between regulation policies, in particular, regarding situations where the *ex-ante* regulation is necessary, and when the *ex-post* regulation (of competition) would be socially more efficient. When they concern essential services (telecommunications, electric energy, etc), the two types of regulation apparently seem to generate conflicts of objectives, in particular: 1) competition versus universalisation of the services, and 2) verticalisation versus deverticalisation⁶.

23. In the few last years, there has been increasing approximation between regulation and competition authorities. CADE has undertaken dialogue seeking closer coordination with regulatory agencies (mainly telecommunications, electric energy and oil and derivatives) with the intent of creating rules, procedures and criteria, which aim to accelerate control and antitrust promotion. Beyond the institutional cooperation, new legal instruments have been formulated, making possible better coordination between the two areas. The inclusion of competition promotion and forms of cooperation with competition authorities with the objective of the verification of anticompetitive behaviours and of economic concentrations effects is present to a greater or lesser degree in the legislation of the regulating agencies, in particular, of ANATEL⁷ and ANEEL⁸. Such measures have begun to help clarify responsibilities and contributed to reducing conflicting objectives.

24. Coordination with other areas, especially with the banking sector, have still created impasses and this lack of clarity concerning the authority of the sectorial regulation in relation to competition promotion, has not infrequently led to problems of jurisdictional conflict. There is currently a new bill under discussion in the Brazilian Congress on the subject. According to the details of the bill, the competition authorities would gain clear jurisdiction to act in the banking sector, while respecting the macroeconomic objectives of the Central Banking regarding overall liquidity and stability in the economy.

⁶ The verticalisation generates productive efficiencies and often coordination, which is desirable of the point of view of the direct regulation, but also generates market power, which is undesirable from the competition point of view.

⁷ National Agency of Telecommunication.

⁸ National Agency of Electric Energy.

25. There is also a need to have better interaction with the Federal Police and the Independent Federal and State Prosecutors Office, particularly in order to help SDE and SEAE get proofs for administrative and potential criminal condemnation of cartels.

Macroeconomic and Political Considerations

26. Undoubtedly the functioning of the Brazilian Competition Defence System is also impacted by political, legal, and financial considerations relevant to the functioning of a stable macroeconomic environment. At a recent meeting on Competitiveness held in Sao Paulo⁹, the three major elements identified by mostly private sector participants as being essential to Brazilian competitiveness were the strengthening of the legal system as a whole, the simplifying of bureaucratic rules and procedures, and overcoming critical lacks in infrastructure. However, there was also extensive discussion of the need for education, promotion and dissemination of R&D, and the lacking of a culture for internationalization, increasingly vital in a globalized economy.

27. According to the Brazil Cost Project¹⁰ being undertaken by the National Confederation of Industry¹¹, policy reforms are urgently needed in the area of taxes, the cost of capital, better training of the labour force and more responsive health services, considerations critical to optimizing economic efficiency, and which have clear impacts on the objectives being sought by competition policy. The project reflected very serious concerns about the immediacy of tackling the high level of interest rates, which is seen as a major competitive disadvantage.

28. Nonetheless, it can be said that overall, the renewed and strengthened commitment of the new government to maintaining price stability and fiscal discipline in its first year of office has significantly calmed nervous international financial markets and preserved necessary conditions for economic development and growth of competitiveness

IV. Balancing public policy goals for economic development

29. As posited in the previous section, the optimal functioning of competition promotion relies on a conjuncture of public policies in other areas. Currently, the new Brazilian government is reviewing a number of key reforms, which will impact on competitiveness, including fiscal, pension and labour legislation. There is no doubt that Brazil in recent years has instituted privatization and deregulation policies as part of a major structural change from its previous experience with an active and largely protectionist industrial policy (which included State-owned monopolistic practices), to a clearly market open economy.

30. Nonetheless, there continue to exist grounds for supporting the promotion of some type of industrial policy as part of an economic development strategy. It should be recognized that competition

⁹ See the report "Brazil Competitiveness Meeting 2003: Brazil Agenda Monitor" prepared by World Economic Forum. Available online at:

< <http://www.weforum.org/site/homepublic.nsf/Content/Brazil+Competitiveness+Meeting+2003> >.

¹⁰ See "Brazil Cost: How to Develop and Promote a Competitiveness Agenda", José Augusto C. Fernandes. Available online at: < <http://www.cipe.org/publications/fs/articles/article9c8a.htm> >.

¹¹ The Brazilian Confederation of Industries has mounted an aggressive campaign geared toward the business community as well as Congress to raise awareness about the relationship of burdensome costs, regulations, and bureaucracy to the economic competitiveness of the national industry.

policy does not necessarily have to be in conflict with industrial policy¹² as the application of competition enforcement measures often deal with short-term and mainly static efficiency concerns while industrial policy tries to find mechanisms to contribute to the improvement of dynamic efficiencies in the long run in selected sectors. Therefore competition policies may often co-exist and compliment industrial policies in order to optimize overall dynamic efficiencies for long run economic development goals.

31. The challenges of balancing public policy goals and reconciling various legal imperatives is apparent within the working of the Brazilian Competition Defence System as illustrated by a brief example from CADE's experience with enforcement of competition law. In the Brazilian Constitution, revised in 1988, one of the principle aspects defining the economic order is full employment. At the same time, Paragraph 1 of Section 58 of the Brazilian competition law underlines that performance commitments assumed by the interested parts submitting acts for review pursuant to article 54¹³ have to take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

32. In order to minimize unemployment effects from mergers, in 1997, CADE and the Secretary of Labour signed an agreement in which one of the objectives was the exchange of information about the numbers of workers that could be fired during the implementation of the mergers. Subsequently, during approximately 2 years CADE sent to the Secretary of Labour the estimated number of workers that could lose their jobs after each merger presented to the competition agency. The main objective was to provide advance warning to the Secretary in order to allow for timely creation of measures to avoid the negative social effects of the mergers, through training and reallocation of workers.

33. During this period, the CADE Commissioners approved some mergers with the condition that the companies implement reallocation programs for the workers fired because of the merger. An important example was the privatization of the state owned company Ultrafértil¹⁴, which had much market power in the fertilizers sector. CADE stated as a condition for the approval of the acquisition that the company should implement an extensive program of retraining and reallocation of workers. Reports submitted by the company after 5 years showed that the number of workers of the company had increased to a much larger number than the level immediately following the privatization. Although the effects of these types of measures on employment have not been fully evaluated as of yet, some analysis has been made on the basis of the available data and information collected.

34. Usually, the immediate impact of a merger has been a reduction in the number of employees, especially those in the administrative areas, particularly employees in divisions which were duplicated after merger. However, in several cases, the effects of mergers in the long run have tended to produce an increase of the number of workers. In the cases in which CADE imposed a "compromisso de desempenho" (consent decree) including a retraining or a reallocation program, most of the data sent by the companies to CADE seems to indicate that the number of employees had increased at the end of the period (usually 5 years).

35. In general, these results are to be expected due to a reason associated with the proper objective of competition policy. If a merger does not increase market power, it has to be approved without any other

¹² Alves, Roberto Teixeira. "Considerations of Potential Conflicts between Industrial Policy and Competition Policy".

¹³ Section 54 of Law n° 8.884 of June 11, 1994: "Any act that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review".

¹⁴ Merger Act n° 02/94 Ultrafértil/Fosfértil.

consideration. However, if it increases market power, it has to be reviewed by the competition agency, which seeks to prevent that increase of market power, or to verify if the efficiencies produced are sufficient to compensate the harm to competition. In either case, the agency review tends to promote a better environment for competitors in order to realize optimal strategies of growth in a free market. A company involved in a merger with large effects on market concentration, usually has an extensive program aimed at expanding and consolidating its position. The implementation of this program not only tends to create new opportunities for investments within the company in the long run, but also stimulates other competitors to innovate and increase the rivalry. Thus on balance the overall effects of a merger reviewed by the competition agency has tended to provide a better environment for the investment programs of companies, with beneficial impacts on the general level of employment.

36. A recent report by the International Competition Network (ICN) agrees that competition policy often accommodates other public policy goals and reconciles varying objectives: “The fact that a sector or a firm is partly subsidized or is protected for industrial policy reasons does not mean that competition law cannot, as a matter of principle, be applicable to this sector or this firm. Competition law can be applied to practices which go beyond what is allowed by public authorities unless all aspects of business strategies in the sector are regulated, which is rare”¹⁵

37. Some studies have shown that unfettered competition may not be appropriate for developing countries as too much competition may lead to price wars and ruinous rivalry, which can be harmful for future investments. Instead, as Singh¹⁶ suggests, what may be required by developing economies is ...“ an optimal degree of competition which would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the microeconomic level, but not so much competition that it would deter the propensity to invest.”

38. However, the basic point, which must be reiterated, is that the promotion of competition in itself stimulates and is fundamental to economic development. This affirmation is less obvious than it seems because many people confuse the defence of competition policy with the defence of one determined paradigm of market structure, known as perfect competition. Perfect competition supposes that markets are atomized, which discourages economic development, although from a static point of view, the social welfare is maximized. Schumpeter¹⁷ reminds us that markets are dynamic, in a permanent process of “creative destruction”, and the social profits derivative of this process are underestimated by only focusing a static analysis.

39. What is clear is that the promotion of competition must continue to contribute to innovation and growth in order to be compatible with the reality of the globalized economy. From the perspective of furthering economic development, competition promotion cannot defend the fragmentation of markets, but rather focus on the stimulation of rivalry between companies, only possible in oligopolized markets, which assumes strong competition authorities, capable of effectively inhibiting predatory behaviours, cartel formations and other strategies of monopolization.

40. Although this paper will not enter into discussions of the relationship of international trade policy to competition policy, this subject and the following section dealing with links between foreign investments and competition policy are also clearly important aspects of balancing public policies. Perhaps an essential perspective to keep in mind when seeking to balance and complement competition promotion

¹⁵ ICN report: *Capacity building and technical assistance: Building credible competition authorities in developing and transition economies.*

¹⁶ Singh, Ajit: *Competition Policy, Development and Developing Countries.*

¹⁷ Schumpeter, Joseph: *Capitalism, Socialism and Democracy.*

with other public policy goals, as UNCTAD has summarized in a recent note¹⁸, is that the competitiveness of developing country firms to integrate into the world economy depends to a large extent on seeking to acquire the necessary capabilities to apply available technologies and innovate, as well as on the domestic availability of competitive supporting infrastructure (including human and financial resources and services). “This implies policy measures beyond trade liberalization to address (i) supply capacities at the systemic level (ii) concentration of market power, which is both an outcome of global competition and a threat to global competition; and (iii) the consequent need for the strengthened application of competition principles”.

V. Defense of competition and foreign investments

41. The 1990’s were characterized by a rapid process of liberalization, especially in the developing countries. The tendency of governments in facilitating flows of foreign direct investments reflected significant changes in their regulatory structures, in the opening of industries previously closed for foreign investments and in the rapid growth of bilateral investments treaties. In Latin America, the economic reforms implemented by great number of countries since the mid 80s meant the radical change of the predominant type of traditional development strategy in the region - the model of import substitution - for a process of insertion into the global economy.

42. The relationship between competition promotion and foreign direct investment (FDI) can be examined from two points of view:

a) *Competition promotion and the access of FDI*

43. According to a study done by Oliveira¹⁹, in a sample of 66 countries, there does not exist a simple causal effect relationship between the degree of competition promotion and the volume of FDI. Each country studied was classified in one determined level of institutional development (seven levels is all), considering determined institutional elements such as, for example, the existence or not of competition law and of a specific competition agency, the control of mergers and acquisitions or cooperation agreements between regulation agencies and the competition authority. The sample of countries was selected in accordance with the availability of data related to direct investment in the World Investment Report of 1998. The statistical studies demonstrated the slight positive correlation between the two variables. But it is important to reiterate that the study demonstrates the lack of a negative correlation between competition promotion and direct investment, which militates against the argument that very severe competition legislation would inhibit the entrance of investments.

44. However, it is necessary to understand that the determinants of FDI are multiple and complex. Nonetheless, competition policy is one of the necessary components for what is called “regulatory credibility”. The capacity to attract private investments and to generate efficiency depends on the capacity of the country to restrict arbitrary administrative action²⁰, a condition that exceeds competition policy and more broadly depends on the institutional environment of the country that receives investments.

¹⁸ Note UNCTAD secretariat. *The Relationship between Competition, Competitiveness and Development*.

¹⁹ Oliveira, Gesner: *Defesa da Concorrência e Investimento Direto: Evidências Empíricas e Hipóteses Conceituais*.

²⁰ Levy, Brian and Spiller, Pablo T: *A Framework for Resolving the Regulatory Problem*.

b) FDI raises economic concentration and abusive behaviours

45. The conclusion of lack of conflict between competition promotion policy and the entry of FDI is important, therefore, if on the one hand such investments can represent new entries and greater contestability of the domestic markets, on the other hand, can imply economic concentration and anticompetitive practices, which generate negative effects on the economic development.

46. Most of the FDI entering in Brazil occurs through mergers and acquisitions. In accordance with a study analyzing mergers evaluated by CADE²¹ on the impacts of FDI on market structures, 32% of the acts evaluated in 2000 had resulted in denationalization²². Although quantitatively the denationalization cases represent a minority share of the mergers submitted to CADE, these are the acts which present greatest impact on market structures. Cases that usually do not involve foreign participation are approved without restrictions. The Brazilian case supports the position of UNCTAD²³ regarding the impact of the entrance of the FDI, which under certain conditions, can generate anticompetitive practices and negatively affect the markets' performance.

47. The process of worldwide economic liberalization, which resulted in a greater flow of FDI in the last years, was also accompanied, in accordance with data provided by UNCTAD, by a wave of dissemination of competition laws around the world. Even in Brazil, which already has competition legislation and a competition agency since 1962, the last 10 years have been characterized by increasing activism and commitment to continual improvements in the legislation. In the past few years, there has been an increasing understanding in Brazil that public policy cannot neglect competition considerations without risking, reduction in investments over the long terms.

48. However, there continues to be a lively debate over the future course of balancing competition and foreign investment considerations. A current project on Investment for Development²⁴ at the University of Campinas suggests that efforts for attracting foreign investors should be very selective and that it is important to insure that foreign investors and locally owned companies should have access to the same type of incentives. Furthermore, the study calls for preferential treatment for investment projects involving the creation of employment and qualification of workers as well as to those involving long run commitments in order to establish linkages with the national system of innovation, including public and private research institutions.

VI. Challenges and progress in the fostering of a brazilian competition culture

49. The building of a "culture of competition" is clearly both a long-term and multi-faceted task. However, it is also undoubtedly the best way to garner both popular/societal support as well as increasing budgetary allocations needed to both promote and defend competition policy in the economy. Although it often seems a frustrating process to change attitudes and inculcate new values, there is much evidence to support the clearly growing recognition of the importance of competition in the Brazilian society. Not only has the Brazilian Competition Defence System become increasingly activist, better known and respected through proactive advocacy efforts, but the emergence of competition discussion in the media, Congress and business as well as consumer groups testifies to successful diffusion of the proposition that competition offers a positive contribution to the social welfare.

²¹ Oliveira, Gesner; Goldbaum, Sérgio e Santana, José Ricardo. *Desnacionalização e Defesa da Concorrência no Brasil: Implicações do Comportamento do Investimento Estrangeiro Direto*.

²² Situation which a foreign enterprise acquires a majority participation in a national enterprise.

²³ UNCTAD. World Investment Report 2000.

²⁴ University of Campinas (UNICAMP). "Investment for Development Project Process Report: Brazil".

50. Increasingly high profile actions by competition authorities, including the intensive media coverage given to the conduct of the first “dawn raid” in relation to a suspected cartel recently led by officials from the SDE, as well as recently proposed new initiative regarding a type of “ISO anti-trust” to recognize companies in compliance with the national competition legislation, have become useful tools in the campaign to alert citizens to the importance of competition defence and the efforts being made on the part of the competition authorities to combat abuses which often ultimately harm the consumer in their anti-competitive effects. Also the recently launched internet site of the Brazilian Competition Defence System not only promotes greater transparency and public access to information, but allows the public to accompany the progress of recent cases and provides information on how to better interact with competition authorities.

51. Less obvious perhaps but just as crucial is the steady work being undertaken to educate the media and the public through articles, speeches, interviews, congressional contacts and formal testimony, as well as networking through conferences and meetings and the building of coalitions to support the work of the competition authorities. At the international level, there continues to be increasing participation on the part of competition authorities in presentation of papers and networking at multinational forums such as the OECD (where Brazil was an initial non-member to formally support the Recommendation on Cartels), UNCTAD, and the ICN, as well as active leadership at FTAA, Mercosul and other regional fora, highlighting the importance of competition promotion. Brazilian competition officials are also working closely with these organizations and others to promote conferences and various training opportunities to share experiences, technical expertise and advances in international competition promotion.

52. On the academic front, particularly with an eye to training future competition advocates to deal with evolving issues in the field, CADE has annually sponsored a well-publicized conference and prize for the best paper on competition written by a university student. CADE also has an active internship program to acquaint university students with the functioning of the administrative tribunal which enforces competition laws, while also giving practical experience for both future specialists in the field as well as broader knowledge of competition issues to students in other areas. Within the educational curricula of Brazilian universities, Economic Law has gradually been incorporated into the legal studies at Law Schools in the last three decades, and as competition and regulation issues]] have become a new area of specialization within Economics Departments of universities, the field is growing in popular appeal and recognition as being fundamental for the nurturing of modern economies.

53. Although it remains difficult to measure or quantify results of competition promotion activities, there is no doubt that advocacy efforts and the diffusion of information about the importance of competition to the public is critical in building a constituency of support which helps the government to defend competition policy from powerful business as well as political special interests which might seek to undermine it. In addition to a growing perception of improvement in competition enforcement through notices such as the much reported improvement of the system in the latest Global Competition Review ranking²⁵, perhaps the greatest testament to its advancement and success is the multiplying number of fora, in business, consumer and political circles which are increasingly addressing the importance of competition defence and promotion in Brazil today.

²⁵ Global Competition Review. Volume 6, issue 6, June 2003.
Available at: < www.globalcompetitionreview.co >.

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