

The Recent Evolution of Competition Policy in Brazil: An Incomplete Transition¹

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I) Introduction

This article emphasizes some aspects of the transition in competition policy law and its application in Brazil in the nineties. We use Khemani and Dutz's (1992) classification about the three Schools of thought in competition policy: Structuralist, Statist and Chicago.

The main issue is that the country is coming from a period in which competition policy was based on the Statist School and progressively it is becoming a hybrid model between the Chicago and Structuralist Schools. In the second section, we briefly describe the Schools and their influence over competition policy in the USA, Japan, Korea and Brazil. In section three, the main aspect of the transition related to the Structuralist School will be presented, that is, the control of mergers by CADE (Conselho Administrativo de Defesa Econômica)³.

The principal problem in the transition is the maintenance of a strong influence of the Statist School in competition policy making. This will be seen in sections IV and V, which deals, respectively, with the instrument of "Compromisso de Desempenho" (Performance Commitment-PC) in merger control, and the treatment given to abusive prices in the law.

The sixth section will evaluate one of the most striking problems of the transition, which is the lack of a strong action of CADE towards reducing or simply eliminating *government failures*⁴. We also argue for a more active role of CADE in the deregulation process, and as the advocate of liberalizing reforms in the public sector. The seventh section evaluates the relationship between trade liberalization and competition policy. Although trade

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³ Administrative Council of Economic Defense. CADE is the competition policy agency in Brazil, similar to Federal Trade Commission in USA.

⁴ There is some confusion over this terminology. We will use *government failures* to designate economic policies that hurt competition in a given market.

liberalization does not imply the obsolescence of the enforcement of competition policy law, the opposite is also clearly inadequate. In other words, the competition policy agency must take in consideration trade liberalization in it's analysis. As will be seen from CADE's jurisprudence related to geographical relevant markets, there is little attention, in practice, to trade liberalization. Section VIII will be reserved for conclusions.

II) Competition Policy in Brazil and the Three Schools of Thought

There are several targets attributed to competition laws in different periods over the various countries. These targets will be more or less limited, depending on the policy makers view of the role of competition in national development, and the scope of state intervention.

The easiest way to evaluate and compare competition laws and policies around the world is to make some classification of the ways of thinking this subject. In this context, we think that the classification proposed by Khemani and Dutz over three schools of thought in competition matters can be very useful for our purposes. They are the Structuralist⁵, the Statist or Industrial Policy and The Chicago schools. The first one takes a competitive environment in the economy and a strong intervention of the state to keep or strengthen competition as fundamental issues.

The Chicago School shares the view of the Structuralist School about the importance of competition. However, the Chicago School, as usual, is very skeptical about state intervention in this area.

The Statist School does not believe that a competitive environment is very important for development. As a consequence, the State should not interfere to protect or strengthen competition in the country⁶. It is quite surprising that the Statist School converges to Chicago's view, when the subject is competition policy prescription. According to Franceschini and Pereira (1996), "the real difference between the two Schools, apparently antagonist, is just ideological, related to the definition of the role of the state in economics". Otherwise, the contradiction between these two Schools is critical in matters related to the role of the state in industrial fostering.

The Structuralist School, on the contrary, gives a high priority to competition policy not just for conduct regulation but also for the control of market structure by the competition agency. In fact, this statement is based on the most traditional issue in the literature on industrial organization: the

⁵ It is important to note that the term "structuralist school" here is used in a different sense from the concept of structuralism used by CEPAL in Latin America.

⁶ These similarities between the Chicago and Statist Schools is very well decribed by Franceschini and Pereira (1996).

structure-conduct-performance model. According to Viscusi (1995), “the hypothesized linkage among these three concepts is that the structure (number of sellers, ease of entry, etc.) of a market explains or determines to a large degree the conduct (pricing policy, advertising etc.) of the participants in the market, and the performance (efficiency, technical progress) of the market is simply an evaluation of the results of the conduct “⁷.

Table I makes a comparison among the three Schools, following Khemani and Dutz’s classification:

Table I
Competition Policy in the Three Schools

Issues	Structuralist School	Chicago School	Statist or Industrial Policy School
Competition Importance	High	High	Low
State Intervention through Competition Policy	High	Low	None
Correlation - Market Structure and Conducts	Strong	Weak	Not a relevant problem
Barriers to Entry	Erected by concentrated structures	Erected, mainly, by government failures	Not a relevant problem
Competition Policy Scope	Strong intervention in market structure	Minimalist, avoiding excessive intervention, restraining to fight cartels and to eliminate barriers to entry erected by government	Minimalist, because such a policy may damage the competitiveness of national enterprises, given that it reduces economies of scale
Main targets of state intervention	Market deconcentration and income distribution improvement	Microeconomic efficiency	Competitiveness with an active government “picking the winners” and improving scale gains
Evaluation about the positive relation between concentration and profitability	Indicative of monopolist practices	Higher Performance of concentrated enterprises in particular sectors	Higher Performance of concentrated enterprises in all industrial sectors
Price intervention	Not a relevant matter	None	Strong

⁷ See Salgado also (1996).

Source: Khemani and Dutz and mine.

Although the authors do not propose any classification of countries in terms of the influence of the Schools in legal framework and practice, we think this procedure may be useful.

Korea and Japan, for instance, undertook policies very close to the Statist School. It becomes clear when we observe that one of the main benefits given by the Japanese government through MITI to “target-sectors”, was the exemption of antitrust legislation⁸. However, despite the closeness of Asian economic policies to the Statist School, competition policy was not irrelevant in practice. According to Khemani and Dutz, “strong government policies have supplied the discipline imposed by market forces”, in that “conglomerates must compete for government subsidies, for access to credit, and for foreign exchange”. So, despite Statist School influence, Asian countries paid strong attention to competition, and that made all the difference from the Brazilian Statist model of the past.

In fact, the legal framework and economic policy in Brazil from the seventies until the beginning of the nineties, as in Asian countries, were very close to the Statist School, but in a “pure” way, i.e., without any drive related to competition fostering, as had the Asians. In other words, the Asian model followed industrial policies close to Statist model, but using competition concerns as crucial parameters for state intervention out of the market.

In the past, the Brazilian government did not make any relevant repressive action against anticompetitive conducts nor any policy toward structure control. On the contrary, Salgado (1995) argues that “concentrated, differentiated, blended or fragmented, the oligopolies belonging to the Brazilian structure, had strong help from the state. Even barriers to entry, such as scale and access to technology, were - directly or not - erected by the State’s hand.” So the State, besides avoiding action against concentrated structures, fostered the concentration process and even the maintenance of high degrees of concentration, when it created barriers to entry, through regulations and “pick-the-winners” policies (as did Asian countries).

The statistics on state repressive action against anti-competitive conduct speak for themselves. According to Farina (1990), “from 1963 to 1990, CADE took care of about 337 processes, 117 of which were considered valid, it being that only 16 were condemned. Those 16 processes were all suspended by the judiciary branch after judicial resources from the enterprises accused”.

It is interesting to observe that despite North American economic policy being very close to the Chicago School, it’s competition policy model

⁸ See Guimarães et alii (1995). According to Salgado(1995), Japanese antitrust legislation only began to work in 1977.

can be described as a hybrid between that one and the Structuralist School. The main aspect of American experience related to the Structuralist view is merger control, made, nowadays, through the Federal Trade Commission - FTC and the Department of Justice - DOJ⁹.

Otherwise, USA antitrust policy has focused on efficiency targets, which are, according to table I, an issue close to the Chicago School¹⁰. Anyway, it is important to keep in mind that, as a general rule, American economic policy in the last twenty years had been increasingly close to the Chicago School, and this clearly restrained the work of the FTC and DOJ, which can be taken as a “Structuralist island” in the public policy of that country.

In the nineties, Brazilian and Asian antitrust policies became closer to the American hybrid model. However, we argue that in Brazil there remain some undesirable traces of the Statist School in antitrust policy making and even in the legal framework. In this sense, we argue that it is important for the country to complete the transition and consolidate a hybrid model that strengthens positive aspects of both the Structuralist and Chicago Schools. Far from exhausting all the characteristics of the “incomplete transition”, we will focus on four crucial points, which we believe, show the more acute problems of competition policy in the country: A) The Brazilian merger control system, focusing on the way that CADE has used the so-called “Performance Commitments (PCs)”¹¹; B) Competition policy and price control in Brazil; C) The link between competition policy and liberalizing reforms and D) The link between competition policy analysis and trade liberalization. The next section presents the legal evolution of merger control in Brazil.

⁹ In the USA, the judiciary branch has a strong role in antitrust policy and is not very close to the Chicago ideas.

¹⁰ Lande (1996) points an interesting issue of Sherman Act history related to its targets. According to the author, despite the popular interpretation of Bork that the Sherman Act focused on efficiency and, therefore, would be close to the Chicago School in this respect, the historical evidence of the congressmen’s intentions at the time indicate that the income distribution target, close to the structuralists, was a major issue. Being valid this interpretation, the influence of the Structuralist School in American competition policy would be even greater. Recent American competition policy reveals that the influence of the schools vary a lot, especially in relation to the targets. Salgado (1996) emphasizes that the strong weight given to the Chicago School in the Reagan administration is being changed by an increasingly role of the distributive issues in the Clinton administration. This seems a revival of some Structuralist School concerns in antitrust policies. Thus, the american hybrid model varies a lot in relation to the school’s weight in antitrust law application.

¹¹ Article 58 of Law 8.884/94.

III) Merger Control in Brazil

The change in the Brazilian antitrust model from a Statist model to a hybrid one, with a strong weight on Structuralist tradition, is very clear when we observe the legal evolution of merger control in the country. Law 4.137 from 1962, that created CADE, stated that “control was not applicable to mergers and other transactions between enterprises which caused change of shareholder’s control”. But the main feature is that the Brazilian government would never allow CADE to block mergers. This was perfectly consistent with the Brazilian Statist model of that time.

The evolution began only in the nineties, when the Brazilian government made strong changes to law 4.137/62 through law 8.158 from 1991 (today it has already been changed by law 8.884 from 1994). Differently from the earlier legal framework, law 8.158/91 is explicit on the need of merger control. The law stated that “any agreements that can limit or reduce competition, including mergers, whose consequence be a market share higher than 20% in the relevant market” must be approved. However, the evaluation of mergers would be done by the “Secretaria Nacional de Direito Econômico” - “Economic Law Department of the Justice Ministry” (today it is called Secretaria de Direito Econômico-SDE)¹², which is not independent like CADE.

Law 8.884/94 changed merger control from the SDE to CADE, and strengthened the independence of this last one. President, commissioners and the attorney of CADE would enjoy fixed mandates, signaling a new mindset in public policy toward structure control close to the Structuralist School.

Even in relation to anticompetitive conduct repression, law 8.884/94 emphasizes structure control. While law 4.137/62 did not establish any structural penalty, law 8.158/91 already stated that CADE could recommend divestiture to punish anticompetitive conducts. Law 8.884/94 strengthens the power of CADE to intervene in structure, punishing anticompetitive conducts. Article 24 of the law states that one of the possible punishments imposed by CADE for anticompetitive conducts is an order to divest assets or to quit some of the economic activities of the company. However, this kind of punishment has not been applied yet¹³.

On the other hand, it is very important to take care in controlling structure in Brazil, specially considering the poor tradition of the country in this area. The reference to concentration indices like the HHI¹⁴ to define

¹² SNDE was created in 1990 as an investigative body, separating this function from the judgment one worked by CADE. Before 1990, there was no such separation.

¹³ Even the fees applied since the approval of the new law have been few and very modest.

¹⁴ Herfindhal Hirschman Index.

damages to competition as used by FTC and DOJ¹⁵ must be very parsimonious when it is applied to Brazil's reality. CADE's president stated this very clearly in the judgment of the Kolynos/Colgate merger in 1996:

"We must not overestimate concentration indexes in the antitrust decision process given that:

- despite the existence of a strong correlation between degree of concentration and above normal profit margins, the modern theory of industrial organization and empirical evidence do not confirm the hypothesis of a simple causal relationship between those indicators;
- the Brazilian industrial structure has some particular aspects due to the nature of the import substitution process that marked the growth dynamic in almost all of this century and due to its smaller size relative to the American economy, for which the FTC and DOJ classification is applied¹⁶..
- the Brazilian economy is passing through a strong productive revolution due to the adjustment of companies to trade liberalization and price stability through deep structural changes in great part of the relevant sectors for antitrust analysis."

These special characteristics of Brazilian economy can be challenged by competition authorities in three ways:

- First, nowadays, a lot of mergers in Brazil can be seen as part of a process of efficiency search by local companies to gain competitiveness in front of foreign competitors. It means that efficiencies may be, on average, more emphasized in Brazil than in USA, in terms of offsetting concentration increase derived from a merger;
- Second, it is important to review HHI intervals as defined in American Merger Guidelines of FTC and DOJ to evaluate potential anticompetitive effects in the Brazilian reality;
- Third, the geographical relevant market can be more frequently defined with scope greater than the national territory than in USA. It is important to remind that concentration indices are always defined in a geographical relevant market. We will focus this matter in the seventh section.

Thus, in average, the Structuralist content of the Brazilian hybrid model of antitrust policy can be relaxed relatively to the parameters used in American experience.

Beyond these problems, we must point out a distortion. CADE has focused its work, since 1994, more on mergers than on anticompetitive

¹⁵ See DOJ-FTC Guidelines(1992) and Viscusi (1995).

¹⁶ Brazilian GDP is about 10% of American.

conducts, which is not consistent with the international trend according to Farina (1994). This can be seen by the low level of anticompetitive conducts judged relative to the stock of such cases at CADE in 1996: It reached 23%, compared to the same statistic for mergers of 59%. It is not adequate that the time spent by CADE's staff on merger control impair the work on anticompetitive conducts. In passing, this last task should be taken as the most important work of CADE, specially to improve its educational function for society on competition affairs. Anyway, the solution for matters related to the sluggishness of case analysis depends on a strong program of technical improvement of CADE, which involves a higher amount of budgetary resources from the federal government.

The next section studies the institute of the "Performance Commitment" (PC) and the Schools' influences (positive or negative) on it.

IV) Performance Commitments in Brazil and the Transition of Brazilian Antitrust Model

Brazil, like several other countries, has intermediate solutions for mergers that can cause damages to competition, besides the simple blocking of the whole transaction. These interventions are typical of a competition policy close to a Structuralist approach. The USA makes intermediate solutions through the restructuring of the transaction, which are generally called "Consent-Orders", including divestiture of assets, technology licensing, trademark transactions and so on¹⁷.

According to Boner (1992), the advantages of those solutions happen specially "in transactions involving multiproduct companies where the reviewing agency's antitrust concerns arise out of a discrete overlap or set of overlaps that can be eliminated by partial divestiture."

In Brazil, the so-called "Performance Commitment" (PC)¹⁸, regulated by article 58 of law 8.884/94, is similar to the American "Consent Order".

A remarkable difference between these two institutes is that the Consent Order focuses on structural commitments targeting the elimination or reduction of competitive damages of the transaction, while the PC has wider scope in its clauses, which is a strong indication (almost always negative, as

¹⁷ According to the DOJ's manual, "while partial divestiture is the most common remedy, the agencies have demonstrated an increased willingness to entertain alternative remedies such as licensing of intellectual property to create or enhance a competitor and, in unusual cases, even "conduct" relief (permitting the acquisition to go forward conditional on certain changes in the parties' ongoing operations)".

¹⁸ A synthetic table of the PCs already made by CADE is in Appendix I.

we will argue) of the remaining strong influence of the Statist School in Brazilian policy making¹⁹. The PC's clauses can be of two types:

- a) structural, involving divestiture, selling of assets, technology licensing, equipment leasing etc... This kind of clause is similar to that used in American Consent Order.
- b) behavioral, aiming to compensate, through efficiency gains or conduct restrictions, the damages on competition. This kind of clause has a strong content based on the Statist model, which we consider inadequate for the new Brazilian economic environment.

Based on Brazilian experience after 1994, we suggest to dividing behavioral clauses in three types:

- i) technical efficiency guarantees, such as productivity increases, quality and technological improvements and investment increases, when they represent a positive net return to the company, improving the profit maximization of the entrepreneur (See article 54 of law 8.884/94).

These are based on the assumption that the company's benefit will increase social welfare as well. This kind of target is linked to the Chicago School. However, it is clear that the Chicago School would be very skeptical about any kind of state intervention through a PC to reach these improvements;

- ii) non-technical or social efficiencies guarantees, involving some distribution of the benefits of the merger to society, specially to consumers (See article 54). These efficiencies are not targeted to improve the company's profit maximization, but social welfare, at least in the short run. Several commitments linked to this kind of efficiency have been demanded by CADE: lower prices or some kind of price control, production and employment increases (article 58 of law 8.884/94), maintenance of trade-marks, financing of social programs, quality and technological improvement, investment increases, when they result in a net negative return to the company;
- iii) conduct commitments, which involve a previous promise of the company to avoid some conducts considered anticompetitive in that sector or to implement some pro-competitive actions. One important example of this kind of clause is observed in the Gerdau/Pains merger process, where CADE demanded a guarantee of input supply to some agents²⁰, or in the Rockwell-Albarus merger where CADE forbid the concession of

¹⁹ There is a debate among the experts if the "performance commitments" include or not structural commitments. In practice, CADE is using "Performance Commitment" on a broader sense, which we will follow.

²⁰ See Appendix 1.

privileges that would not be extended to competitors. The “conduct commitment” clause is close to that used in another legal tool of law 8.884/94 named “Compromisso de Cessação de Prática” (article 53 of law 8.884/94)²¹, which is focused in anticompetitive conduct control. This last one is similar to the Consent Decree in the USA, where it is becoming increasingly frequent with a strong emphasis on non-discrimination clauses.

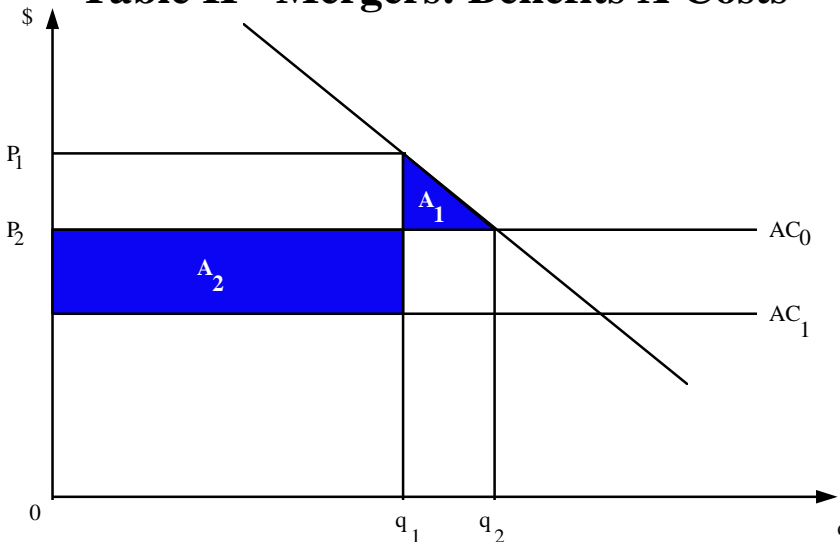
Thus, behavioral clauses do not search to reduce or even eliminate the causes of damages to competition, as in the case of structural clauses. The conduct commitment tries to compensate damages to competition, but without dealing with the primary causes linked to structural change in the market. But the first two kinds of clauses (technical and non-technical) neither reduce the cause of competition damage nor its consequences. They only try to compensate competition damages by efficiencies guarantees in the context of the “rule of reason”²².

Just to elucidate the principle used in technical efficiencies clauses, we use the graphical example of Viscusi in table II, showing benefits and costs of a horizontal merger: “The horizontal line Aco represents the level of average costs of two firms before combining and Ac1 shows the average costs after merger. Before merger, the degree of competition is sufficient to force price down to Aco. After merger, costs fall and market power is created-which leads to price increasing from Po to P1. The merger results in a deadweight loss in consumers surplus equal to the shaded triangle A1. However, there is a gain to society because the cost savings, given by the shaded rectangle A2”. The idea behind a technical efficiency clause in a behavioral PC is that CADE would wish to be safe that the decrease of AC0 to AC1 will be enough such that rectangle area of A2 is greater than A1²³.

²¹ See Mallard (1995) for a better understanding of the “Compromisso de Cessação de Práticas”. See Mattos (1996) for a critical approach.

²² The “rule of reason” is the opposite of “per se” rules. According to Salgado (1995), while this last one represents an “absolute prohibition for certain kind of behaviour”, in the “rule of reason”, “the competition agency or courts will observe the trade-off between benefits and costs” of the practice or merger. For an overview of the use of this concepts for American antitrust policy, see Pittman (1996).

²³ Williansom (1968) introduces this explanation with more rigour. An interesting conclusion is that small decreases of costs will, normally, be enough to counteract great price increases, even with a high demand elasticity.

Table II - Mergers: Benefits X Costs

An useful division of behavioral PC clauses of technical efficiencies, according to its motivations, can demonstrate the lack of practical sense in establishing obligations for the company targeting profit maximization improvements. So, technical efficiencies can be:

A) introduced by the company as intrinsic to the transaction, but without certainty of CADE about its truth. In other words there is asymmetric information of CADE relative to the company. The company states that such efficiencies are a logical consequence of the transaction, and CADE, since it does not know if this is true, put them as an obligation of the company in the PC²⁴. However, observe that if the company is, in fact, lying or stating without being sure, these clauses will result in inefficient outcomes for the company, weakening the main reason for their inclusion in the PC: profit maximization.

B) introduced by the company as intrinsic to the transaction with CADE being sure that this is really true. In other words, there is symmetric information of CADE relative to the company. However, there would be no reason for the inclusion of such efficiencies in the PC, *ceteris paribus*, since the profit maximization behavior hypothesis would warrant that the same would be done, independent of its inclusion as an obligation in the PC. The

²⁴ The incentive for the company to increase alleged efficiencies is to reduce the rigour of CADE's analysis.

sole reason to insert this kind of clause in a PC would be the breaking-up of profit maximization hypothesis, based on the presumption of the likelihood of X-inefficiency after merger, caused by damages to competition. Viscusi puts it well: “The pressures of competition force perfect competitors to be cost minimizers, whereas the freedom from competition makes it possible for the monopolist to be inefficient, or X-inefficient. That is, the monopolist may operate at a point above its theoretical cost curve”. In other words even if the company presents good faith in terms of the alleged efficiency, damages to competition will induce the company to work inefficiently, off of its profit maximizing equilibrium. However, even in this case, these clauses may be looked on with some reservations:

- the hypothesis of symmetric information by CADE seems implausible²⁵;
- if the transaction is likely to create technical inefficiencies caused by damages to competition, the best procedure is to use structural clauses in place of behavioral ones in the PC.

C) Not introduced by the company, but CADE thinks that the inclusion of such clauses must improve company efficiency, increasing its profit. The sole reason for the inclusion of such efficiencies in the PC would be the presumption that CADE knows more about the company than itself does, which we think, as a practical matter, should be disregarded.

Thus, it becomes clear that the reasons behind insertion of behavioral clauses related to technical efficiencies in the PC, given lack or presumption of superior information or likelihood of x-inefficiency are, in fact, fragile. It can be taken as undesirable vestiges of the typical interventionist approach of the Statist School. It must be used only in exceptional circumstances, when there is a lack of potential buyers in the case of structural clauses involving divestiture, for example.

In behavioral clauses relating to social efficiencies, the lack of any relationship between those with profit maximization leads to the conclusion that they are not intrinsic to the transaction. In other words, as there do not exist profit motives, the rational entrepreneur will never work for them by his own. Thus, social or non-technical efficiencies focus on social return against private one, when these are not coincident. Social efficiencies can be:

²⁵ Schymura emphasizes how hard is for an antitrust agency to evaluate efficiencies size of an operation and its asymmetric information relative to the company. However, the author concludes favorably about the approach proposed by Brodley in two stages: In the first one, the agency elaborates a list of efficiencies that the company must perform in a given term and, in the second stage, the agency must evaluate the fulfillment of those efficiencies. As we argued in this section, CADE already does it in practice, which we consider inappropriate by the reasons exposed.

a) linked to economic decisions of the company, such as investments, quality improvements, production and employment increases, price decreases or control, export performance, trade-mark maintenance. These clauses can both improve consumer welfare and/or improve government policies (inflation control, unemployment decrease, trade balance improvement, etc. The most typical social clauses in CADE experience with PCs are related to price and production targeting, and aim to reduce or even eliminate the deadweight loss resulting from the merger, as we have already seen in rectangle area A1 from Table II.

Theoretically, an optimum price regulation can eliminate the deadweight-loss resulting from monopoly power, as long as this control does not exceed the limit of the competitive equilibrium²⁶. However, this control means, many times, a strong restriction on a company's behavior that can distort resource allocation. More than that, we can say that it is the antithesis of present economic policy in Brazil. It is important to remember that experience has already demonstrated that this kind of clause is very hard to implement in practice, given lack of information by the competition policy agency and by the unavoidable political intervention involved in any bureaucratic control of variables like prices and production. Up to now, there are a total of 7 PCs presented in Appendix I which involve some kind of price clauses, which is remindful of the interventionist-minded time of price control through CIP.

The cases in which some kind of price control by CADE may be accepted are very few, as we will see in the next section. However, it is important to consider that the inclusion of some social efficiencies in the PCs seem to be unavoidable in some cases, just to make it possible to approve certain mergers that, clearly, create enough technical efficiencies. The problem is legislation rigidity. Observe from the area of rectangle A2 in table II, that technical efficiencies are completely appropriated by the entrepreneur. On the other hand, the consumer loses part of his surplus represented by A1, lower than A2. In this case, law 8.884/94 states in article 54 that CADE can only authorize mergers that hurt competition when they fulfill requirements of both technical and social efficiencies. In other words, even if A2 is higher than A1, law 8.884/94 considers the merger undesirable, given that the consumer lost A1. Given this restriction in the law, it is certainly desirable to establish social efficiencies in order to approve the merger.

Anyhow, there are some curious examples of social clauses in the PCs such as in the Helio/Carbex merger, where CADE ordered the

²⁶ For more details see Pyndyck & Rubinfeld (1991) Chapter 10. The optimum price control should already check for the existence of increasing returns, which is not consistent with competitive equilibrium.

maintenance of the production of some goods that were on a technological obsolescence path. Even the Statist School would not take such a measure against technological improvement.

Other examples of PC clauses lacking economic sense are the order for trade-mark maintenance in Melita/Jovita and Santista/Carfepe mergers, or the employment warrant established in Oriento/Ajinomoto PC. In the first case, it is clearly better to leave to the entrepreneur the choice about the maintenance of some trade-mark in the market. If it remains profitable to keep a trade-mark, it is not necessary to include this obligation in the PC.

It is curious that the PC of Oriento-Ajinomoto, at the same time that it orders cost reductions, obliges the company to keep the same employment level as before merger. It is clearly an example of target contradiction.

Thus, as in the clauses of technical efficiencies, those social efficiencies related to economic decisions of the company have strong Statist model contents, which make no sense in the present moment of Brazilian economic reality. It is important to bear in mind that we don't argue against efficiencies by itself, which, of course, are positive, but only against its inclusion in a PC monitored by CADE. This body takes the risk of perform some functions of the old CDI (Industrial Development Council)²⁷ if CADE's demands of technical efficiencies and social efficiencies related to economic decisions of the company remain a common practice²⁸. We can still add to those problems the low ability of CADE to perform fiscalization requirements of those clauses, which is a problem that is really happening and is implying a fall in credibility of the PC as a tool of the brazilian competition policy and of CADE itself.

b) not linked to economic decisions of the company (or, alternatively, that don't affect resource allocation of the company), such as pollution control, dismissed personnel retraining, etc....

In this case, consequences of *government failures* are lower, since they do not damage either allocative or productive efficiencies of the company. Additionally, they can improve competition aspects, as is the case in one of the points of Gerdau's decision and one of the Kolynos/Colgate PC

²⁷ As Franco and Fritsch (1994) state "in many industries the key source of regulation as regards the expansion of productive capacity and "adequate" levels of minimum domestic content was the project evaluation activity carried out by the Industrial Development Council (CDI) which was created in 1969 and closed in 1988".

²⁸ In this sense, we agree with Schymura (1997) about the growing importance of efficiencies in antitrust analysis, but we disagree in respect of the proposal of the author to include it in PCs.

clauses, which were retraining of dismissed personnel. This kind of social efficiency can:

- i) correct a negative externality of sectoral unemployment caused by company restructuring;
- ii) enlarge the labor market supply side flexibility;
- iii) create a series of self-owned businesses, improving competition in those areas. Another interesting example was the clause of dental education investments in the Kolynos/Colgate PC²⁹.

Thus, there are two promising kinds of behavioral clauses in CADE's analysis for inclusion in a PC:

1. Conduct clauses;
2. Social efficiencies not linked to economical decisions of the companies.

But even these two must be used parsimoniously, avoiding excessive damages to the companies.

In proceeding, it is important to analyze statistics about PCs clauses, consistent with our proposed classification³⁰. Observe the strong weight of behavioral clauses of technical efficiencies and social efficiencies involving economic decisions of the companies, a strong evidence of the Statist School influence in the PCs. This is true not only of the quantity of PCs but also for the average number of clauses of each kind in the PCs in table III.

Table III
Performance Commitments Clauses in CADE

Performance Commitments Clauses in CADE			Quantity of PCs	Average Number of Clauses
Structurals			5	1,4
Behaviorals	Technical Efficiencies		15	2,8
	Social Efficiencies	Linked to Economical Decisions of Companies	15	3,9
		Non-Linked to Economical Decisions of Companies	4	1,7
	Conduct		7	1,6

Source: CADE. Author's elaboration.

²⁹ Observe that this kind of social efficiency can benefit the company, through a demand increase of lower income groups. Thus, this program, in the limit, could be considered even a technical efficiency PC clause if its net return was positive.

³⁰ Some methodological explanations about technical and social efficiencies will be made in the Appendix I.

Of course, even structural, conduct and social efficiencies not linked to economic decisions clauses are not always consistent with a less Statist influence in merger control. These clauses must be analyzed case by case, which involves research work beyond the scope of this article.

V) Price Control by CADE

One of the aspects of competition policy where CADE should be closer to the Chicago School prescriptions is abusive price control. It is important that CADE introduces an approach completely different from the old CIP and SUNAB approaches in the past. Both were responsible for a strong price control very far from the market direction. This can be taken as one characteristic of the Statist School Model. The control focuses exclusively on the cost structure presented by the companies which means only the supply side of the market, disregarding the demand side.

This kind of intervention had two additional failures:

- information asymmetry between the controlled companies and the government bureaucracy;
- the CIP became, in practice, a coordinator among companies around the price fixed, so it could be seen as a cartel sponsor³¹.

The problem is that this kind of interventionist view influenced strongly:

- i) the competition law 8.884/94;
- ii) the public perception about CADE's role;
- iii) the government expectation about CADE's role³².

This becomes transparent when we observe in table IV that more than half of the judged cases in CADE in 1996 were about abusive price increases, which are a phenomenon typical of an inflationary economy. It is interesting that the majority of the abusive price processes that entered CADE began in the Finance Ministry, which shows that a distorted governmental expectation about CADE is at the root of this problem. Thus, it is important that CADE corrects this wrong image of a price controller such as CIP and SUNAB.

³¹ See Salgado (1995).

³² This aspect of Brazilian transition is explored by Franceschini and Pereira (1996).

Table IV
Frequency of Judged Conducts in CADE in 1996

Conducts	Quantity	%
Abusive Price Increases	31	52,5%
Cartelization	15	25,4%
Price Coordination Made by an Association	2	3,4%
Customer or supplier discrimination	1	1,7%
Price fixing	1	1,7%
Predatory Pricing	1	1,7%
Refusal to Sell	1	1,7%
Tie-in Selling	1	1,7%
Others	6	10,2%

Source: CADE

Another important consequence is the introduction of a new article in Brazilian competition policy law quoting explicitly abusive prices. It is known how hard is, conceptually and in practice, to define abusive prices. According to Pittman in a Brazilian newspaper³³, “abusive price increase is not considered a problem in American antitrust law. However, Brazil is not alone. The majority of countries around the world have laws explicitly quoting punishments to “abusive price increases”, including the European Union. But these laws are not quite used in practice, since it is very hard to know if price increases were, in fact, abusive”.

According to Stevens (1995), it is even harder for the entrepreneur to know himself if he is increasing his prices in an abusive way: “It is also notoriously difficult to establish a satisfactory test as to what constitutes excessive or “abusive” prices; the industrialist is often left confused or finds it impossible to apply the test in practice”.

An alternative to reduce CADE’s image of a “price controller” may be to improve the definition of abusive price control in Law 8.884/94, that fails in three aspects:

- remains focusing only on the supply side, neglecting the demand side.

Similarly to CIP’s time, competition law takes in account to define abusive prices:

- i) cost evolution of the company;
- ii) quality improvement;
- iii) last price of the good, when there is no substantial quality changes;
- iv) prices of similar goods in competitive and comparable markets and;

³³ Newspaper “Folha de São Paulo”.

v) agreements toward price fixing³⁴.

Thus, when there is a sudden increase in demand above supply possibilities of response, the implicit rationing proposal in the law are queues or restricted access to goods for seller's friends!!!

- the concept of abusive prices is not restricted, as it should be, to sectors where there exist market failures derived from lack of information, dominant position and strongly inelastic demand curves. Health care plans, School monthly payments and prices from some infrastructure sectors, have a high frequency of those failures³⁵;
- contestability of the particular market.

If law 8.884/94 included these reservations in the definition of abusive prices, there would be no need for CADE's intervention in the majority of conducts related to prices.

Thus, Brazilian law still distrusts two basic roles of the price system in capitalist economies:

- to establish rationing rules in cases of supply or demand shocks;
- to help, as quick as possible, price convergence to equilibrium after shocks³⁶.

This kind of problem derives from the specific historical moment of the law's edition. According to Oliveira (1996), law 8.884/94 was strongly influenced by the need to build an adequate institutional environment as a background to Real Plan. In other words, the Real Plan policy makers were much more looking for an accessory tool for the stabilization plan than for a new model of competition policy for the long run³⁷. It is important to note that in an inflationary process such as Brazilian economy was suffering until the first semester of 1994, abusive price increases were intrinsic to economy working, since price system lost its informational content and signaling role. So inflation created market failures over all the economy, not being restricted to specific sectors. Thus, it was logical that the focus of government policy

³⁴ Observe that this is not a necessary provision, given that the conduct of price fixing jointly with the competitor is already mentioned in inciso I of article 21.

³⁵ Health and education market failures can be corrected, in the long run, more by the public expenditures in those areas than by price controls. However, it demands the acceleration of constitutional reforms such as social security and public administration.

³⁶ It is out of the scope of this article to discuss the notion of price equilibrium and its problems.

³⁷ Stevens (1995) goes beyond: "Inclusion of abusive prices in the legislation is therefor viewed by many as part of of the government's attempt to control inflation and the main reason for the implementation of the new antitrust law".

through CIP and SUNAB was in price control and that this kind of view still influences CADE's working.

In a stabilized economy, there are always other anticompetitive practices at the root of abusive prices, and CADE should act strictly on them. In other words, CADE must move the focus from the consequences of abuses (which was almost unavoidable in an inflationary environment) to its primary causes.

We hope that CADE's image as price controller will vanish after the consolidation of two processes:

i) price stabilization;

ii) the dissemination of competition culture in Brazilian society³⁸, with economic agents recognizing anticompetitive practices which are at the root of abusive price increases. Such a process demands continuous learning by economic agents and a growing consensus about what is an anticompetitive practice.

Anyway, CADE's trend has been, as in other countries where legal framework has explicit clauses about abusive price increases, to not punish this kind of conduct. In fact, this is a positive feature of CADE's work. In 1996, there were 22 cases in CADE which the council considered anticompetitive, but none of them was related to abusive price increases, despite the great frequency of this kind of charge. The three conducts observed in those 22 processes were price coordination through an organization, Cartelization and trading restraints for customers. It is important to note that the three kinds of conducts caused abusive prices increases as a by-product. However, the main difference was that price increases were not taken as a cause, but as a consequence of another conduct.

VI) CADE and the Liberalizing Reforms

Probably, the most important contribution of the Chicago School in the competition policy debate is its diagnosis about the main cause of barriers to entry in an economy: *government failures* based on excessive regulations.

Thus, Boner indicates that "competition agencies have played significant roles in regulatory policy making and have tended to support deregulation in reforming economies". According to Pittman (1996) "a good competition law and strong enforcement are important, even vital components of a policy of economic liberalization". The lack of a good competition law, as Pittman states, will have as a result that "customers will not enjoy the full

³⁸ Nowadays, the spreading of a culture of competition is one of the main goals of CADE.

benefits of other liberalizing policies, as firms collude to raise prices, merge to remove competition, or take monopolist actions to destroy competitors, all without government interference”.

Therefore, competition agency policies should have a strong interconnection with deregulation policies. Boner goes beyond, stating that “raising competition advocacy from an advisory to a law enforcement function..... helps ensure that reforms are not weakened by subsequent regulatory action at the regional or lower levels of government”³⁹. In other words, since there is always a trend for revival of regulation, even in other forms, it is important to strengthen the links between CADE and the general strategy of deregulation, which involves putting government actions under the scrutiny of competition law⁴⁰. World Bank and OECD pointed out that an important task of a competition agency may be focused in “the elimination of regulation in markets where it is unnecessary, and where it is necessary (because natural monopolies exist), the agency can urge a form of regulation that is the least restrictive and fosters the maximum possible competitors”.

The Brazilian deregulation process that happened between 1990 and 1992 was very wide in scope and successful, but there are still many sectors where it could go through, as labor market, insurance, transportation, etc...⁴¹. Since 1992, the deregulation program, despite being formally in operation, has stopped. The deregulation program should go on and the important synergy that should exist between CADE’s policies and deregulation ones should be improved. Besides, in practice, CADE’s prerogatives over government actions are not clear.

The Brazilian Constitution is clear that any government acts that damage competition should be analyzed by CADE, as stated by Salomão (1996). Law 8.884/94 seconds the Constitution on this issue:

³⁹ According to the summary of World Bank- OECD to a recent conference of Competition Policy in Buenos Aires, “The term “competition advocacy” refers to the ability of the competition office to provide advice, influence and participate in government economic policy formulation and decision-making, promoting more competitive industry structures and firm behaviours. It is a function that needs to be strengthened and formally embodied in a competition law. Competition offices should be able to “proactively” foster competition by lowering barriers to entry, promoting deregulation and trade liberalization. A competition advocacy function will also tend to foster greater accountability and transparency in government economic decision making and give rise to sound economic management and business principles in both the public and private sectors”.

⁴⁰ See Oliveira (1996).

⁴¹ See Rodrigues (1994) and Portugal (1992).

“Art 15. This Law applies to citizens and public and private law entities.....”

“Art 7º CADE’s plenary is responsible for:

X) asking the executive branches in all levels (Federal, State and Municipalities) to undertake the measures to fulfill this law requirements”.

However, despite that the strengthening of the links of CADE with government policies is a high priority of CADE, the legal framework described above is being neglected and we identify three reasons for that:

- The division of investigative functions, which are done by SDE, from judgment ones, made by CADE;
- The lack of willingness of the executive branch in being evaluated by an independent body;
- There are some members of CADE that are following a very cautious interpretation of the legal framework related to this issue. An example of this line of thought can be found in the view recently expressed by one of CADE’s commissioners⁴²:

“.....in the repressive action of government actions against competition, there is a role for CADE, but a limited one. However, CADE cannot restrain any government actions or their similar”. According to the same commissioner “it is not practical nor judiciously possible that CADE goes beyond recommending and asking for the government to take measures to fulfill the law”.

This approach clearly limits the scope of competition agency action in relation to Boner’s analysis, damaging what would be one of the most prominent roles of CADE in Brazil. It is important to note that despite the fact that many competition laws around the world provide authority to the competition agency to attack government actions that harm competition, every government and competition authority with such a law seems to be in the same position as Brazil: there is an extreme hesitancy in using this power, for fear that the result would be an embarrassment or the ignoring of the competition authorities and thus a weakening of their power⁴³.

The Federal Trade Commission, and the Justice Department in USA and, increasingly, the bureau of competition in Canada are exceptions to this standard. According to the World Bank and OECD “through analytical

⁴² See Fonseca (1996).

⁴³ I am indebted to Mr. Russel Pittman from American Justice Department for providing this important information, besides others, in the text.

studies, public statements, formal submissions, participation in legislative committees and regulatory proceedings, both the Antitrust Division of the Department of Justice and the FTC have often acted as catalysts for competition oriented regulatory reforms and policy changes. The Canadian Competition Act includes a specific provision whereby the head of the Bureau of Competition (the Director of Investigation and Research) has the statutory right to intervene and make representations before parliamentary commissions, federal tribunals and regulatory agencies where competition in the provision of goods and services may be affected”.

Thus, it is important to discuss the way that CADE should treat government actions, defining its scope. This demands the consolidation of CADE’s own jurisprudence about government actions and a greater political support⁴⁴.

VII) Trade Liberalization and Competition Policy: A Conceptual Challenge for CADE

According to Khemani & Dutz (1992), trade liberalization does not mean the obsolescence of competition policy. In Brazil, this was a striking debate in the recent past, and the government almost changed the law to diminish CADE’s powers, especially those related to merger control. As it was argued by some Brazilian antitrust analysts at that time, it would not be consistent with worldwide trends in competition policy nor with the present reality of the Brazilian economy. The thesis of CADE’s continuing usefulness was only accepted by the government after an acute period of crisis for CADE. Summing up Khemani & Dutz’s arguments about the role of competition policy agencies in open economies, we have the following:

Table V
The Role of Competition Policy in an Open Economy

1.	In a flexible exchange rate macro-model, if local companies fail to rationalize its production, a current account arises and exchange rate will devalue, imcreasing protection against imports.
2.	Non-Tradables Sector Growth in the Economy. This includes goods with high transportation costs such as cement and iron and perishable goods as food. In some cases transportation costs plus international prices (plus taxes, port costs etc..) will be greater than the monopoly equilibrium of the market. Thus, lack of domestic competition will result in domestic prices at monopoly situation with all it’s inefficiencies.

⁴⁴ According to Boner, “without political support, no competition agency can guide economic reform”. The same author adds that “if economic reforms enjoy political support, competition advocacy can ensure that the actions of all levels of government are consistent with the chosen reforms”.

3.	Global cartels can share geographical markets. In markets concentrated worldwide such as pharmaceuticals, petrochemicals and telecommunications equipment, this is very common.
4.	Differences in income, tastes, culture, safety, consumer protection and technological patterns can split domestic markets from international ones.
5.	Quotes, Exports voluntary restraints, antidumping rights and safeguards may reduce import contestability. It is important to note that in the process of reducing tariffs, political pressures for this kind of protectionism increase. According to the authors, antidumping laws approved by GATT were not structured to promote competition, but to foster protectionism. It is necessary to substitute competition laws for anti-dumping provisions. Anyway, the competition policy agency must avoid that anti-dumping provisions restrain competition excessively.
6.	A competition law reduces barriers to free trade and to investment. In a world where transnational companies operate under competition laws in several countries, the lack or a bad performance of the competition law can erect a barrier to trade and investment. When domestic companies begin to adapt to competitive culture, it becomes easier to participate in international markets.

Source: Khemani & Dutz.

Taking as solved, at least temporarily, the debate about the necessity of competition policy in Brazil, it is very important to avoid the other extreme: Neglecting trade liberalization's impact on antitrust analysis. What we will point out is that CADE, in practice, does not consider trade liberalization effects in its analysis, especially those involving mergers⁴⁵.

This can be seen by the high percentage of geographical relevant markets which are being considered strictly on a national scope, neglecting international competitors. It is important to remember that relevant market concepts are crucial⁴⁶ to define the scope of competition matters on an operation. In this context, operations involving tradable goods with low barriers to entry in the country should have a relevant geographic market greater than the national territory and even worldwide. This implies that the increase in concentration degree strictly in the national market in such cases may not hurt competition, given that trade liberalization will allow the contestability of domestic markets by imports. If that operation does not have a substantial impact in market concentration in international grounds, competition concerns should be minimal.

In the case of CADE, there is still a strong resistance to consider worldwide relevant market in its analysis, which implies neglecting positive effects of foreign competition. CADE's statistics are very clear: In the 51 mergers judged by CADE since law's change in June 1994 until the midst of

⁴⁵ The debate in 1995 in Brazil about usefulness (or uselessness) of merger control in an open economy can be seen in Possas (1996), Del Chiaro (1996) Fagundes (1996) and Simonsen (1995).

⁴⁶ See Guidelines-FTC-DOJ (1992).

may 1997, there is no one geographical market defined beyond national frontiers.

In several cases, the justification found to neglect the international market is a low import coefficient. However, this approach does not take in account that:

- even a low import coefficient does not imply that a “small but significative and non transitory domestic price increase” of a good ⁴⁷ will not have a strong response from imports. In other words, the price-elasticity of imports may be high, despite low import values until that moment. The American Merger Guidelines (AMG) is very clear that, both, actual and potential competitors may be included in the relevant market. According to AMG “the agency’s identification of firms that participate in the relevant market begins with all firms that currently produces or sell in the relevant market”. In other words, the method proposed by AMG only begins with actual competitors. Then, the AMG goes on: “In addition, the agency will identify other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses”. Thus, AMG includes potential competitors in relevant market definition (with supply response lesser than one year). It is obvious that this view does not necessarily include goods with a low degree of import supply in that moment. What is important is the credibility represented by the threat of competition coming from imports;
- the process of trade liberalization is still in course; the Brazilian economy only recently can be considered relatively open. In several cases, there is a lag in import response for the new parameters of an open economy. Since there are a lot of cases in CADE analyzed with data before 1994, there are still a lot of adjustments to occur, which seems to be confirmed by the aggregate import growth recently: Import values grew 31%, 50,7% and 7% in 1994, 95 and 96, respectively;
- sometimes a low import coefficient results from the fact that the barrier to entry to produce the good locally is so small for the foreign firm that, beyond a very small quantity of sales, it is more advantageous to install a local factory than to import. It is important to note that this constitutes a medium-long run movement that will establish a new equilibrium situation in that sector. It does not hurt the general conclusion that in the short-run, the reaction of the foreign firm to an increase in domestic prices will be to export to the country, so that the geographical relevant market should be defined as worldwide. By the way, it is recognized as a natural strategy for

⁴⁷ Criteria used in the Guidelines FTC-DOJ (1992).

transnational companies to first “test” the domestic market through exports from their countries until a “break-even-point”, when they begin to invest in a local factory.

Another source of justifications against a market definition beyond National scope or even worldwide is the comparison to antitrust analysis in USA and another countries. We can reply these criticisms by the following arguments:

- The smaller size of the Brazilian economy relative to the American one, turns the role of trade liberalization even greater in relation to domestic markets contestability in Brazil. In other words, for the same sector and the same import tax, there is a much more active role for imports in the Brazilian economy than in the American one. In absolute terms, an import increase toward the USA must be much greater than in Brazil to compensate for the damages of a merger that results in the same degree of concentration in the national market;
- A high concentration level in a sector of the US economy, frequently, corresponds to a high worldwide concentration degree in that same sector, given America’s share of the world’s GDP;
- It is not true that american competition authorities neglect worldwide relevant markets. All computer and automobile cases include foreign suppliers; three recent cartel cases of fax paper, plastic dinner ware and agricultural chemicals⁴⁸ were defined as worldwide market. FTC included Airbus in its market definitions when it analysed Boeing/Mcdonnel Douglas;
- In Europe, there is really a strong tendency toward national relevant market definition by competition authorities as mentioned by World Bank and OECD. However, according the same source, “many european wide markets have already been defined and “the commission has also delineated markets defined” and “the commission has also delineated markets wider than the European Union”. For instance, markets for commuter aircraft and platinum have been defined as worldwide in their geographical scope”.

⁴⁸ Curiously, there was a recent case of a privatization in agricultural chemicals (Ultrafertil/Fosfertil), which can be defined as national market, despite the strong evidences of international influence on domestic prices.

Pittman (1997) confirms this understanding when he states that “on the other hand - and probably more important in transforming economies - the current lack of long distance shipments may not indicate decisively that such shipments will not take place in the future, as transport markets improve and (especially in a merger investigation) if local prices were to rise to an anticompetitive level”.

This low propensity to consider the importance of foreign markets in domestic competition dynamics can also be interpreted in the context of the central thesis of this article: Antitrust analysis in CADE still is restrained by a closed economy mindset, which is one of the problems of the transition from a Statist model to a hybrid model. In this sense, we believe that it is very important for CADE to consolidate its conceptual basis in such a way as to make stronger the influence of trade liberalization in antitrust analysis.

VII) Conclusion

Nowadays, the Brazilian economy is passing through three important process that are crucial to understanding the role of competition policy and CADE in the country:

- deep changes in the manner of state intervention, moving from an interventionist model to a free competition one;
- the consolidation of a stabilization program that established the conditions for the functioning of the price system;
- strong industrial restructuring⁴⁹, due to trade liberalization, privatization and economic deregulation;

In this context, it is fundamental that CADE reinforces and makes feasible the positive aspects of these three processes, focusing on consumer interests;

However, given the long period of strong state intervention and trade protection, competition issues are still not well understood by Brazilian economic agents. Thus, CADE like every Brazilian public agency, suffers from “transition pain” in which a “new mindset” is still being consolidated while the “old mindset” remains strong, but growing weaker.

In this article we have tried to discuss some aspects of the “incomplete transition” of competition policy making in Brazil. The maintenance of Statist School characteristics in CADE’s and government’s policies towards competition damages the relation between CADE and those

⁴⁹ For details of the Brazilian process of industrial restructuring, see Mendonça de Barros & Goldenstein (1996).

three processes quoted above. As Franco (1996) states about the old import substitution model which is strongly linked to the Statist School's characteristics, "nobody denies that the past links between import substitution mechanisms and growth became increasingly ineffective in the 80's".

Finally, CADE needs to complete its transition toward a hybrid model between Structuralism and Chicago, focusing in the four main aspects mentioned in this article: A) review the clauses used in the "performance commitments(PCs)"; B) change the legal framework relating to abusive prices, which would be an important signal to society about the philosophy of CADE; C) define the scope of CADE's role in anticompetitive measures taken by the three levels of government (federal, state and municipalities); D) increase the influence of trade liberalization in CADE's process of analysis.

Appendix I

I) Methodological Notes

It is important to make some methodological observations about the table with the 18 performances commitments signed by CADE up to May 1997:

- i) The Eternit-Brasilit merger was denied by CADE, obliging the companies not to join. The Brazilian legal framework does not consider this kind of measure as a Performance Commitment (PC). However, for our own purposes, we will consider, at the limit, this measure as a structural PC, changing 100% of the operation;
- ii) Gerdau's decision is not, formally, considered a PC, but given the similar features, we will take the items of the decision as such;
- iii) As the reader can observe in the table, where we present PC clauses in greater detail using our classification, there are some clauses defined simultaneously as technical and social efficiencies involving economic decisions from the company, being computed two times. This procedure is used, given that it is very hard to identify, in practice, if clauses demanding quality improvement and investment are targeting profit maximization (technical efficiencies) or social welfare improvement.
- iv) Clauses regarding productivity increase, personnel training for the company and high technology investments commitments are taken exclusively as technical efficiencies⁵⁰;
- v) "Investment" may be understood as capacity investment;

⁵⁰ This does not imply that those efficiencies are not, in fact, social ones. However, it is hard to think about PC clauses of productivity, personnel training and technology not oriented toward profit motive.

II - Performance Commitment Clauses in CADE (Until May 1997)

Mergers	Structurals	Behavioral			
		Technical Efficiencies	Social Efficiencies		Conduct
			Linked to Economic decisions of the company	Not Linked to Economic decisions of the company	
Yolat-Parmalat		-Quality improvement.	-Production level maintenance; -Maintenance of milk C (lower quality and lower price) production share in total production; - Price control; -Investment for broadening the goods produced; -Maintenance of milk C (lower quality and lower price) in the market.	-Pollution Control in the Rivers affected.	-
Norton-Carborundum	-	-Productivity increase; -Quality improvement; -Investment.	-	-	-
Rockwell-Albarus	-	-Investments	-Investments; -Production increase -Price decrease -Domestic market supply; -Export Increases; -Efficiency gains must be shared between "original parts" market and "replacement" market.	-	i)avoid agreements on market-share between the two companies; ii)avoid the concession of privileges for companies share-holders of the two companies.
Melitta-Jovita	-	-Productivity increase; -Quality improvement; -Investment; -Marketing Expenditures Increase;	-Investment; -Marketing Expenditure increases; -Quality improvement; -Production Increase; -Sales Increase; -Transfer of part of the productivity gains to consumers; -Price decrease; -Amplify distribution net; -Exports increase; -Maintenance of trade-mark Jovita in Brazilian market	-	-

			until 2,000.		
Oriento-Ajinomoto	-	-Productivity increase; -New technology Investments; -Investments; -Quality improvement.	-Investments; -Quality improvement; -Employment maintenance; -Transfer part of the benefits of the operation to consumers, targeting price reduction;	-	-Supply Guarantee for domestic market.
Hoechst-Fairway	-	-Investment; -Productivity Increase; -Quality improvement.	-Investment -Quality improvement.	-	-
Verolme - Ishibrás	-	-Productivity Increase; -Personnel Training	-	-	-
Belgo-Dedini	-	-Investments; -Productivity increase; -Quality improvement.	-Investments; -Production Increase; -Supply increase in domestic and external markets; -Transfer part of productivity increase to consumers through price shrinking; -Amplify distribution net; -Quality improvement;	-	-
Helios - Carbex	-	-Investments -High technologies investments; -Productivity increase.	-Investments; -Export Increases; -Maintenance of obsolete goods in the market;	-	-
Electrolux-Oberdofer		-Investments -High Technology Investments; -Quality improvement; -Productivity increase.	-Investment; -Quality improvement; -Transfer part of productivity gains to consumers; -Price Shrinking; -Sales increase for domestic and external markets.	-	-
Santista-Carfepe		-Personnal Training; -P&D Investment for quality improvement.	-Production level maintenance ; -Transfer part of productivity gains to consumer prices; -Maintenance of trade-marks Campo Grande;	-	-Supply guarantee for domestic market;
Ficap - Alcan	-Avoid share-holder control of Caraibas Metais and Caraibas Mineração by FICAP.	-Technology investment; - Investment.	-Production level maintenance ; - Investments;	-	-
Eternit-Brasilit (*)	-Total divestiture	-	-	-	-
Rhodia-Sinasa (*)	-Partial divestiture related to business of some	-	-	-	-

	synthetic fibers.				
Kolynos-Colgate	<ul style="list-style-type: none"> -Temporary Suspension of trade-mark (4 years) for the relevant market of tooth paste (it does not include, therefore, tooth brush, dental rinse, dental floss; and either tooth paste for export); - Colgate should make a public offer to produce for existent or potential competitors. The target was to help develop other trade-marks. 	<ul style="list-style-type: none"> -Investments -Investment in P&D; -Technology development; -Personnal training; -Productivity increase. 	<ul style="list-style-type: none"> - Investments; -Investment in P&D; 	<ul style="list-style-type: none"> -Personnal training toward labor basic skills of the company; - Personnal training for dismissed workers; - Social Investments in educational programs of dental health care. 	<ul style="list-style-type: none"> - Tooth paste import with Kolynos trade-mark is forbidden for Colgate during the suspension period.
Gerdau-Pains (**)	<ul style="list-style-type: none"> -Rebuilding and divestiture of factory unity of Contagem; - Divestiture of Transpains (transportation company of Pains) 	<ul style="list-style-type: none"> -Investment 	<ul style="list-style-type: none"> -Investment 	<ul style="list-style-type: none"> - Personnal training for dismissed workers; - Granting of gains coming from "cooperation fee" contract with Manessmann for a P&D institution without profit ends. 	<ul style="list-style-type: none"> - Supply Guarantee of inputs for the divested factory; - Restraint on the iron distribution of Pains in excess of 20% of total production of the factory of Divinópolis sold to others companies of Gerdau's Group. - Free Access for competitors of technologies developed with Mannesman Demag.
Grace-Crown		<ul style="list-style-type: none"> -Quality improvement; -Technology Investment; -Productivity Increase; -Investment; 	<ul style="list-style-type: none"> -Investment; - Export performance; -Transfer of part of productivity gains to consumers; -Production increase. 	<ul style="list-style-type: none"> - Personnal training for dismissed workers; 	<ul style="list-style-type: none"> -The Company is obliged to submit any price discrimination practices to CADE;
Nitroquímica-Mineração Floral			<ul style="list-style-type: none"> - Investments. 		<ul style="list-style-type: none"> -Supply guarantee of the "Fluorita". - Imports of inputs for the maintenance of quality and supply of "fluorita".

(*) Formally, they are not PC, but complete or partial denial of the merger.

(**) Decision implementation, not being formally taken as a PC.

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