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COMPETITION POLICY AND THE LEGAL SYSTEM IN BRAZIL: THE EXPERIENCE OF THE STEEL INDUSTRY

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Competition Policy and the Legal System in Brazil: the experience of the steel industry

Germano Mendes De Paula*

INTRODUCTION

Brazil used to be a very closed economy regarding international trade. Like many other developing countries, Brazil adopted an import substitution industrialisation (ISI) strategy. In this context, competition policy was somewhat misplaced, for a couple of reasons. First of all, a substantial proportion of large companies were State-Owned. Therefore, the government did not need to control the firms' pricing practices through the use of antitrust policy, since it was in the command (or was supposed to be) of all companies' decisions. Moreover, the most important State-Owned Enterprises (SOEs) were set up in order to mitigate the weakness of the domestic private sector. Rather than put limits on cartelisation or mergers and acquisitions (M&As), the government fostered market domination by a few large SOEs.

However, Brazil in similar fashion to many other Latin American nations at least, experienced a very important shift in terms of political economy in the 1990s. Indeed, the country engaged in an intense trade liberalisation policy. The government also deregulated and privatised companies. In this new environment, a massive wave of M&As occurred, in which multinationals were in the acquiring corner for around 2/3 of all transactions (Amann, De Paula and Ferraz, 2002). As a consequence, the share of the foreign companies in the top 100 non-financial firms in Brazil increased from 26 percent to 40 percent in the period 1990-1998.

The 1990s was definitely a turning point for the Brazilian economy. Since then the government and the corporate sector have faced a very different economic environment. Instead of restricting competition, the government began to encourage it, mainly via trade liberalisation and, to a lesser extent, through antitrust policy. The latter has implied a new

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set of challenges for the Brazilian State. While deregulation required basically the elimination of rules and privatisation demanded asset sales or leasing, the revitalisation of competition policy necessitated a large effort in reorganising, creating and consolidating institutions. In fact, it is a very hard task to invigorate any role of the State, during a time when any form of governmental intervention is under tremendous attack. This duty is even tougher when the bureaucratic team in charge of developing the new guidelines of competition policy was inherited from agencies that used to operate under the 'old regime'. Furthermore, in a country where the education and health systems are very problematical, it is hard to believe that the budget approved to the agencies related to the competition policy would be increased substantially. This consideration stems from the fact that the main results of competition policy are usually only delivered in the medium and long terms.

The main goal of this article is to analyse Brazilian competition policy, since the early-1990s, when the country altered radically the orientation of its political economy. It can be argued that a change from a closed to a more open economy could bring to the fore the role of competition policy. However, using the steel industry as a case study, it will become clear that such a transition is far from simple. Brazil, like other Latin American nations, has a very complex and slow legal system. This issue has been stressed in the corporate governance literature. According to Rabelo and Coutinho (2001, p. 36), the Brazilian judicial system is excessively bureaucratic, slow and expensive. In similar vein, as the legal system permitted a lot of possibilities to postpone decisions, law enforcement in Brazil is very weak. Pinheiro (1998, p. 10) underlines the point that the Judiciary, in Brazil, is a luxury good, restricted to the most affluent sectors of the population.

In order to discuss the improvements and limitations of Brazilian competition policy since the early-1990s, the legal tradition is a key issue to be tackled. The steel industry appears to be an appropriate choice of sector to address this discussion, as it has experienced a strong wave of M&As and three steel companies have received the largest fine for cartelisation ever applied in Brazil.

This paper is divided into five sections, including this brief introduction. The next makes a review of the main characteristics of Brazilian competition policy. The third analyses the M&A issue in the Brazilian steel industry, while the fourth discusses cartelisation in the same sector. The last section summaries the main conclusions.

EVOLUTION OF THE COMPETITION POLICY IN BRAZIL

Regarding industrialisation, Brazil can be considered a late-late-comer country. In such a country, the State, instead of limiting large companies' market power, has tended to encourage firms to achieve the optimum minimum scale. Therefore, at least in the Brazilian case, from the 1930s to the 1980s, industrial policy was oriented to help companies become bigger rather than stimulating competition among them. Moreover, the ISI strategy usually required robust protectionist measures as a way to defend infant industries.

In almost all Latin American countries, the corporate governance patterns differentiated markedly from the Anglo-Saxon paradigm. While in the latter, companies tend to be specialised and based on a pulverised ownership structure, in Latin America, the leading firms are in fact family-owned ones, most of them with a large degree of productive diversification (De Paula, 2003). In other words, Latin American enterprises have preferred to grow by entering new industries, due to the opportunities opened by the ISI, rather then amplifying their market presence in just one business or a small number of correlated businesses. In fact, various Latin American companies adopted a conglomerated diversification strategy. In this sense, it can be argued that different corporate governance patterns influenced the attention paid by the governments to competition policy.

In the particular case of Brazil, it was only in the 1960s that the government began to take competition policy into account. Indeed, the antitrust watchdog *Conselho Administrativo de Defesa Econômica* (CADE) was constituted through Law 4.137, issued in September 1962. This Law regulated the abuses of economic power, such as disloyal competition, abusive speculation, collusion, agreement among competitors, abusive price increases and so on (Considera and Corrêa, 2002, p. 7). CADE began to operate in 1963. The following year, President Goulart's leftist government was terminated by a military *coup d´état.*

Salgado (1995) stresses that the Brazilian antitrust legislation was based on US norms. Nevertheless, in the latter antitrust policy was conceived as a way of preserving a conception of democracy based on the trilogy of individual freedom, privately-owned property and equality of opportunities. In Brazil, on the contrary, antitrust legislation was issued just before the inauguration of a military regime that exercised authoritarian control during the 1964-1984 period.

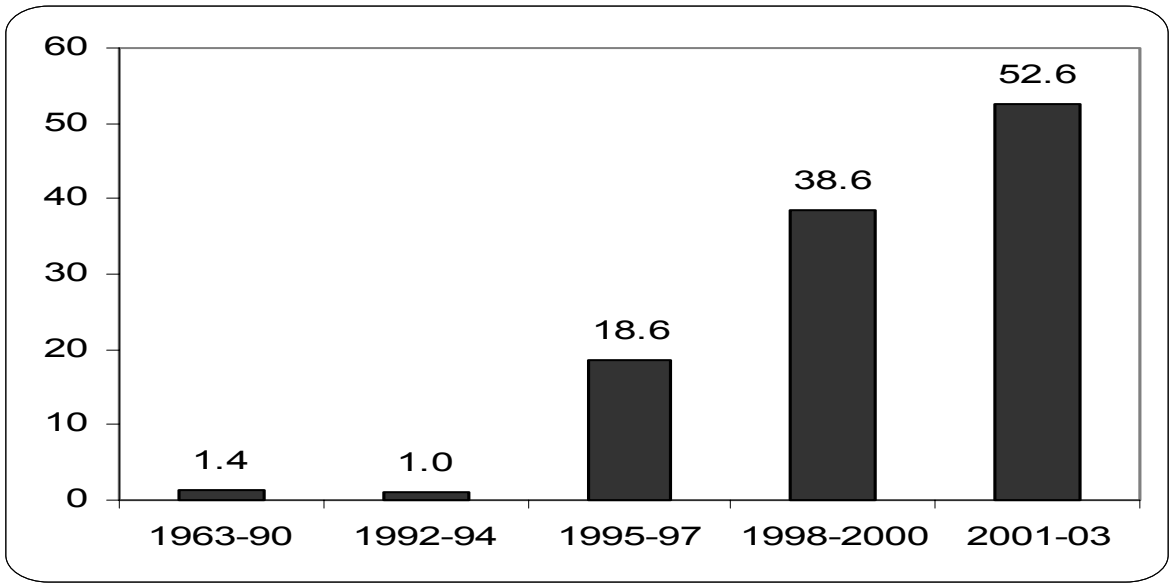
Since the installation of CADE in 1963, competition policy in Brazil can be divided into three phases. The first was observed in the 1963-1990 period. During this stage, competition policy played a minor role in Brazil, if any at all. Indeed, Considera and Correa (2002, pp. 5-6) observe that for a long time there was not much concern for competition and antitrust issues in Brazil. In reality, the State became a monopolist in infrastructure services and in strategic industries, either by creating new SOEs or by nationalising the existing ones in activities such as mining, oil refining, steel, energy and telecommunications.

The State exercised a tremendous control over the Brazilian economy during the 1960s and the following two decades. As mentioned, in many industries, SOEs played a very prominent role. In the steel industry, for instance, the governmental-owned firms were responsible for 70 percent of the country's production. Additionally, as a consequence of increasing inflation, the Brazilian government adopted a price control system in the most important industries. Regarding the experience of steel industry, this system was utilised in the period 1967-1990. In reality, price control served as cartel organiser, because: a) for products already in the market, the policy was aimed at readjusting prices according to cost increases, guaranteeing the stability of the profit margin and, thus, the crystallisation of a certain relative price structure; b) prices tended to be relatively rigid, with each firm maintaining its market share; and c) the government tried to avoid predatory competition (Considera and Correa, 2002, p. 10). It should also be remembered that medium and large projects, even without any public participation, required governmental approval. Due to the fact that Brazil was a closed economy regarding international trade and the State coordinated prices and investments, there simply was not room for competition policy.

Cook (2002) observes that competition policy is distinct from competition law, because the first is influenced by a wide range of policy measures including policies directed towards trade and industry, employment and investment. Privatisation, deregulation, foreign investment policy, regional and international agreements are some of the factors that affect competition policy. Competition law is a subset of competition policy and aims to establish the rules and guidelines governing market power and dominance. In the first phase, although Brazil had a competition law, the reality was that competition policy was quite irrelevant.

The incoherence of Brazilian competition policy during this period with the most important goals pursued by the government naturally impacted – negatively – on CADE's performance. In the first phase, CADE did not examine M&As, being limited just to the analysis of anticompetitive conduct. In particular, the main purpose of competition policy was to defend small and medium-size enterprises (SMEs) from large firms' disloyal competition such as predatory pricing. Nonetheless, CADE could not play this role appropriately. Graph 1 shows that on average CADE analysed just 1.4 cases per month. Furthermore, from 337 accusations, only 117 turned into administrative actions. This means that CADE denied around 2/3 of initial accusations. Considering 117 administrative actions, only 16 companies were fined. Not only were the fines quite small, but they were all suspended by the Judiciary (Farina, 1990; Salgado, 1995).

Graph 1
CADE's Number of Judgements per Month, 1963-2003

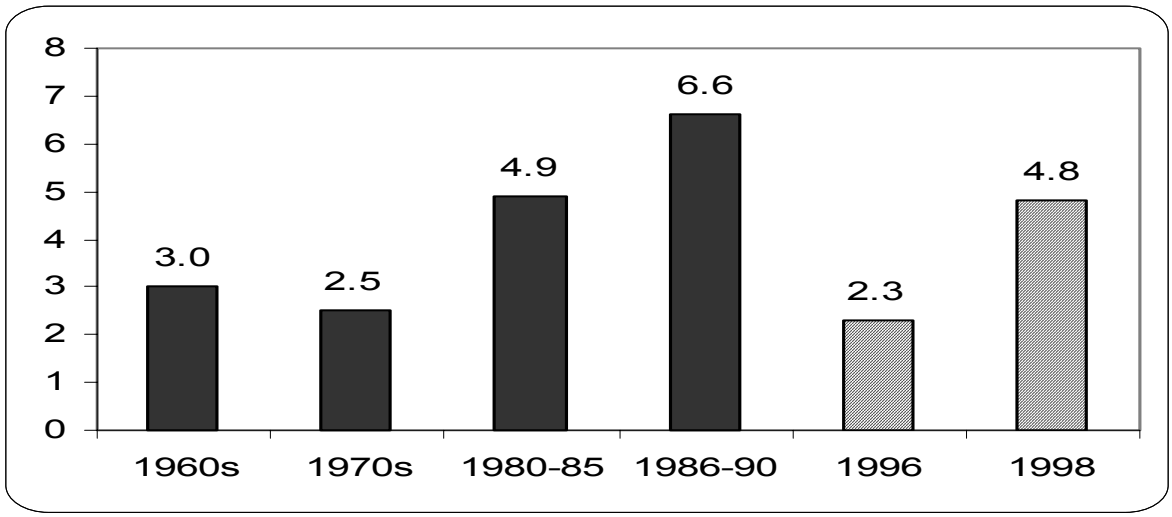


Source: CADE Annual Reports

As cited, the main motivation of competition policy in the period 1963-1990 was to preserve SMEs. Unfortunately, CADE totally failed in this respect, because not only were few fines applied (and not paid), but also the administrative actions took more than 4 1/2 years, on average, to be completed (Graph 2). Obviously, if a large company was really practicing predatory pricing, it would be totally impossible for a SME to survive for so long. The slowness was partly related to CADE's own deficiencies at that time, including small budgets, reduced numbers of technical personnel and lack of prestige. However, the Brazilian legal

system also allowed for many possibilities of the companies postponing decisions, a fact that contributed strongly towards the slowness of the process. In sum, during the three first decades of competition policy in Brazil, CADE judged few cases per month and the time required to conclude an administrative action was large.

Graph 2
CADE's Average Time to Conclude an Administrative Action, 1963-1998 (years)



Source: Farina (1990), CADE Annual Report
Note: In 1996 and 1998, the average time also includes the period utilised by other organs involved in the competition policy and excludes the analysis of M&As

The second period of competition policy in Brazil started in the 1990s, when the government engaged in a trade liberalisation strategy, in order to pressure companies to seek competitiveness. In this new environment, competition policy began to have coherence with other economic policies. Law 8.078, which was issued in 1990, established the Customer Rights Code. Law 8.158, promulgated in 1991, was at the time usually termed as a New Competition Law. The main institutional change was the set up of *Secretaria de Direito Econômico* (SDE) as an organ of the Ministry of Justice.

This second period can be considered a transition stage of competition policy in Brazil. On one hand, this policy began to gain momentum. According to Nascimento (1996), in only three years, 128 administrative actions were analysed. On the other hand, a large proportion of accusations were made by governmental agencies instead of companies. Moreover, competition policy continued to be restricted to the analysis of anticompetitive practices. Only in 1994, when Law 8.884 was issued did M&As come to be considered by the antitrust watchdog in Brazil.

The third and most important period of competition policy in Brazil began in 1994. Besides the amplification in its scope (including M&A and joint venture cases), CADE gained administrative and financial autonomy, although it continued to be linked to the Ministry of Justice. CADE's decisions are taken by a plenary session of seven members, all nominated by the President of Republic and approved by the Federal Senate for a two-year mandate. An additional two-year mandate for the counsellors is allowed by statute (in fact this is a frequent occurrence). The *Secretaria de Acompanhamento Econômico,* an organ of Ministry of Finance, came to be part of the so-called *Sistema Brasileiro da Defesa da Concorrência* (or Brazilian System of Competition Defence) in this third phase.

It will be useful to describe briefly the attributes of CADE, SDE and SEAE. Regarding M&As and joint ventures, Law 8.884 establishes that the transaction should be notified obligatorily to CADE for its deliberation in the 15-day period after its accomplishment, if: a) as a consequence of the transaction, one company obtained more than 20 percent of the relevant market (defined in terms of a combination of product and geographical dimensions); b) one of the companies involved is part of a business group with revenues higher than US$ 130 million (at the current exchange rate). In the event that the 15-day notification period rule is not followed by the acquirer, an 'untimeliness' fine is charged.

The M&A and joint venture analyses begin at SEAE, which is entrusted with emitting an official finding about the economic impact of the transaction. Usually, SEAE organises preliminary meetings to obtain additional information on the relevant market and the product. SEAE has a 30-day period to conclude its opinion. However, the 30-day period is suspended whenever SEAE asks the firms for more information. Then, SDE has an additional 30-day period to emit its official finding, stressing the juridical aspects of the transaction. SEAE and SDE have analytical and investigative functions. Finally, the transaction is voted on by CADE, which has a 60-day period in which to pass judgement. CADE's decisions can be only reviewed by the courts. Both in the cases of SDE and CADE, this period is interrupted if the organs require supplementary information. Usually, the average time taken for approval (or disapproval) surpasses 120 days. In 1998, (the last year for which official information is available), on average, it took 360 days for an M&A or joint venture transaction to be judged. However, in the same year, the anticompetitive conduct cases judged by CADE required 4.8 years, on average (Graph 2).

In terms of anticompetitive conduct, such as cartelisation and disloyal competition, an investigation is traditionally opened as a consequence of a complaint made by a customer or a competitor. A complaint can also be elaborated by CADE itself or by any other public administration institution. The complaint is presented to SDE, which has a 60-day period to accomplish the necessary investigations and to determine if the information is sufficient to justify the beginning of an administrative action. In this manner, SDE will proceed with the investigations and it will grant rights of defence to the defendant. This phase includes the hearing of witnesses and it should be concluded in a 45-day period. Several levels of negotiations with the antitrust authority are allowed, including the instigation of an agreement requiring the ceasing of anticompetitive conduct (AMCHAM, 2003). The cartelisation fine, when applied, should be within the 1 percent to 30 percent-range in relation to the companies' total revenues in the previous year.

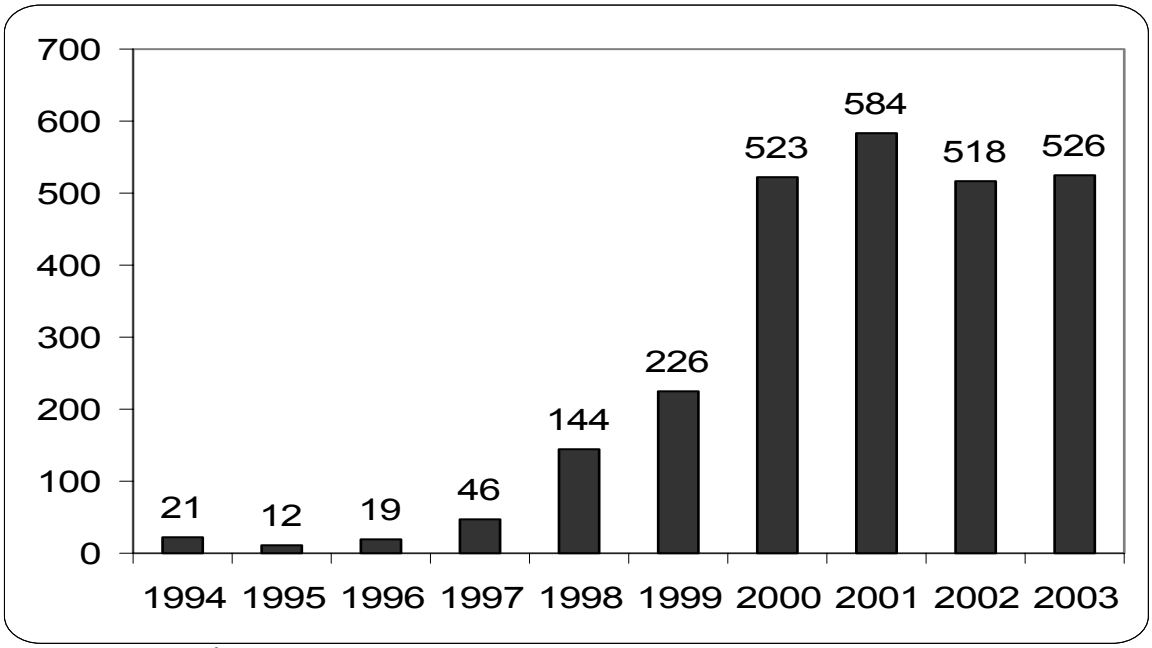
Since the promulgation of Law 8.884 in 1994, there have been attempts to improve the efficiency of competition policy in Brazil. Two initiatives deserve special attention. Firstly, in December 2000, Law 10.149 established the implementation of a leniency program, designed to encourage parties involved in antitrust conspiracies to co-operate with the authorities, providing them with evidence of illegal activities. The legislation grants the Brazilian antitrust authorities the power to concede administrative amnesty associated with full, automatic criminal immunity for conspirators co-operating with antitrust investigations (Considera and Corrêa, 2002).

Secondly, new procedures were conceived in order to reduce slowness. One of them was called 'Early Termination' in M&A and joint venture transactions. If such criteria are observed, SDE and SEAE should each be able to emit a simplified finding in a 15-day period. This procedure was created in February 2003, and amplified in February 2004. Transactions that involve the purchase of franchises, the set up of joint ventures for entering new markets, internal ownership restructurings, entry to the Brazilian market or M&As involving the generation of a reduced market share should be beneficiaries of this. Also under study is the possibility that in the most important M&A cases, SEAE and SDE should emit a unified report, in order to diminish the time consumed and to improve the quality of the analyses.

Concerning performance, CADE's monthly judgements have increased substantially, as can be observed in Graph 1. On average, during the first phase of its existence, CADE judged

only 1.4 cases per month. In the period 2001-2003, this figure reached 52.6. A large proportion of this outstanding growth was derived from the fact that M&As and joint ventures needed to be approved by the antitrust authorities from 1994 on. Graph 3 shows that the number of M&As and joint ventures analysed by CADE rose from 21 (in 1994) to 144 (in 1998), 584 (in 2001) and 526 (in 2003). It should remembered that the companies have a 15-day period to notify their M&As and joint ventures, otherwise they would be fined for 'untimeliness'. Thus, the burden of the proof lies in the companies' hands. On the contrary, in the case of cartelisation, it is more difficult to collect sufficient information to begin an administrative action and ultimately to punish the enterprises.

Graph 3
Number of Mergers, Acquisitions and Joint Ventures Judged by CADE, 1994-2003



Source: CADE Annual Reports

The average time consumed by the judgement of M&As and joint ventures in Brazil was 1.4 years in 1996 and 360 days in 1998. Unfortunately, these data represent the latest available information. Even considering that the time was smaller than that required for administrative actions (2.3 and 4.8, respectively), again slowness is a marked characteristic of competition policy in Brazil.

It is very important to note that the growth of M&As and joint ventures judged by CADE reveals an increasing share of multinational corporation involvement in Brazil. In the context

of 1,834 transactions judged by CADE in the period 1996-2002, around 85 percent of the acquiring companies were foreign (Table 1). In each year individually, the smallest share of non-domestic acquiring firms was 79 percent. It is worth noting that M&As involving two or more enterprises in third countries, but with impacts in the Brazilian market, need to be approved by CADE. For whatever reason, experience demonstrates that if the acquiring company has not been operating on Brazilian soil, the transaction tends to be approved more easily, as the degree of concentration will not be increased.

Table 1: Home Country of Acquiring Companies in Mergers, Acquisitions and Joint Ventures Judged by CADE, 1996-2002

	1996	1997	1998	1999	2000	2001	2002	Total
Domestic	4	7	14	n.a	79	90	68	262
Foreign	15	39	140	n.a	443	492	447	1,566
Domestic + Foreign	0	0	0	n.a	1	2	3	6
Total	19	46	144	n.a	523	584	518	1,834

Source: Silva (2004), CADE Annual Reports

According to Silva (2004), among 1,834 transactions judged by CADE in the period 1996-2002, 94 percent were wholly approved, 2 percent were partially approved, 1 percent were conditionally approved (with a performance commitment clause) and 3 percent were classified as 'other cases'. Only 2 transactions were totally denied. In the particular year of 2002, CADE judged 518 M&A cases, of which 474 (or 92 percent) were approved without any restrictions. However, CADE imposed fines in 44 cases of this group, because the firms submitted their notifications after the legal time had expired (hence the levying of an 'untimeliness fine'). Nine transactions (or 2 percent) were approved under some conditions. Oliveira (1999, p. 20) declares that the non-approval rate regarding M&As and joint ventures in Brazil, which is lower than 5 percent, is in line with other country practices. This diagnosis is shared by Clark (2000, p. 52) who states that in a majority of OECD countries the intervention rate by the competition agency in M&As is 5 per cent or less.

CADE analysed thirty cases of possible anticompetitive actions during 2002. Of these, the main accusations were related to collusion (ten cases), abuses of dominant positions (six), exclusivity covenants regarding professional associations (three cases), price fixing among competitors (three), refusal to deal (two), price discrimination (two) and others (four). From the total of thirty cases, twelve were found guilty, resulting, therefore, in the imposition of

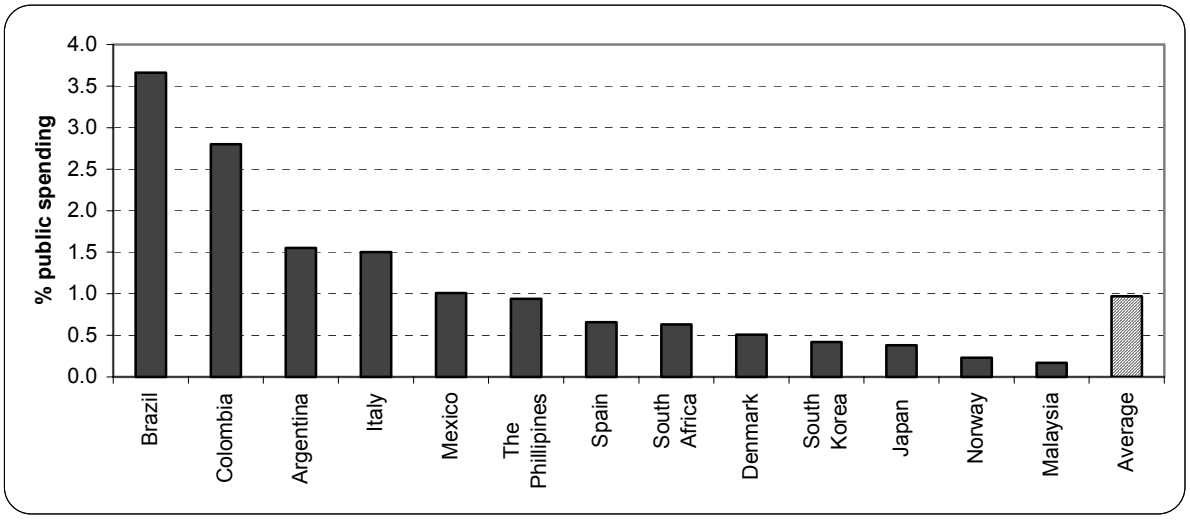
fines and other sanctions. Sixteen were considered not guilty, and the cases were consequently closed. One case was terminated before its judgement and another was sent back to SEAE for further analysis (OECD, 2003, pp. 3-4).

The revision of CADE's decisions is only possible by appealing to the Judiciary. Nevertheless, in many cases, the companies do not utilise this possibility, because: a) of the process' slowness; b) the high costs incurred by the companies; and c) uncertainty about the future results derived from the absence of the judges' familiarity with the matter. Furthermore, firms enjoy a 30 percent discount if the fines are paid without any appeal (Salgado, 2003, p. 41). However, in recent years, the number and the value of the fines have increased considerably, as well as the amount of companies that appeal to the Judiciary to revise CADE's decisions. Rocha, Santos & Alves (2003) point out that there has been a proliferation of judicial appeals against CADE, in which about 90 percent of them have started from 1998 on. More importantly, the authors note that the Judiciary has been accomplishing widespread revision of CADE's decisions, regardless of merit. On average, companies have won 65.2 percent of the preliminary cases (through seeking injunctions) and 59.1 percent of sentences. Nonetheless, in the case of M&As no judicial decision has found against CADE's original judgement. It can be argued that enterprises have strong incentives to appeal against CADE. Not only is the legal system in Brazil very unhurried, but also the Judiciary frequently accepts injunctions and even changes sentences dished out by the antitrust watchdog.

The Brazilian Judiciary is an institution with serious problems. In spite of the great increase in public spending on it, the Judiciary has remained slow and distant to the great majority of population. This is partly explained by dizzy growth in the demand for judicial services, which implies that Brazilian magistrates continue to be forced to judge thousands of actions annually. Other structural problems can be noted, such as: a) the instability of the country's juridical framework; b) the excessive formalism of the Codes; c) bad training of a substantial part of the magistracy; and d) the excessive appeal to procedural arguments, to the detriment of substantive decisions on the subject's merit. Due to the fact that these problems have strong historical roots, the slowness and the heavily bureaucratic and formalist mode of operation have become a cultural characteristic, with an associated low probability of change (Pinheiro, 2003).

The legal system impacts on the performance of the economy in respects other than its effects on competition policy. According to Pinheiro (1998, p. 5), there are four main channels through which Judicial inefficiency affects the nation's economic performance: technological progress, companies' efficiency, investment, and economic policy. In August 2004, the Brazilian government released, in all probability, the most important official report to date concerning the Judiciary (Ministério da Justiça, 2004). Making an international comparison, the report sheds unfavourable light on the Brazilian Judiciary showing it, relatively speaking, to be associated with large expenses and low productivity. Firstly, regarding judicial expenditures as a proportion of total public spending, Brazil has the largest index (3.66 percent) among 35 countries, surpassing, for instance, Argentina (1.55 percent), Italy (1.50 percent), Mexico (1.01 percent), Spain (0.66 percent), South Africa (0.63 percent) and Japan (0.38 percent) – see Graph 5. Secondly, in the terms of judges per 10.000 inhabitants, Brazil's figure is 7.73, quite similar to the international average (7.34). Even so, its number is higher that countries such as Denmark (6.42), South Korea (2.57) and Japan (1.05). Thirdly, regarding senior judge's salaries, in purchasing power parity terms, in a sample consisting of 30 countries, Brazil has the second highest, just behind Canada and in front of the USA, Spain, Japan and India. In fact, Brazilian salaries are 200 percent higher than this sample average and 640 percent higher than the Indian. Fourthly, the average cost of a lawsuit has reached US$ 600, while the minimal wage in Brazil is currently US$ 87. Consequently, poor people in Brazil are effectively barred access to the Judiciary.

Graph 4
Expenditures on the Judiciary as a Proportion of Total Public Expenditure, SelectedCountries,
2000



Source: Ministério da Justiça

Definitely, slowness is the key characteristic of the Brazilian legal system. According to Paduan (2004), on average, it takes 12 years to resolve a judicial case. It is estimated that 70 percent of this time is consumed by bureaucracy, 20 percent by lawyers and only 10 percent by the judges' consideration itself. This result is naturally related to the legal system tradition in Brazil. According to La Porta *et al.* (1998), in general, commercial laws come from two broad traditions: common law and civil law. Most English-speaking countries belong to the common-law tradition, based on the British Company Act. The rest of the world belongs to the civil-law tradition, derivative of Roman law, which has three main families: French, based on the Napoleonic Code of 1804; German, based on Bismarck's Code of 1896; and Scandinavian, which legal scholars describe as less derivative of Roman law but 'distinct' from the other two civil families. The French legal family includes France, Spain, Portugal, and their former colonies, including Brazil and other Latin American countries. Even though La Porta *et al.* (1988) are concerned about commercial law and its impact on corporate governance, it can be argued that this distinction is useful in highlighting peculiarities among countries regarding the legal system. In other words, the legal system tradition has a large impact on how conflicts between companies and governments and among companies themselves are solved.

It can be stated that the low efficiency of the Brazilian legal system places strong limitations on the further development of the competition policy in the country. It seems very difficult to change this reality, because it has been reinforced by a long tradition. Bearing this aspect in mind, the analysis of competition policy in a less developed country should highlight institutional path dependence issues, such as the legal system tradition, corruption levels and dictatorship/democracy periods. In the following sections, the analysis will shift to a sectoral level, by analysing the experience of competition policy in the Brazilian steel industry.

COMPETITION POLICY AND ACQUISITIONS IN THE BRAZILIAN STEEL INDUSTRY

The steel production chain constitutes a very important industry in Brazil, in particular as it relates to exports. In 2003 the exports of the Brazilian steel industry totalled US$ 3.9bn. In the same year, iron ore exports reached an additional US$ 3.3bn and pig iron exports hit US$ 572m. Jointly, the Brazilian iron and steel production chain generates more than US$ 8bn in exports, equivalent to 11.4 percent of the country's total export revenues.

The Brazilian steel industry originated in the early 20th Century, registering continuous growth since the 1930s. In that decade, Belgo-Mineira, a subsidiary of the Luxembourg-based company Arbed, constructed a new mill in João Monlevade, in the State of Minas Gerais. Simultaneously, Barra Mansa, a subsidiary of the Brazilian diversified group Votorantim, erected another mill in the city of Barra Mansa, in the State of Rio de Janeiro. These and other steel companies, until the early 1940s, were restricted to the production of long steel products, such as rebars (demanded in the construction) and railways.

In the 1940s, Brazil engaged in flat steel production – whose main customer came to be the automobile industry – via a SOE, Companhia Siderúrgica Nacional (CSN). In the following decades, the State constructed large steel mills, due to the lack of financial capability among domestic private sector companies. The State also took over private sector firms on the edge of bankruptcy. Nationalisation was the key characteristic of the Brazilian steel industry until the 1980s. As mentioned, SOEs used to represent 70 percent of the country's crude steel production. However, in the late-1980s the government decided to resell the SOE steel companies that used to be privately-owned. Most these steel firms had a medium size scale, although as is noted later, their privatisation implied a larger degree of concentration. Furthermore, in the early 1990s, the so-called Big Six (Usiminas, Companhia Siderúrgica de Tubarão/CST, Acesita, CSN, Cosipa and Açominas) were privatised too.

According to data provided by the OECD (2002), in the period 1994-2000, the steel and metalworking sector accounted for 14.0 percent of all M&As and joint ventures judged by CADE. It ranked in fourth place, just behind autoparts (16.7 percent), food (14.6 percent) and information technology (14.4 percent). Indeed, the Brazilian steel industry has been marked by numerous corporate control changes, since the late 1980s. Besides privatisation, between 1993 and 2004, there were 28 ownership change transactions and three asset leasings in this industry. In an attempt to summarise the diversity of these ownership changes, Table 2 separates these transactions into eight categories.

Table 2
Ownership Changes in the Brazilian Post-Privatised Steel Industry, By Category, 1993-2004

Type of Ownership Change	Number of Transactions	Number of Transactions that Increased the Degree of Concentration
Changes in the Internal Composition of Main Shareholders	10	3
Financial Institution Sale of Equity Stakes	5	-
New International Entrants	4	-
Acquisition of Always Private-Owned Sector Companies	4	3
Leasing of Assets	3	2
Acquisition of Majority Stake of a Former SOE	2	2
New Domestic Company Entrants	1	-
Other Cases	2	-
TOTAL	31	10

Source: Own Elaboration

Around two-thirds of the corporate control changes in the Brazilian steel industry, over the post-privatisation period have not implied any increase in the degree of concentration. For instance, on five occasions financial institutions sold their stakes without any impact on market structure. In the other seven transactions, the composition of main shareholders changed without any effect on market structure. The same happened when five newcomers (four international and one domestic enterprises) purchased shares in Brazilian steel enterprises (Table 2).

It should also be stressed that the real impacts on steel market structure have tended to be differentiated among segments. For example, in the special flat steel business, Acesita is the only producer in Brazil. Although its corporate control changed substantially in 1998, when a French steel company became the largest shareholder, there was no impact on market structure. The opposite was observed in the common long steel business, because the two largest companies, Gerdau and Belgo-Mineira, have increased substantially their market control. Table 3 shows the acquisitions carried out by these two enterprises in the Brazilian steel industry. Considering both companies together, in seven instances the acquisitions implied an enlargement in the degree of concentration. The other cases corresponded to a plant closure (which also augmented the market power of the leading companies), an entry into a new market, an internal change in the composition of the main shareholders and a

vertical integration. No other segment in the Brazilian steel industry has experienced such market structure transformation. Significantly, it was exactly in this business that a relatively small transaction (US$ 62 million) caused the most serious imbroglio to date regarding competition policy.

Table 3
Gerdau and Belgo-Mineira's Acquisitions in the Brazilian Steel Industry, 1988-2003

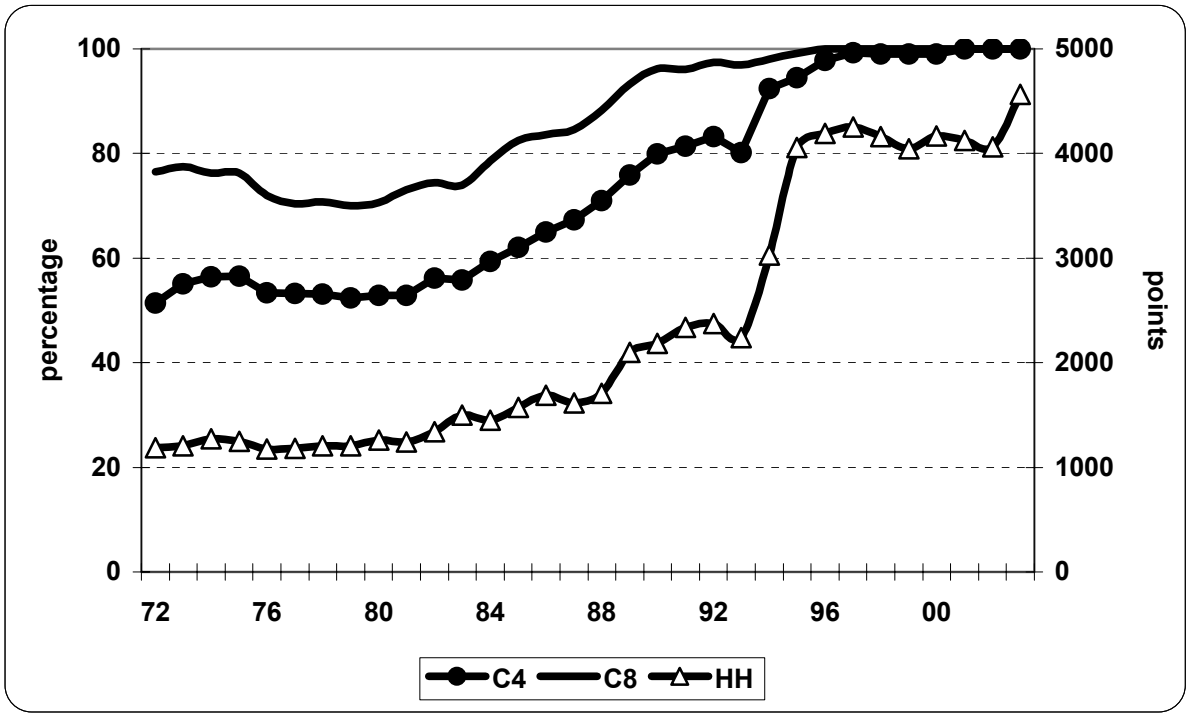
Acquiring Company	Acquired Company	Data	Type of Transaction	Impact on Market
Gerdau	Cimetal	1988	Privatisation	Higher Concentration
Gerdau	Usiba	1989	Privatisation	Higher Concentration
Gerdau	Cosinor	1991	Privatisation	Plant Closure
Gerdau	Piratini	1992	Privatisation	Entrance in a New Market: Long Special Steel
Belgo-Mineira	Cofavi	1993	Acquisition of the Rolling Mill	Higher Concentration
Gerdau	Pains	1994	Acquisition of Majority Stake	Higher Concentration
Belgo-Mineira	Dedini	1994	Acquisition of Minority Stake	Higher Concentration
Gerdau	Fi-El	1994	Acquisition of All Shares	Higher Concentration
Belgo-Mineira	Mendes Jr.	1995-2003	Leasing Followed by Acquisition	Higher Concentration
Belgo-Mineira	Cofavi	1997	Acquisition of the Steelshop	Higher Concentration
Belgo-Mineira	Dedini	1997	Acquisition of Additional 51 percent-Stake	Changes in the Internal Composition of Main Shareholders
Gerdau	Açominas	1997-2003	Acquisition (Six Transactions)	Backward Vertical Integration
Belgo-Mineira	Itaunense	2000	Leasing	Higher Concentration

Source: Own Elaboration

Another way to express the massive concentration process that the Brazilian common steel market has undergone is shown in Graph 5. According to data supplied by *Instituto Brasileiro de Siderurgia* (IBS), the joint share of the four largest companies increased from 51 percent in 1972 to 100 percent in 2001, while the same index for the eight largest steelmakers jumped from 77 percent in 1972 to 100 percent in 1996 (left axis). The degree of concentration as measured by Herfindahl-Hirschmann Index (HHI) also rose from around

1.200 points in 1972 to some 2.000 points in 1989, 3.000 points in 1994, 4.000 points in 1995 and 4.500 points in 2003 (right axis). Indeed, the number of steel companies that operate in this particular market has dropped significantly from around 30 in the mid-1970s to just three nowadays.

Graph 5
Degree of Concentration in the Brazilian Common Long Steel Sector, 1972-2003
(percentage and points)



Source: Own elaboration, using data supplied by IBS

It is precisely in the common long steel business that the most important event relating to antitrust policy and the legal system has been observed. The rest of this section is dedicated to analysing this experience: the acquisition of Pains by Gerdau. In the other cases of M&A, similar events could have occurred, but their intensity and repercussions were definitely not so strong.

In February 1994, Gerdau bought, through its Uruguayan subsidiary Laisa, all the shares of the German company Korf, whose main asset was a 64.7 percent-stake in Siderúrgica Pains (Table 4). The transaction value reached US$ 62 million, of which around US$ 50 million was

related to the participation in Pains. This acquisition also included a 100 percent-stake in the engineering company KTS and a 60 percent-participation in the pig iron producer Companhia Brasileira de Ferro (CBF). Later, in November of 1994, Gerdau raised its participation to 99.1 percent of voting shares of Pains, by investing an additional US$ 5.8 million. Although the first transaction corresponded to a purchase of a foreign company by another firm based abroad, it was analysed by CADE due to its impact on the Brazilian steel industry. Indeed, this transaction was extremely controversial and took more than three years to be approved.

Table 4:
Timetable of Pains' Acquisition by Gerdau

Date	Event
Feb 1994	Gerdau bought an indirect 64.7 percent-stake in Pains
Mar 1994	Gerdau asked CADE's authorisation to buy Pains
Nov 1994	Gerdau increased its participation to a 99.1 percent-stake in Pains
Mar 1995	CADE ruled against the acquisition for the first time
May 1995	Gerdau asked CADE to reconsider its first decision
Oct 1995	CADE judged against the transaction again
Nov 1995	The Minister of Justice accepted officially the company's appeal
Dec 1995	Judicial contest confronting CADE with the Minister of Justice
Nov 1996	CADE offered three options to Gerdau in order to finish the imbroglio
May 1997	CADE approved the transaction
Oct 2001	The action was formally concluded

Source: Own Elaboration

According to Brazilian competition legislation, a transaction that amplifies market concentration may be approved if it generates an improvement in economic efficiency (defined in the Law in terms of technological development, capacity expansion, export increase, additional job creation, production cost reduction or price reduction) that more than compensates for its negative effects. In the first instance, Gerdau proposed to invest an additional US$ 50 million in Pains, of which US$ 36 million were in the metallurgical operation itself, US$ 4 million in environmental projects and US$ 10 million in forest plantations. However, CADE's counsellors understood that this was insufficient to compensate for the fact that Gerdau would increase its share from 39.6 percent to 46.2 percent in the Brazilian common long steel market. Moreover, this market was characterised by high barriers to entry – deriving from the then high degree of concentration and the large nominal installed capacity – and insignificant import levels (CADE Annual Report, 1996, p. 47). Therefore, in March 1995 CADE ruled against the acquisition, obliging Gerdau to resell the company in a 60-day period.

In May 1995, Gerdau asked CADE to reconsider this first decision, something not foreseen in CADE's procedural norms. Based on the principle that every administrative decision can be reconsidered by the same organ, CADE agreed to reanalyse the acquisition. This time, Gerdau proposed that 50 percent of Pains' production would be converted into special long steel products. CADE judged once more against the transaction in October 1995, when four of the seven counsellors voted for blocking the purchase.

Gerdau, then, interposed an administrative appeal to the Minister of Justice. In November 1995, the Minister accepted officially the company's appeal, suspending the impacts of CADE's second decision and asking SDE for a second official finding. In December 1995, CADE's counsellors decided to ask the Judiciary to guarantee that its decision would be implemented. In other words, what resulted was a judicial contest involving CADE (an autonomous organ linked to the Ministry of Justice) and the Ministry of Justice proper. In April 1996, new members of CADE, including the President, took their places. The new composition of CADE allowed for the discovery of a new kind of solution.

In November 1996, CADE made a proposal to Gerdau, consisting of three options, in order to finish the imbroglio. The first option consisted of ten measures to reduce the transaction's negative impacts upon market competition. The more important were: a) a program of retraining and reemployment of workers that were sacked after the acquisition of Pains; b) the sale of Transpains, a transport company; c) the prohibition that Comercial Gerdau, the company's trading arm, sell any more than 20 percent of Pains production; and d) open access to the technologies developed by KTS, which had already be sold to the Germany company Mannesmann Huttentechnik. More importantly, the idle rolling mill located in Contagem (Minas Gerais State) would be modernised in order to be resold. The second option comprised the leasing of the Divinopólis (Minas Gerais State) and Contagem mills for a 20-year period. The third option involved the reselling of Pains assets as a whole (CADE Annual Report, 1996, pp. 47-50). Gerdau opted for the first proposal and CADE approved the transaction in May 1997, effectively mandating a 39-month period between acquisition and approval. Finally, the action was formally ceased in October 2001.

CEBRAP (1997, pp. 123) concludes that the main measure in the option chosen by Gerdau consisted of the modernisation and reselling of Contagem rolling mill. Nevertheless, this was equivalent to only 20 percent of the Divinópolis mill's installed capacity and around 1 percent

of the Brazilian common long steel market. Therefore, the remedy proposed in this third decision was much weaker in relation to the first two. According to the CADE Annual Report (1996, p. 47), during the period between the first and the third decisions, some new facts occurred, in particular the impressive growth of Belgo-Mineira, which bought a 49 percent-stake in Dedini and leased Mendes Jr. Regarding the stake purchase of Dedini, CADE approved the transaction in February 1996. Considering that this acquisition had occurred in August 1994, it took 18 months for CADE to decide. The transaction was approved unanimously by CADE's counsellors, allowing the company to expand its participation from 18.8 percent to 37.2 percent in the common long steel market. This enabled Belgo-Mineira to confront the 41.1 percent-market share held by Gerdau. However, the approval was conditional on the fulfilment of a performance commitment clause, containing production goals, sales and prices (CEBRAP, 1997, p. 121). This term was signed in October of 1996, with a four-year duration, stipulating half-yearly situation reports.

CARTELISATION CASES IN THE BRAZILIAN STEEL INDUSTRY

The most important case regarding cartelisation in Brazil has occurred in the steel industry. It is related to a supposed price agreement reached in 1996. The involved companies were sentenced in 1999, but until now the firms have yet to pay the fines (Table 5). This provides an illustrative experience of how the antitrust system is slow in Brazil and how enterprises have possibilities to forestall penalties handed down by the legal system.

Table 5:
Timetable of the Brazilian Common Flat Steel Cartel Case

Date	Event
Jul 1996	Meeting between SEAE, IBS, CSN, Usiminas and Cosipa regarding price increases
Aug 1996	Price increases carried out by CSN, Cosipa and Usiminas
Jun 1997	SEAE official finding: cartelisation in the common flat steel business
Jun 1997	Meeting between CADE, SEAE, SDE and IBS regarding price increases
Out 1999	CADE fined steel companies for cartelisation and distorted information
Feb 2000 – July 2004	CADE refused administrative appeal and subsequently a judicial fight breaks out

Source: Own elaboration

This first cartel case in the Brazilian steel industry involved three flat common steel producers: CSN, Usiminas and Cosipa. All of them were established as SOEs and were privatised in the 1991-1993 period. Moreover, as a consequence of the privatisation,

Usiminas became the largest shareholder of Cosipa. Until 2002, these three companies were responsible for all flat common steel products fabricated in Brazil. In addition to the small import penetration (around 4 percent), this market was highly concentrated, being under the control of three companies – or even just two, if the dominance of Cosipa by Usiminas is considered.

The high degree of concentration cannot be understood as a negative development *per se,* in an industry characterised by high economies of scale. Furthermore, even if Usiminas had not bought a stake in Cosipa, the market would have been highly concentrated. This situation should not be dissociated from the fact that these three companies were set up as SOEs exactly because domestic privately-owned firms were unable to achieve the optimum minimum scale. In order words, if the economies of scale were irrelevant, there would not have been any justification for the State to have established these enterprises in the first place. In addition, companies dedicated to the flat common steel business became involved in megamergers in Western Europe and Japan from the late-1990s on. A high degree of concentration in this business is a rule, not an exception (De Paula, 2002).

Not only was a highly concentrated business inherited from the closed economy period, but also some practices related to price control. Until 1990, the Brazilian steel companies were obliged to ask for governmental authorisation to increase prices. The price control system was only abolished when the government decided to privatise the enterprises. However, in July 1996, the IBS, the trade association that represents the steel companies, requested a meeting with SEAE. Officials from SEAE, IBS, Usiminas, Cosipa and CSN took part in the meeting. During that occasion, the companies notified the government that they would increase their prices in early-August. Indeed, they applied quite similar readjustments in a very few days (Table 6).

Table 6:
Price Increases Announced by Brazilian Common Flat Steel Companies, August 1996

	CSN – Aug 1st	Cosipa – Aug 5th	Usiminas – Aug 8th
Hot Rolled Sheets	3.63 percent	3.59 percent	4.09 percent
Cold Rolled Sheets	4.34 percent	4.31 percent	4.48 percent
Heavy Plates		8.32 percent	
Electro-Galvanized Sheets			3.38 percent
Hot Dip Galvanized Sheets	4.23 percent		

Source: Santacruz (1999)

It is worth remembering that Brazil used to live with very high inflation rates. In the early-1990s, for example, an official inflation index reached 84 percent in just one month. Not surprisingly, governments tried many stabilisation plans, some orthodox others heterodox. In July 1994, the government launched the *´Plano Real´*, which was very successful in terms of restricting inflation, at least considering the historical Brazilian pattern. Viewed from a developed economy, low-inflationary perspective, a price increase of some 4 percent of steel products in one month might seem considerable.. Nevertheless, this was not the perception in Brazil. For instance, in 1996, the wholesale price index rose 9.1 percent, whereas the steel wholesale price index increased 4.3 percent. Therefore, the Brazilian common flat steel companies were not accused of abusive pricing, but rather of price collusion.

Almost one year later, in June 1997, SEAE finished its official findings and concluded that the three companies had cartelised the common flat steel business. In the same month, IBS requested another meeting with CADE, SEAE and SDE, in order to communicate that the steel companies had decided to raise prices again. This time, the steel companies learned from their previous mistake and did not take part in the meeting.

In October 1999, CADE decided to punish CSN, Usiminas and Cosipa for cartel formation and the release of distorted information. The counsellors' decision was unanimous. According to Santacruz (1999), who was the designated counsellor, the evidence against the enterprises comprised: a) the high cost of importing the flat common steel products that gave them additional market power, in a high barrier to entry industry; b) considering the period 1993-1998, the companies' maintenance of a stable market share; c) the denial of the price leadership hypothesis because, in 1997, the company that was the first to elevate prices was different from that of the previous year; and d) the meeting requested by IBS in July 1996 constituted an indirect proof of cartelisation, because obviously the executives had met before this meeting.

This was the first time that CADE applied a large cartelisation fine in Brazil. According to the legislation, the fines are supposed to vary from 1 percent to 30 percent of the total sales in the previous year. The joint cartelisation fines totalled US$ 25.9 million. Moreover, Usiminas and Cosipa were also condemned to pay an additional fine (US$ 3.5 million) because they had initially denied that their directors took part in a meeting, which in fact was the starting point of this case.

In its defence, Usiminas declared that the above-mentioned meeting was intended to notify the government about the price increase. More importantly, it noted "that such a practice was a habit in the country" (Santacruz, 1999, p. 19). If the participation in the meeting could be attributed to a mistake linked to a path dependence convention, then the firms learned quite fast. In June 1997, when a new meeting was requested by IBS to communicate that a new price readjustment would be made, the companies did not take part. The three steel companies were also accused of increasing prices together in September 1999. They justified, at that point, that they were merely following the inflation rate. In February 1999, another readjustment was implemented, between 9 percent and 11 percent, under the justification that it was correction derived from the strong currency devaluation realised in the previous month. There was no condemnation resulting in these cases, because there was no proof that the steel enterprises had agreed previously to the price rises.

The reality is that almost five years after the application of fines, the steel companies have still to pay them. This situation is obviously associated with a legal system that allowed – or to be honest, stimulated – postponements. After the condemnation, the steel companies interposed administrative appeals at CADE, which were refused in February 2000. Then, the firms appealed to the Judiciary. In Brazil, generally enterprises are granted preliminary decisions (injunctions) from the judges. In February 2002, for instance, a Federal Judge determined the suspension of the fine applied to Usiminas for issuing distorted information. In July 2003, another Federal Judge decided to maintain the cartelisation fines, although he understood that it had not been proved that the companies had arranged a price agreement. This opened another possibility for new appeals.

A second cartel case in the Brazilian steel industry affected the common long steel market (in particular, rebars), which is highly concentrated in the hands of Gerdau, Belgo-Mineira and Barra Mansa. In September 2000, two trade associations, SindusCon/SP and SECOVI/SP, accused these companies of market division via price discrimination in São Paulo, the most important State in Brazil. SindusCon/SP represents the civil construction companies, while SECOVI/SP congregates real estate sellers. Two weeks later, SDE opened an administrative action against the three mentioned companies (Table 7).

Table 7:
Timetable of the Brazilian Common Long Steel Cartel Case

Date	Event
Sept 2000	SindusCon/SP and SECOVI/SP accused steel companies of market division
Sept 2000	SDE opened an administrative action against Gerdau, Belgo-Mineira and Barra Mansa.
Aug 2002	SEAE suggested the condemnation of the three companies for cartelisation
Feb 2003	SDE preliminary finding also suggested the condemnation of the three companies for cartelisation; a final finding was issued in September 2003
Feb 2003 – July 2004	A judicial battle began, which has impeded CADE from judging the case

Source: Own Elaboration

Only in August 2002, did SEAE present its official findings, which concluded that three companies had organised, in fact, a cartel. During the investigation process, besides the price discrimination (whose objective was to guarantee market division), it was observed that the companies had established retail prices through the imposition of 'table prices' to the distributors. Moreover, effective sanctions were applied to the non-followers' agents. Without doubt, it is never an easy task to prove the existence of a cartel. In this particular case, a former manager of Belgo-Mineira alleged that the steel companies' managers frequently met aiming to carve up the market and to reach agreements about retail prices.

In February 2003, SDE released a preliminary finding also suggesting that CADE condemn Gerdau, Belgo-Mineira and Barra Mansa for cartelising the common long steel market. Since then, the companies have been asking for provisional decisions by the Judiciary, to avoid – or postpone – CADE's decision. In the same month, Belgo-Mineira won a preliminary judicial decision in order to suspend this administrative action. This decision was reversed in March 2003.

Afterwards, Gerdau, Belgo-Mineira and Barra Mansa were accused of a price increase implemented on the same date (March 5, 2003) and to the same value (12.9 percent). As a consequence, SDE required that these companies inform it of every price readjustment, in terms of dates and values. It also prohibited the release into the public domain of any kind of information about price increases which could facilitate the functioning of a cartel. Belgo-Mineira tried again to stop the suit in July 2003, but a Federal Judge considered its appeal unfounded. SDE eventually released its final finding with the same conclusions in September 2003. The latest available information is that Gerdau won a preliminary decision in May 2004 blocking CADE's judgement.

FINAL REMARKS

Cook (2002, p. 543) observes that at the end of the 1980s only a handful of developing countries had effective competition legislation. From the 1990s on, this situation has changed, in particular among the higher income developing nations that have recently strengthened their approach to competition policy. Nevertheless, the author stresses that due to various reasons – for example misunderstanding among policymakers regarding the nature of competition itself, the lack of capacity to implement competition policy, the failure of 'imported models' to work in the local environment, or the need to maintain the *status quo* – many countries continue with a weak system and process for monitoring competition.

For a number of reasons, the Brazilian experience regarding competition policy has shown quite important improvements since the beginning of the 1990s. Although the country has counted on competition legislation since the early-1960s, competition policy *per se* was quite irrelevant, because the contemporary orientation of political economy was marked by trade autarchy and weighty State intervention. In fact, the government used to control prices and investments, even for non-SOEs. In the 1990s, economic reform was based on deregulation, privatisation and trade liberalisation. Therefore, competition policy came to fit in with other governmental policies, rather than to be incompatible with them.

In the 1990s, new competition legislation was issued on two occasions. In 1994, the antitrust watchdog CADE began to analyse M&As, amplifying its scope which used to be restricted to the anticompetitive practices. Other procedural improvements were made, such as the introduction of the leniency program and the arrival of the ´Early Termination´ option. Over time, competition policy has gained more public attention and companies have become more preoccupied about it. The number of cases judged monthly by CADE has also expanded. Moreover, a very positive feature of the Brazilian experience has been that competition policy has gained more and more importance; since the early-1990s no important retreat has been observed. In around a decade, Brazil has re-launched and consolidated a quite sophisticated apparatus concerning competition policy for a developing nation. According to Clark (2000, p. 35), the level of expertise and analytical skills of professionals employed in three agencies exceed those in many other countries, including some that have been actively enforcing competition laws for a much longer time than Brazil.

However, even though some attempts have been made to circumvent the bureaucracy since 1996 (something which has accelerated from 2003 on) as the experience examined has demonstrated, the competition policy system in Brazil has remained very slow. Not only has the time involved in the formulation and release of CADE's judgment continued to be high, but also there have been considerable delays in implementing the decisions themselves. In this regard, the steel industry case should be considered emblematic and certainly not an exception. The goal of this article has been not to scrutinise the steel case *per se,* but rather to provide an illustration of how the legal system can place strong limitations on the quite substantial effort that government has pursued in order to develop an effective competition policy. Moreover, the companies tend to have a fast learning capability, especially in a country that traditionally has proved very unstable. Adaptation is the key to survive in such a challenging environment. One might say that firms have learnt two main golden rules the first being, never ask to meet government officials! Looking at the common flat steel business cartel case, in the second instance when the companies were accused, the supposed proof utilised first time around could not be used again, because only the trade association took part in the meeting. The second golden rule, for large companies seems to be that an appeal to the Judiciary pays off! This is because even if cases are eventually lost, valuable time is gained. Although Brazilian companies have traditionally criticised the bureaucracy, they are very well aware of how to be beneficiaries of it.

At least three important features contribute to the slowness of competition policy procedures in Brazil. Firstly, it is a hard task to change bureaucrats' minds, especially when the same group that used to control prices have now taken charge of promoting competition policy. Time and patience is demanded to create new institutions, especially in a context of lack of financial resources. Moreover, Clark (2000, pp. 28-29) also observes that there is a shortage of personnel at CADE, but possibly even more seriously, there is a lack of a permanent, stable group of career officials whose presence preserves 'institutional memory' and enhances enforcement expertise over time.

Secondly, there is a overlapping of competences among SEAE, SDE and CADE. Salgado (2003, pp. 36-37) affirms that this overlapping has been frequently criticised, both by the companies and by bureaucrats themselves, due to the inefficiency related to the duplication of work and the costs imposed to the private sector. The author terms this situation as 'bizarre' and advocates that all the functions distributed among the three organs should be

unified in CADE. Clark (2000, p. 32-35) agrees that in the system utilised, there is duplication of effort, and expenditure of too much time. However, he suggests that the relationships between SEAE and SDE, on the one hand, and CADE, on the other, are on the whole formal, which is undoubtedly a necessary aspect of CADE's status as an independent agency. The result, nevertheless, is a loss in efficiency; in general, CADE is unable to take full advantage of the experience and expertise of its sister agencies. Although each specialist tends to reinforce his/her proposition, it might be said that there is a consensus that further steps towards simplification should be taken. It must be stressed that some of the problems mentioned previously should be eliminated – or, most probably, attenuated – through the reform of the competition policy legal framework currently under examination in the National Congress.

Thirdly, competition policy cannot be dissociated from the country's legal system. On the one hand, competition legislation is a part of competition policy. On the other, the Judiciary can restrict the scope and efficiency of the organs in charge of competition policy. In the case examined in this article, companies have appealed to the Judiciary to avoid the implementation of CADE's decisions and even to impede CADE's judgement. It can be argued, then, that one of the most important obstacles for the further development of competition policy in Brazil is the legal system. In Brazil, far more often than not, it is rational to appeal to the Judiciary, which in its turn is extremely slow. It is a national consensus that a judicial reform is urgently needed, but the National Congress has been discussing this issue for 12 years. In such an environment, how could anybody expect that the competition policy organ be a paragon of swiftness and agility?

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