Emerging Market Competition Policy: The Brazilian Experience

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I. Introduction

Brazilian competition policy has developed over decades into a policy system that has allowed Brazil to lead South American nations in generating economic growth and sustainability, as well as the development of a “fully functioning market economy” in Brazil. The Brazilian Competition Policy System regulates merger control, competitive behavior among Brazilian firms, antitrust issues, and economic stability within regulation. Brazil’s policies have been crucial to the nation’s development from mostly state-owned enterprise and government interference in the markets after World War II. Brazil’s status as an emerging economy has also required that the policies guarding the competition of Brazilian firms and markets remain strong and steadfast in the global marketplace.

This paper develops an understanding of Brazil as an emerging economy as well as an understanding of the intricate competition policy system, with emphasis on merger control, within Brazilian regulation. Section II provides an overview of issues and considerations for dealing with emerging market economies. Section III examines Brazil’s status and development as an emerging economy in order to appreciate where they fit on the world stage. Section IV outlines the most essential merger control regulations and competition policy considerations in the Brazilian system. This section details the requirements for firms wishing to engage in cross border transactions with firms inside and outside Brazil that may have implications on the Brazilian economy and marketplace. Finally, section V evaluates a hypothetical airline merger transaction between an American acquirer and a Brazilian target with discussion on relevant considerations in the review and notification process. Section VI concludes.

II. Dealing with Emerging Economies

Developing countries have become, over the last decade, more financially solid than they had been for years. Prices for the raw material exports remain strong; economic growth consistently impresses; and much of the current accounts remain in surplus, which keeps the need to borrow from the rest of the world low.¹ According to the World Bank, the “Big Five” emerging economies are Brazil, Russia, India, Indonesia, and China. Furthermore, Western commentators observe the critical transitions made in these economies that will fundamentally alter their course in the future. In fact, the World Bank estimated in the late 1990’s, that by 2020, these five countries will double their exports, thereby capturing roughly sixteen percent (16) percent of total world output.²

Transitioning from a “developing country” into an “emerging economy” reflects a general view of development and an extremely important concept.³ “Emerging market economies are now perceived by the international community as offering a wealth of opportunities in trade, technology transfers, and foreign direct investment. In fact, “foreign direct investment” is increasingly replacing “foreign assistance.”⁴ Trade relations and capital investments are now being rationalized in a new international economic order that does not

³ Id.
⁴ See Id. at 706
conform to past development. The current capital, technology, and trade flow toward new market opportunities wherever they exist, almost without restriction.

Private actors in the industrialized world have expanded entrepreneurial interests and forged new connections with the developing world. Private entrepreneurs and investors have been the most influential actors in the liberalization of capital and technology flows in these economies. Two potential causes exist to explain this dramatic liberalization. First, the failure of state-led economic intervention to produce sustainable development results is key in the developing world. Second, the developing world’s need for capital to sustain and finance development has led to large-scale public borrowing. This borrowing has come from both commercial and multinational banking sources.

Foreign investment capital is now, and has been for the last decade or so, available in most developing economies with limited exceptions. However, in order to really be considered as an “emerging capital market”, capable of attracting adequate equity financing from domestic and international sources, a developing country must first establish the preconditions of a market economy. For those emerging economies able to attract foreign investment, the rewards and possibilities are endless as an increasing level of investment is pouring into these economies that has not been seen since 1997. A member of President Bush’s Council of Economic Advisers noted that “the outlook for emerging markets is the most positive we have seen for years” and that “emerging markets are expected this year [2004] to repay more to the International Monetary Fund, the World Bank and other international financial institutions than they borrow, for the first time since at least 1978.”

Establishing the preconditions for a market economy means that the developing countries must create a business climate that meets the foreign investors’ expectations. These reforms will have legal as well as economic implications. The recent agenda for market integration on a global scale requires a great deal of commitment to radical changes. Three such changes were proposed in 1998: (1) a changing role of the state; (2) instituting a rule of law change; and (3) encouraging a process of democratization within an emerging capital market.

First among these changes suggested for developing economies is that of a “redefinition of the role of the state in the development process.” Despite the desire of the state to have an active role in the development process, “state intervention in the productive sectors of the economy has led to uneven and sometimes disastrous results.”

In order to facilitate the transition away from state intervention in the productive sectors of emerging economies, these countries must eliminate the idea of planned economies. This idea of the past is no longer viable in competition with current capitalist democracies. The countries must also privatize state-owned industries, much like Brazil has recently done with BP Petrobus, the Brazilian oil firm. They must “encourage domestic capital savings and
investment.” Additionally, these countries may need to “refocus their attention and resources on regulating markets and facilitating north-south linkages, instead of taking direct responsibility for economic production.” Governments of these emerging nations “should seek to create new partnerships with private individuals, non-government organizations, and international capital markets to form sustainable linkages for the future in the areas of trade, finance, and technology.”

Secondly, developing nations must support the developing economics by implementing and institutionalizing a rule of law regime. Perhaps the most influential of these changes in the rule of law regime is the expectations of the foreign investor. The “menu” of expectations that foreign investors will be sure of in evaluating emerging economies involves the following criteria: (1) a stable economy that is relatively free of political disturbances and interference; (2) a freely convertible currency; (3) repatriable profits; and (4) a legal system that provides adequate redress for conflicts or disputes.

“Most transitional economies have already instituted a complete overhaul of their property and commercial laws because the underlying premise of capitalism as the right to own private property.” Moreover, additional legal change may be needed in support of a new macro-legal framework in the areas of contract, bankruptcy, trade, intellectual property rights, banking, taxation, foreign investment, securities and commodities, labor, the environment, and international dispute resolution.

“Both the developing and transitional economies must make sure they have a well educated and independent judiciary” by which to interpret and enforce the newly drafted laws of the developing nation in furtherance of the market-based ideology. However, implementation of these new policies and laws can create stress on the developing nation in the form of increased costs to initiate the reforms, pre-existing conflicts of laws issues, and some misgiving in the system when dealing with the global integration necessary in the developing marketplace.

Balancing the tradeoffs inherent in administering this new system must be done with a careful eye. It is made even more difficult since competition for new capital investment grows more intense. Emerging capital nations face even more stress with the possibility that if they are not successfully integrated into the global market, the entire development process will be jeopardized. This makes it possible that the legal identity of these developing nations will be lost in the cards.

The final consideration for change to the structure of a developing nation is the political landscape. It becomes a question of democratization. Regarding international global markets, “any kind of risk, including political risk, affects the viability of foreign investment in that economy.” It is therefore necessary for developing nations to minimize the political risks of investing in their economy. Foreign investors must be assured that the country is stable, transparent, and not subject to military coups or violent overthrow; they want to know that the

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19 Id.
20 Id.
21 See Id. at 721
22 Id.
23 Id.
24 See Id. at 722
25 Id.
26 Id.
27 See Id. at 723
28 See Id. at 724
29 See Id. at 724
30 Id.
host government will honor commitments investors make and have instituted agreed upon economic and other reforms.  

Democratization naturally puts the individual on the pedestal as the “sole actor and arbiter of his or her political life.” The assertion of one’s economic liberty and political freedom allows the expression of free will in every aspect of the marketplace and the political arena which secures the centrality of the individual in the development process. Significantly, “the idea of putting the individual at the center of the development process – whether it is economic, political, or legal change – may be difficult in some developing societies;” but it is nevertheless a concept that they must confront.

Despite the issues for the emerging economies to address in the future, the investment in these emerging markets remains steadfast and increasing. For example, at the end of 2005, the stock of domestically issued bonds in emerging market countries amounted to US$3.9 trillion, constituting an important global asset class. Moreover, dedicated emerging market US mutual funds have been growing rapidly from only US$27 billion in 2000, to roughly US$230 billion just six years later. In the last 10 years, the stock of domestic securities had increased from only 26% of GDP to about 40% of GDP in the emerging economies. A “striking sign” that positive change continues to occur in emerging markets is that international investors continue to purchase their securities denominated in local currency.

Most recently, many of the emerging economies have been taking the correct steps to substantially improve macroeconomic performance by strengthening monetary and budget policies through the financial markets. These economies have also taken advantage of the more favorable environment to build in “cushions against external shocks-through measures like improved debt structures, expanded regional reserve pooling arrangements, and increased stockpiles of international reserves.

Moving forward, there are a few key issues that must be considered by authorities in development of policies for emerging markets. They include: (1) strengthening public debt management and submitting to market discipline in domestic markets; (2) strengthening the investor base and improving regulation and consistency of treatment of institutional, foreign, and other investors; (3) developing financial derivatives like repos and swaps, as well as asset-backed securities markets, improving access by foreigners to domestic hedging services. This must be matched by suitable regulation of equity derivatives markets, as well as increased market surveillance and improved risk management at the firm level; (4) bringing trading, settlement, custody, and delivery mechanisms up to world standards, where necessary through regional linkages, and opening up to foreign investment in these services; and (5) developing and refining regional solutions that can bring greater efficiency and scale to smaller capital markets.

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31 Id.
32 Id.
33 Id.
35 Id.
36 Id.
37 Id.
38 Id.
III. Brazil as an Emerging Economy

In the last few decades, Brazil has followed suit with China, India, Indonesia, and Russia in making the transition from a “developing country” into an “emerging capital market” offering greater opportunities for foreign investment.\(^{39}\) Emerging markets, such as those mentioned, are in need of external financing in order to fund rapid growth and development and will be able to provide a large population with a ready market for manufacturing goods and technology.\(^{40}\) In addition, emerging capital markets, such as Brazil, provide an “open door for businesses to establish long-lasting relationships that will grow as the country develops.”\(^{41}\)

The President of Wachovia’s corporate banking division has stated, “historically there has been more volatility and less stability in Brazil, but the fact remains that Brazil has the largest and most diverse economy in Latin America.”\(^{42}\) Brazil is considered, along with similarly situated economies, by the international community as being able to offer opportunities in trade, technology, transfers and foreign direct investment.\(^{43}\) Sao Paulo, the financial capital of Brazil, alone has over 22 million people making it the third largest city in the world after Tokyo and Mexico City.\(^{44}\)

Concerns with competition in many of these emerging economies with many state-owned enterprises may discourage some, but these markets are simply too large to ignore. Sao Paulo and Mexico City are two of the three largest cities in the world, by population, and India and China represent over one third of the six billion people on the planet. While many of this population may not be investing in the economy, the potential growth in these economies allows for capital market development in countries implementing Western capitalist principles.

In 1986, only US$25 billion in private capital investments were allocated to the emerging market economies. By 1991, 36% of all foreign funds earmarked for emerging markets went to Latin America and by 1996, over US$250 billion in private capital was allocated to the Latin American market.\(^{45}\) Brazil’s Bovespa, the Brazilian equivalent to the Dow Jones Industrial Average, experienced a 69% rise in the first quarter of 1991.\(^{46}\) By 1997, the total foreign investments in Brazil accounted for 18% of Brazil’s total Gross Domestic Product, compared with just 15.5% percent in 1990.\(^{47}\) Specifically, the United States Banks made a total of US$27 billion in loans to Brazil by the end of March 1998.\(^{48}\)

Brazil’s economy was truly exposed to the international community in the mid-1990’s by then Finance Minister and later Brazilian President Fernando Cardoso. He was the driving force behind implementing policies with anti-inflation measures and continued privatization, which allowed foreign investors greater access to larger areas of the Brazilian economy.\(^{49}\) Cardoso also implemented the “Real Plan” which linked the Brazilian currency to the United States dollar. By keeping their exchange rate relatively high, Brazil was able to show the international investing


\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Kraus, James R., *Country Spotlight: Brazil: A South American Giant Finds its Footing*, The American Banker, 1 (March 27, 1997)

\(^{43}\) Steinwender at 413

\(^{44}\) Kraus at 1

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) See Id. at 413-414

\(^{48}\) Id.

\(^{49}\) Id.
community a robust economy poised for expansion. This exchange rate program “stabilized the Brazilian currency and reduced inflation from 40% a month, to about 1% for all of 1998.50

In addition to the stable currency, Brazil maintained sufficient foreign currency reserves to protect itself against panics. Once the reforms of the Real Plan were in place, the United States companies alone invested more that US$26 billion in that market.51

The sheer size of the Brazilian market makes the country impossible to ignore. Brazil is the “commercial powerhouse” in Latin America. Their economy is twice the size of both the Russian and Mexican economies and in 1997, Brazil had a gross domestic product of almost $800 billion.52 In 2006, the Brazilian GDP is estimated to be over $940 billion.53 Brazil is also the world’s third most populous democracy with 186 million people. Brazilian imports of United States goods and services ran at about $14 billion a year in the mid and late 1990’s.54 Because of the development in Brazilian reforms and the fact that Sao Paolo is considered to be the business center of Latin America, more Untied States investment goes to Brazil than any other Latin American economy.55

Between 1990 and 1998, the United States export growth to the Latin American economies increased by 150%.56 Many of the large national banks of the United States vastly expanded their operations in Brazil by the mid-1990’s. For example, by the end of 1997, Bank Boston Corp. had a total of US$13 billion of assets in Latin America and Citicorp had US$28 billion of assets.57

Along with Citibank and BankBoston’s corporate customer, specifically, North Carolina businesses significantly increased their presence in Brazil during the 1990’s. For example, in 1997, North Carolina based bank, Wachovia, became the first bank in the United States to acquire a Brazilian bank, Banco Portugues de Atlantico-Brasil SA.58 Wachovia’s Executive VP emphasized that “Brazil has been one of the top three markets for trade and investment activity for Wachovia clients over the last several years, and this trend is expected to continue.59 Brazil’s commitment to privatizing their state-owned business culture has given hope and assurance to the banks and financial institutions in the United States to invest in Brazil. In fact, during the 1990’s Brazil successfully privatized the government’s majority stake in most of the energy, utility, and transportations systems.60

All of this foreign investment and merger activity has drastic implications for the Brazilian economy. In order to handle the issues inherent in increased merger activity, Brazil has developed an antitrust and competition policy system to ensure that capitalist principles are observed and that the necessary consumer protection is in place for the citizens of Brazil. As it is modeled in many respects after the principles found in the United States’ Sherman and Clayton Antitrust Acts, the competition policy system for merger control in Brazil is dedicated to fair and efficient markets and actors.

50 Id.
51 See Id. at 415
52 Id.
54 Steinwender at 415
55 Id.
56 See Id. at 416
57 Id.
58 Steinwender at 417
59 Id.
60 Steinwender at 419
IV. Competition Regulation of M&A in Brazil

Merger control regulations in Brazil are covered under the Nation’s umbrella Competition Policy System. This system is comprised of three regulators each with specific regulatory powers and goals. While the Brazilian Competition Policy System (BCPS) is young with a small staff compared to similar agencies in the United States and Europe, its reach has developed to be quite broad. Aside from the review of mergers and acquisitions meeting threshold conditions, the Brazilian Competition Policy System oversees competitive behavior by Brazilian firms, antitrust issues, and economic stability within regulation.

For much of the post-World War II era, Brazil’s economic policies were characterized by “pervasive government intervention in market operations.” With this high degree of state intervention in the economy, the role for any competition policy was minimal and antitrust was unimportant. However, it was during this period of state intervention and control that Brazil enacted a more modern competition law. In 1962, Brazil enacted Law No. 4137, the nation’s first competition law. Significantly, this piece of legislation created the Conselho Administrativo de Defesa Economica (CADE). However, for the next few decades, CADE had relatively marginal economic impact because its authority reached only to private firms.

Not until Brazil wrote a new constitution in 1988 did CADE become more active and influential in the economic order of the country. The 1988 constitution established competition as a key feature of the economic order. With the new constitution, Brazil initiated a new privatization program and attempted to ease international trade barriers. The 1988 constitution recognized the central role of the private sector and began the first movement towards trade liberalization; however, many sectors of the economy remain controlled by the government. In 1990s, Brazil followed much of the rest of the world by liberalizing its economic policies with new developments in the early part of the decade. In 1990, Brazil introduced and engaged the “New Brazil Plan” which introduced numerous market-based reforms, including gradual privatization of government-owned industries, deregulation, removal of restrictions on foreign direct investment, and the reduction of tariffs and export subsidies. In 1991, in an attempt to mimic globalization sentiments and development, Brazil entered into the Mercosur Agreement with Argentina, Uruguay, and Paraguay. The Mercosur Agreement aimed to create a free-trade zone similar to the EU and NAFTA.

The modern era of competition policy in Brazil began in 1994. Along with a new stabilization plan implemented in that year, the “Real Plan”, aimed at combating hyperinflation that plagued the country. The Real Plan introduced tight fiscal and credit policies and a new Brazilian currency, the real, pegged to the US dollar. Brazil also enacted a new antitrust statute in Law No. 8.884/94 (“8884”) within the framework of the Real Plan. While 8884 was not the first antitrust statute Brazil had implemented in its national policy, it was the first to engage the agencies responsible for regulation, such as CADE, in substantial oversight and significant enforcement procedures. Until 1994, CADE was a nominal antitrust agency with recognition for ordering firms to rollback excessive price increases.

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63 OECD at 13  
64 See Id. at 13  
65 Oliveira at 622  
67 See Id. at 1120  
68 OECD at 13
Law 8884 repealed earlier antitrust laws, imposed new substantive provisions, and allocated to CADE broad remedial powers.\(^{69}\) The three major changes that 8884 introduced were: (1) giving more power to the technical body—CADE—which was transformed into the final instance of decision at the administrative level, leaving no appeal to the Minister or the President; (2) giving a greater degree of autonomy to CADE, transforming it into an independent agency with two-year terms for its members; and (3) introducing merger control.\(^{70}\)

While it was enacted with the “expectation that it could be employed to deal with inflated prices”, the new law also introduced merger control and made important institutional changes with CADE and two other agencies that were conferred with certain aspects of enforcement authority, the Secretariat of Economic Law in the Ministry of Justice (Secretaria de Direito Economico do Ministerio da Justica, or “SDE”) and the Secretariat for Economic Monitoring in the Ministry of Finance (Secretaria de Acompanhamento Economico, or “SEAE”).\(^{71}\) These three agencies comprise the BCPS. “Over the next few years, the pace of privatization increased, the government agency responsible for general administration of prices was abolished; and new, independent regulatory agencies for telecommunications, petroleum and natural gas, and electricity were created.”\(^{72}\)

Following suit with the goals of the 1988 Constitution, Article 1 of Law 8884 states that the statute’s objective is to “set out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.”\(^{73}\) Law 8884’s substantive provisions for the competition policy and procedure are found in Articles 20, 21, and 54. Articles 20 and 21 deal with all types of anticompetitive conduct, other than mergers, while mergers, acquisitions, and the like are addressed in Article 54, which will be my focus of competition law analysis.

While my concentration for this paper is merger control by the BCPS, I would like to address a few points on the Article 20 and 21 concerns about firm conduct because they do have implications for all firms wishing to engage in economic activity in Brazil. First, Article 20 contains some general language providing that, “notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such acts are not achieved, shall be deemed a violation of the economic order.”\(^{74}\)

The effects that Article 20 notes are “(1) to limit, restrain or in any way injure open competition or free enterprise; (2) to control a relevant market of a certain product or service; (3) to increase profits on a discretionary basis; and (4) to abuse one’s market control.”\(^{75}\) Article 20 states that the achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in economic effect.\(^{76}\) Furthermore, “market control” will occur when a company or group of companies has control over a substantial share of a relevant market in a capacity as agent, financier, purchaser, etc. of a product or service.\(^{77}\) This dominant position in the market mentioned above will be presumed when a company or group of companies controls 20% of the relevant market.\(^{78}\) Significantly, this percentage threshold is subject to change by CADE for specific sectors of the economy.

\(^{69}\) Page at 1120
\(^{70}\) Oliveira at 623
\(^{71}\) OECD at 13
\(^{72}\) See Id. at 13-14
\(^{73}\) Brazil Law 8884/94, Article 1 (1994)
\(^{74}\) Brazil Law 8884/94, article 20
\(^{75}\) Id.
\(^{76}\) See Id. at paragraph 1
\(^{77}\) See Id. at paragraph 2
\(^{78}\) See Id. at paragraph 3
Article 21 provides a 24 point, non-exclusive list of acts that are considered unlawful if they produce the effects enumerated in Article 20.\footnote{OECD at 18} The acts listed include horizontal and vertical agreements and unilateral abuses of market power. They are as such deemed to be a violation of the economic order if any Article 20 effects are implicated by the actions. A 2000 OECD report noted two peculiarities about the list of activities in Article 21. First, the formulation was characterized as “somewhat unorthodox” because it does not expressly distinguish between activities relevant to the law’s prohibition of restrictive agreements and those relevant to the abuse of dominance. Secondly, the report notes that some of the enumerated actions are either ambiguously worded, or not traditionally considered to be anticompetitive.\footnote{OECD at 18, (citing 2000 OECD report p.197)} The report also noted that although such provisions created the potential for misapplication, CADE had issued clarifying enforcement guidelines for Articles 20 and 21 that appeared to ‘place competition analysis at CADE within the mainstream’ of conventional antitrust analysis.\footnote{OECD at 18, (citing 2000 OECD report p. 197-8)}

The Ministry of Finance and Ministry of Justice in Brazil believe that “protection of competition is not an end in itself, but a means to create an efficient economy and to preserve the economic welfare of society.”\footnote{Brazilian Ministry of Finance & Ministry of Justice, \textit{Horizontal Merger Guidelines}, note 10} An efficient economy allows consumers the greatest variety of products at the lowest prices possible and enjoyment of a maximized level of economic welfare.\footnote{Id.}

\textbf{Implementation of Merger Control}

The provisions of Article 54 of Law 8884 outline the requirements and process for merger review in Brazil’s Competition Policy System. Article 54 states that, “any acts 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.”\footnote{Brazil Law 8884/94, Article 54} The language of this article suggests that mergers are not the exclusive reviewable transaction under Article 54. The law states that “any act” meeting the description outlined will be submitted to CADE for review. “In August of 2001, the SDE and the SEAE jointly issued Horizontal Merger Guidelines that confirm the applicability of Article 54 to ‘any transactions that may limit or otherwise harm free competition, or result in the domination of relevant goods and services markets, such as horizontal agreements among competitors.'”\footnote{OECD at 27} Article 1 of Law 8884 established a “rule of reason” as the fundamental principle in the control of mergers.\footnote{Horizontal Merger Guidelines at note 2}

Paragraph 1 of Article 54 provides that a transaction that is submitted for review may be approved if it meets the following four requirements: (1) it is cumulatively or alternatively intended to increase productivity, improve the quality of a product or service, or cause an increased efficiency, as well as foster the technological or economic development; (2) the transaction generates benefits that are equally allocated among transaction participants, as well as consumers, or other end-users; (3) the reviewed transaction does not drive competition out of a substantial portion of the relevant market for a product or service; and (4) only the acts strictly required to attain the objective are performed for that purpose.\footnote{Brazil Law 8884/94, Article 54, paragraph 1}

A look at Article 54 appears to place a burden on the merging parties to show that their transaction is economically beneficial; however, in practice, CADE has intervened only when in concludes that there would be a significant decrease in competition. “Thus, paragraph 1 of
Article 54 is considered to establish an efficiencies defense, to be applied only in the case of mergers that are otherwise deemed anticompetitive.  

The competition law allows merger transactions to be approved if only three of the four above mentioned conditions are met, “whenever such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers or users.” This type of provision is common among many countries approving merger transactions that may otherwise have anticompetitive effects, but are outweighed by an overarching national interest in consummating the transaction. However, there has yet to be a merger approved on this provision.

Paragraph 3 of Article 54 “establishes special notification thresholds for acts that constitute mergers, stating that notification is mandatory for ‘any form of economic concentration’ where the resulting entity ‘accounts for 20% of a relevant market’ or where any of the transaction participants had total turnover in the previous year of BRL 400 million (USD 156 million).” This provision has been amended so that the turnover is measured in terms of turnover in Brazil alone, and not worldwide turnover. Furthermore, as will be discussed in greater detail later, paragraph 4 of Article 54 indicates that notifications of transactions shall be submitted for review in advance or within 15 days of the acts enumerated in the main section of Article 54 for the transaction. This essentially allows for post transaction notification to the BCPS.

Although CADE has not officially adopted them, SEAE and SDE put forth a five step procedure for merger review, the Horizontal Merger Guidelines, in August of 2001. The five step analytical process employs concepts found in similar guidelines published by other countries. The elements of the process include: “(1) defining the relevant product and geographic markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.” CADE uses the process as a non-binding form of guidance on their merger review process and commonly refers to the analytical approach’s points in its formal merger decisions.

Transactions CADE receives notification of under its Article 54 authority may be resolved in one of three possible ways. First, the merger may be approved with no conditions imposed. Second, the transaction may be approved with specific conditions to the approval. And finally, the transaction may be denied. If a merger transaction is denied, paragraph 9 of Article 54 provides CADE with the authority to take action that would essentially undo the transaction and damage that may have already been done to the economic order. To accomplish this, CADE has the power to issue orders requiring “dissolution, spin-off or sale of assets, partial cessation of activities” to “totally or partially revert any action or procedure damaging to the economic order.”

Only one such case of total denial for an asset acquisition exists, the recent Nestle-Garoto case.

“When transactions are approved conditionally, the conditions imposed fall into one of two categories, depending on the statutory provisions invoked.” The first category consists of

88 OECD at 28
89 Brazil Law 8884/94, Article 54, Paragraph 2
90 OECD at 28
91 Quack, Ulrich, Burling, James, et. al., Brazil Adjust merger Notification Thresholds, Antitrust and Competition Update, Wilmer Cutler Pickering Hale and Dorr, LLP, 1 January 31, 2005
92 Brazil Law 8884/94, Article 54, Paragraph 4
93 OECD at 28
94 Id.
95 See Id. at 30
96 Brazil Law 8884/94, Article 54, Paragraph 9
97 OECD at 30
conditions that require one-time acts. For example, a condition requiring the divestiture of assets or the deletion of a non-compete clause from the acquisition contract. These conditions are imposed under CADE’s authority under Article 54. The second set of conditions, imposed under Article 58, consists of conditions that mandate continuing but time-limited acts. An example of this kind of condition would be requiring the company to acquire a license or mandate a relocation program for terminated employees. Article 58 empowers CADE to require that one or more parties to the transaction comply with a temporary conduct restriction or requirement, called “performance requirements.”

Another way to classify the conditions imposed by CADE in approving mergers is to identify the condition as either a “structural” condition, or an “ancillary” condition. A structural condition is one requiring the divestiture of an asset while the ancillary conditions include all other conditions imposed by CADE. The ancillary conditions include most performance commitments, as well as provisions requiring modification or elimination of non-compete clauses in the transaction agreements. Conditions to transactions have only been imposed on about 3% of mergers between 1998 and 2004, and only about .25% of mergers have required structural conditions be met. Most transactions are approved without conditions, about 97%.

Examples of recent Merger control by CADE
1. Structural example: AmBev case requiring divestiture of one beer brand and 5 breweries.

   In 2004, Brazil decided that a performance commitment was necessary from the transfer by Pepsico to AmBev subsidiary Companhia Brasileira de Bebidas of assets and licenses for the production and distribution of the isotonic drink “Gatorade.” CADE required AmBev to divest of the trademark for its existing isotonic drink “Marathon.” Moreover, to ensure that Marathon could survive in the market, thus maintaining competition for Gatorade, AmBev was required to offer the trademark acquirer an option to purchase the Marathon production assets, and an option to utilize AmBev’s distribution network for Marathon over a six month period.


   Nordisk was a major exporter of insulin to Brazil; Biobras was a Brazilian pharmaceutical company and was the sole domestic insulin manufacturer. Nordisk was to structure the transaction so as to spin off the Biobras insulin production assets to Biommm, a newly-created company. CADE approved the transaction, but barred a contract provision specifying that Biommm could not export insulin to Brazil from its foreign production facilities for three years. Many of the ancillary conditions are imposed in cases where a covenant not to compete exists in the transaction documents that would bar activity for a number of years.

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98 Id.
99 Id.
100 See Id. at 31
101 Id.
102 See Id. at note 29
103 See Id. at 32
104 See Id. at 30-31
105 See Id. at 32
106 Id.
3. Application Denial: Nestle-Garoto proposed merger

In February 2004, CADE took the first decision in its history to totally disapprove an asset acquisition merger when it rejected Nestle Brazil’s acquisition of Chocolates Garoto. A threshold issue was whether general chocolates was the correct market for the authorities to consider for competition policy implementation. A majority of CADE voted to block the merger and determined that Nestle should sell off Chocolates Garoto to a competitor with a less than twenty per cent share of the relevant market. Nestle appealed to CADE, and when they were again denied, they instituted an action in the courts for judicial review in 2005. CADE had decided to deny the application because in their view, “the econometric studies demonstrated a high cross-elasticity of demand among the various market segments for chocolates and the different brands, which concluded with a finding that the relevant market was the general chocolate market in Brazil” as opposed to segments of that market suggested by Nestle.

Under CADE’s 1998 Resolution No. 15, respondents in a merger case may seek reconsideration of the Council’s decision by showing that the decision was based on factual errors or that new facts material to the decision have arisen. Between 2000 and 2004, CADE considered 13 total reconsideration applications; CADE granted six in total or in part, denied five on the merits, and rejected two as unfounded.

Article 55 provides that these approvals may be reviewed by CADE ex officio or at the request of the SDE, and may be revoked “in the event of default on obligations by the parties, or if the intended benefits have not been attained.” However, no revocation cases have yet arisen.

Notification

As noted in Article 54 paragraph 4, notification need not be filed in advance of the transaction, but rather “no later than fifteen business days after the occurrence” of the transaction. CADE Resolution No. 15 specifies the “trigger date” that commences this fifteen day period as when either, (1) “the first binding document is signed” by the parties, or (2) when there occurs a modification in the competition relations between the requesting parties or between at least one of them and a third agent.” This post-transaction notification requirement poses some substantial problems for CADE. If an approval is not granted, the process for dealing with the unwinding of the transaction becomes very difficult because the anticompetitive effects of the transaction have likely begun to occur at some level immediately upon consummation of the transaction.

The difficulty of unwinding transactions has led CADE to use the Article 83 provision that applies Brazil’s Code of Civil Procedure and related statutes to BCPS proceedings and CADE may therefore impose an injunction according to the standards applicable to temporary relief under Brazilian law. Article 2 of CADE’s Resolution No. 28, adopted in August 2002, allows for a “precautionary order” to be granted under civil law either by CADE or by the reporting Commissioner, with ratification by the Council (Article 7). Again, this precautionary

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107 Id.
108 See Id. at 34
109 Id.
110 Id.
111 Brazil Law 8884/94, Article 55
112 OECD at 35
113 See Id. at 36
114 CADE Resolution No. 15, Article 2 (1998)
115 OECD at 37
116 CADE Resolution No. 28 Art 2 (2002)
order may be issued either *ex officio* or in response to a request by SEAE, SDE, the CADE Attorney General, or by “any third party interested in the concentration act under review.”

CADE Resolution No. 28 provides a procedure by which the merging parties are given a five day notice of the impending preventive order that will be imposed on them and are given an opportunity to present arguments to CADE to oppose the preventive order. Article 8 of Resolution No. 28 also provides a second mechanism to accomplish the same result as a precautionary order. Termed the “Agreement to Preserve Reversibility of Transaction”, or APRO, it reflects an agreement the merging parties have made with CADE. Between 2002 and 2004, one precautionary order was filed and nine APROs were adopted. “Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company’s freedom to integrate activities; close stores or plants; dismiss workers; terminate brands or product lines; alter marketing, investment, or research plans; or liquidate assets. Both preventive orders and APROs include provisions that specify daily fines for failure to comply with the restrictions imposed.”

**Notification and Review Process in Sum**

The notification process begins with the filing of notification documents with the SDE. Upon receiving the notification, the SDE immediately supplies copies to the SEAE and CADE for review as well. The SEAE, under Article 54, is required to opine on merger transactions and is required to provide the SDE, within 30 days, a technical report on the transaction. The SDE then provides a recommendation to CADE within 30 days of receiving the technical report from the SEAE. When the recommendation is made, all case files are sent to CADE, which evaluates the recommendation and is statutorily required to render a decision within 60 days. Neither the recommendations of the SEAE, nor those of SDE, are binding on CADE. Furthermore, CADE is to make an impartial adjudication of contested cases.

“For most cases transmitted to CADE since January 2004, the two agencies (SEAE and SDE) have formulated a single joint recommendation.” CADE will normally approve transactions for which SEAE and SDE both recommend approval; and in cases where conditions are recommended, CADE will often alter the terms of the conditions, but usually only after the merging parties offer proposed modifications by the time the case gets to CADE.

While there are no implications if the SDE or SEAE fail to meet their 30 day deadlines, should CADE fail to meet its 60 day deadline, the merger is “deemed to be automatically approved” according to Article 54 paragraph 7. While the maximum statutory allowance period for review can be up to 120 days, all three agencies have the authority to issue one or more requests for additional information from the merging parties. In such cases, the period for review is suspended from the time of the request until the information is submitted.

CADE Resolution No. 15 introduced a “two stage” process for merger review that involved an initial notification form that was a simplified and shortened form than its predecessor. A second form (the second stage) that required substantially more information was designed for issuance to merging parties if the Reporting Commissioner deemed that a supplementary investigation was necessary. In practice, the second form is rarely required for

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117 OECD at 37
118 CADE Resolution No. 28 Art 4 (2002)
119 OECD at 37
120 Id.
121 OECD at 38
122 Brazil Law 8884, Article 54, Paragraph 6
123 OECD at 38
124 See Id. at note 38
125 Id.
126 Brazil Law 8884/94, Article 54, Paragraph 8
127 OECD at 39
approval of the transaction. Furthermore, if a transaction is sufficiently complex to require the second form, the SDE and the SEAE will prepare questions addressed specially to the transaction under review.\(^\text{128}\)

Beginning in 2002, the SDE and SEAE developed a streamlined process on an informal basis for simple cases where each agency would prepare a short form report within 15 days instead of the statutorily allowed 30 days. The agencies formalized this procedure in their “Joint Ordinance No. 1, thereby establishing the “Fast Track Procedure” applicable to the following list of transactions:

(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,
(5) 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.\(^\text{129}\)

In January 2004, the SDE and SEAE implemented their “Joint Procedure for Merger Review.” “Under the procedure, the agencies begin reviewing a notification immediately upon its receipt and send a joint recommendation to CADE. This avoids the inherent delay in referring a case to SEAE, waiting for them to take 30 days to review before SDE gets to work.\(^\text{130}\) The two agencies note that about 60% of merger filings qualify for the “Fast Track” analysis and that they normally get these cases to CADE within 30 days.”\(^\text{131}\) As of the 2005 OECD report, this procedure has cut the merger review process from about six months down to roughly 86 days.\(^\text{132}\)

CADE has also begun to implement some of their own fast track procedures to help expedite the merger review process for those notifications that SDE and SEAE have put on the “Fast Track.” All cases that come from the SDE and SEAE “Fast Track” procedure “precede all others on CADE’s decision docket.”\(^\text{133}\) “CADE has also continued the practice of adopting as its own the report issued by SDE and SEAE, rather than preparing a separate decision.”\(^\text{134}\)

**Appeals and Judicial Review**

Administrative appeals against CADE’s decisions are submitted to the same panel of commissioners, since it is a one-tier agency within the Brazilian public administration. Consequently, decisions are rarely changed in the administrative sphere, unless evidence of a new fact or document that could result in a more favorable decision comes to light.\(^\text{135}\) The parties always have the right to go to court because the Brazilian Constitution provides for the judicial review of administrative acts. However, “if the capacity of the courts to go over procedural

\(^{128}\) Id.
\(^{129}\) OECD at 39 (citing the Joint Ordinance No. 1 (2003))
\(^{130}\) OECD at 39
\(^{131}\) See Id. at 39-40
\(^{132}\) OECD at 40
\(^{133}\) Id.
\(^{134}\) Id.
\(^{135}\) Regazzini, Jose and Calliari, Marcelo, Brazil, Getting the Deal Through, Merger Control 2007, 4 (2007)
aspects is unlimited, the extent to which they can review the merits of CADE decisions remains unclear and will only be decided by the judiciary itself as more appeals reach the higher courts in the next few years.\textsuperscript{136} The trend seems to be that most CADE decisions that are substantively adverse to the parties will be challenged in the courts.\textsuperscript{137}

Given that judicial review in Brazil begins with a court of first instance and develops on successive appeals up to the Supreme Court, a final judicial decision on an administrative act may take several years to occur. However, an injunction suspending the effects of CADE’s decision may be obtained in a few weeks.\textsuperscript{138} This is important for the parties, in that if the appealing parties do not get an injunction suspending a CADE order immediately, they will have to comply with it first and then wait for years until a final judicial decision is issued. The number of court challenges to CADE decisions is still “quite limited, but at least in some high-profile cases, parties were able to secure an injunction suspending a divestment order until the end of the judicial review.”\textsuperscript{139}

Proposed Amendments to the Merger Review Process

On September 1, 2005, the Brazilian President sent a draft bill to the Brazilian congress proposing to restructure the Brazilian Competition Policy System by changing important aspects of Law 8884.\textsuperscript{140} The idea was to remedy some of the main problems of the current system. These problems include: (1) the existence of two bodies (SDE and SEAE) that conduct investigations for a decision to be rendered by the administrative tribunal (CADE), which creates redundancy; (2) the extremely broad thresholds for merger and acquisition filings; (3) the judgment of each and every case by CADE, jeopardizing the focus on complex cases; and (4) the ineffective examination of merger and acquisition filings, which impedes the allocation of scarce resources to the investigation of anticompetitive practices.\textsuperscript{141}

This draft bill proposes changes such as the creation of a pre-merger notification system with thresholds designed to capture only those transactions with the ability to effectively create concerns to the Brazilian authorities. The draft bill also proposes to eliminate the mandatory analysis of case by all three agencies (SDE, SEAE, and CADE) by making SDE a department under CADE that would also be composed of an Administrative Tribunal, the Economic Studies Department, and the Attorney General’s office. Furthermore, the bill proposes to allow a four year, nonrenewable term for the commissioners of CADE and creates a federalization of economic crimes, allowing for expediting leniency agreements.\textsuperscript{142}

V. Review of Procedure and Guidelines for a Hypothetical Acquisition of a Brazilian Firm

Consider the following hypothetical acquisition of a Brazilian Airline:

“American Airline Firm “America Air” is in takeover negotiations with a middle market Brazilian firm, “Brazil Charter”, traded on the Brazilian stock market, to acquire 100% of the stock of Brazil Charter at a premium. In

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} See Id. at 4-5
\textsuperscript{139} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
consideration, America Air will be offering a combination of stock and cash to the shareholders of Brazil Charter.

Brazil Charter is a specialized airline focusing on chartering jets for high net worth individuals and institutions in the countries of Latin America and is based in Sao Paulo, Brazil. America Air hopes to gain access to these high net worth clients and also access to the emerging markets within Latin America through this acquisition. Brazil Charter is a middle market corporation in the industry with annual revenue of almost BRL$400 million, but enjoys a relatively large market share in the relevant industry at about 22%.

America Air is a large Airline corporation headquartered in New York, NY with locations mainly in the US and Europe. The hope is to acquire the middle market firm, Brazil Charter, to open up access to the emerging markets in Brazil and others in Central and South America.

America Air would like to offer its stock in the acquisition to the shareholders of Brazil Charter with cash incentives for the deal which provide a premium of roughly 25%. American Air would give what comes to as 1.2 shares of its stock to Brazil Charter shareholders for each share of Brazil Charter they own, with cash. The deal is valued at about $3 billion. American Air has also requested that American law govern the documentation and transaction. Thus far, the negotiations have gone smoothly, but no final documentation has been endorsed. The two airlines are set to sign initial documents in the upcoming week. If all parties agree to the terms, the final stages should be rounded off by the end of the year.”

**Brazilian Review of the Transaction under Competition Policy**

Certain threshold conditions must be met regarding a potential transaction before CADE requires notification of the transaction. The conditions relate to any transaction related to economic concentration, whether through merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or where any of the parties to the transaction has posted an annual gross income of over BRL$400 million on its latest balance sheet. 143 Until January of 2005, the turnover threshold of BRL$400 million applied to either party with turnover that great throughout the entire world. In January 2005, CADE changed this to require notification only if the turnover of either party to a transaction exceeded BRL$400 million with in Brazil. 144

The change in this threshold requirement now forces the 20% requirement to play a larger role to determine if notification is required because under the old worldwide turnover threshold, virtually every multinational corporation acquiring a target company that had even the smallest bit of activity in Brazil, would subject the transaction to notification requirements. Thus, the 20% threshold test for market share was rarely a factor. 145 Accordingly, these thresholds are subject to change only by modification of the law and relate to the pre and post merger market share and gross revenue in the previous fiscal year. 146

According to the hypothetical transaction, the target corporation is in fact located in Brazil and thus, the transaction will naturally fall within the aggressive jurisdictional reach of the Brazilian Competition and Antitrust authorities. More generally however, “without prejudice to any agreements and treaties to which Brazil is a party”, the antitrust laws of Brazil apply to all

143 Merger Notifications and Procedures Template: Brazil, 4 (2002)
144 Quack at 1
145 Id.
146 Merger Notifications and Procedures Template: Brazil, 4
transactions wholly or partially performed in Brazil, or the “effects of which are or may be suffered therein.”  

Therefore, “foreign companies that operate or have a branch, agency, subsidiary, office, establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory.”

As the hypothetical is a transaction where the acquirer is a foreign corporation acquiring a domestic Brazilian corporation, there will be no special waiting periods, and the same notification requirements exist whether a foreign or domestic acquirer is involved in the transaction. However, while all the requirements for notification and information required are the same for foreign and domestic transactions, whenever any of the binding documents are in a language other than Portuguese, here most likely English, such documents must be submitted along with their respective translation. Accordingly, the parties may request additional time from the authorities to submit these certified translations. Also, any signatures on the binding documents executed in a foreign jurisdiction must be notarized in that country and must be certified by the Brazilian Consulate of that country.

Once it is determined, as will be the case with the hypothetical, that the transaction does have an effect in Brazil, notification is required, and notification must be submitted before or within 15 days of the “occurrence of the transaction”, the parties must submit certain documentation with the notification to the Brazilian antitrust authorities. This “occurrence of the transaction” has been interpreted by CADE to refer to the execution of the first binding document among the parties, unless the parties stop behaving as competitors among themselves or in relation to any third party.

CADE Resolution No. 15, Annex I, Item III describes the documentation to accompany the notification must include certified copies of the binding transaction documents and certified copies of the last annual report prepared for the shareholders. The parties must also present a list of members of the executive board of the group that also integrate boards of other firms in the same markets as the parties; as well as any agreement that includes rules in any way related to the administration of the merging parties, such as the Shareholder’s Agreements. CADE Resolution No. 15, Annex II, Item III indicates that the Brazilian authorities may also require “supplementary documents such as analysis, reports and market studies prepared by the parties as well as the financial statements of the three most recent years.”

Consultation prior to review
Should the parties chose, they may formally consult with CADE prior to notification of the transaction. Pursuant to Normative Act Resolution No. 18/1998, a form, Annex 1 of Normative Act Resolution No. 18/1998 must be filled out and formally presented to CADE.

Filing Fees
The law makes no distinction between parties to a deal, so that all (including the seller) are responsible for filing (one filing per deal only), and any of them can be punished for non-compliance. There is a flat filing fee of BRL$45,000 (about US$22,500).

147 See Id. at 5
148 Id.
149 See Id. at 7
150 See Id. at 9
151 See Id. at 7
152 CADE Resolution No. 15, Article 2
153 Merger Notification and Procedures Template at 8
154 Id.
155 See Id. at 8-9
156 CADE Resolution No.18 (1998)
157 Regazzini at 2
Once Notification has been submitted

Once the notification (three copies) of the transactions has been submitted to the competition authorities in Brazil, the SEAE at the Ministry of Finance has 30 days to prepare its economic analysis and issue its recommendations. The SDE subsequently initiates its analysis, also with a deadline of 30 days for recommendations.158 As noted, neither of these authorities’ recommendations is binding on the CADE who receives the recommendations and then has 60 days from the date of receipt to issue a final decision. Recently, this timeline has been altered. In January of 2004, the SEAE and the SDE instituted a joint procedure for merger review where they both begin to review the notification and documentation upon receipt eliminating the need for the SDE to wait 30 days for the SEAE economic analysis.

Expedited Review for Certain Transactions

In February of 2003, SEAE and SDE issued Joint Ordinance No. 1/2003 where the two competition authorities introduced a simplified procedure for the review of certain categories of mergers which clearly do not represent a threat to the competition policy of Brazil.159 This “fast-track” review for mergers with no competitive risks represented another major step in the Brazilian development of simplified merger review process for their emerging economy.

According to the Joint Ordinance, the “fast-track” review process is adopted at the discretion of the SEAE and the SDE, but allows the SEAE and the SDE to return to the full, regular proceedings at any time as they feel necessary.160 Furthermore, SDE has employed a new “expedited” review track for transactions with only a minimal nexus to the Brazilian economy.161 CADE will be able to “request at the decision stage”, that the SEAE and the SDE apply the full analysis should CADE believe the transaction deserves a detailed review.162

Early in 2005, a batch of merger reform legislation was proposed in Brazil that would eliminate the multiple agency involvement, impose strict review deadlines, and formally reform Brazil into a pre-closing merger notification jurisdiction, meaning that the parties could not complete the transaction until the review process in Brazil was complete.163 This change to a pre-closing merger notification jurisdiction has the potential to seriously derail transaction completion in the Brazilian jurisdiction because it has been so difficult for the authorities to abide by the current 120 day review period.164

Consideration if Brazilian Target is publicly traded

In the hypothetical transaction, we have another issue not previously discussed. Here, we have an open market stock purchase to gain control of the Brazilian corporation. Paragraph 10 of Article 54 of the Brazilian Antitrust law notes that in addition to the aforementioned requirements, any change in the stock control of publicly-held companies and registration of mergers “shall be reported to SDE by the Securities Commission- CVM and by the Brazilian Commercial Registry Department of the Ministry of Industry, Trade and Tourism- DNRC/MICT within five (5) business days for review. The issues addressed regarding this reporting are not discussed in this analysis except to recognize the obligation to report such situations.165

158 Merger Notification and Procedures Template at 9
159 Joint Ordinance No.1 (2003)
160 Id.
161 Quack at 2
162 Merger Notification and Procedures Template at 7
163 Quack at 2
164 Quack at 2
165 Merger Notification and Procedures Template at 10
Sanctions and Penalties

Should parties to a transaction fail to comply with the deadline requirements for notification, penalties may be assessed from between BRL$63,846 up to BRL$6,384,600 (US$31,638 up to 3,163,825). Furthermore, the parties to a transaction are each jointly and severally liable for the failures in the notification. However, it is of note that Brazil does have some case law suggesting that if one of the parties did not provide its respective information over time, they may be exclusively liable for that part of the notification failure.

Should the agreement be approved by the Brazilian Competition authorities, the parties will once again be required to submit the final agreement to CADE to verify that it matches the original pre-merger notification filed with CADE.\textsuperscript{166}

American Review of the Transaction generally

The Antitrust Division of the Department of Justice enforces the Sherman Antitrust Act and, together with the Federal Trade Commission (FTC), the Clayton Act.\textsuperscript{167} To block a merger, the Department of Justice must commence an action in the American courts whereas the FTC decisions are from an Administrative Law Judge (ALJ). Decisions in favor of the FTC by the ALJ may be appealed to the full commission and then to a federal appeals court.\textsuperscript{168} While individual states have specific interests in certain merger transactions, the national government, though the DOJ and the FTC, dominate the antitrust arena in the US.

For example, the Sherman Antitrust Act § 2 states:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”\textsuperscript{169}

Section 2 of the Sherman Act, as it is originally written originally prohibited transactions “made with a view or with the end to prevent full and free competition…, or which tend to advance the cost to the consumer.”\textsuperscript{170} This original language was replaced by the common law language against “contract…in restraint of trade” and firms that “monopolize, or attempt to monopolize…trade.”\textsuperscript{171}

“Although the Sherman Act is regarded as the ‘father’ of competition policy in the United States, Section 7 of the Clayton Act is the principle statute regulating mergers.”\textsuperscript{172} Section 7 prohibits mergers and acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such transaction may be substantially to lessen competition, or to tend to create a monopoly.”\textsuperscript{173} Combining these two statutes and developed economic reform and regulation over the last 90 years has created a politically sustainable consumer-oriented merger policy in the United States.

\textsuperscript{166} See Id. at 15
\textsuperscript{167} Bagchi, Aditi, The Political Economy of Merger Regulation, 53 Am. J. Comp. L. 1, 19 (2005
\textsuperscript{168} See Id. at 20
\textsuperscript{169} 15 U.S.C. §2 (1890)
\textsuperscript{170} Bagchi at 20
\textsuperscript{171} Id.
\textsuperscript{172} See Id. at 22
\textsuperscript{173} See Id. at 22-23 (citing 15 U.S.C. §18 (1914)
VI. Conclusion

Given the inherently volatile nature of emerging markets, Brazil’s competition policy system attempts to assure investors and acquirers of Brazilian institutions that the economy is healthy, stable, and continues to grow and offer the return that has attracted increased investment for years. Brazil has become a powerhouse on the global scale and has been able to demonstrate its financial stability and success in providing meaningful regulation to promote fair and efficient markets.

The implication for Brazil with the foreign investment and acquisitions in Brazil is that there must be efficient regulation to ensure a competitive economic environment for consumers and institutions within Brazil. The Brazilian Competition Policy System is the backbone of the efficient regulation of these needs. While change occurs constantly to make the BCPS more efficient and developed in the constantly changing world economy, the justifications of the competition policies and regulations modeled after much of their American counterparts will continue to engage firms in Brazil with foreign investors and a view toward expansion of global business for such a vital and expansive region.

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