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## The International Harmonization of Competition Norms and Brazilian Competition Law: The Use of Settlement Agreements

Kathryn McMahon  
*School of Law, University of Warwick*

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# THE INTERNATIONAL HARMONIZATION OF COMPETITION NORMS AND BRAZILIAN COMPETITION LAW: THE USE OF SETTLEMENT AGREEMENTS

*Kathryn McMahon\**

UNLIKE many other emerging and developing countries where competition laws have only recently been enacted, Brazil has had a long history of the application of competition laws and policies, culminating in its most recent legislative reforms in 2011. Brazilian competition agencies are also internationally commended as a success story, particularly for their strong stance against, and criminalization of, cartel activity. But there are also emerging difficulties. In recent years, the Brazilian constitutional courts have become important sites of social change as they adjudicate in areas such as health, telecommunications, and financial markets. There have been comparatively fewer applications for judicial review in competition law, however, and those who have litigated have been subject to increased costs and lengthy court delays. Rather, Brazilian competition law is increasingly characterized by a shift to the extra-judicial resolution of disputes. This decline in judicial review has had important consequences on the supervisory design and effectiveness of regulatory institutions and the identification of substantive conduct, potentially opening the way to inconsistent and discretionary regulatory interventions.

Many of the recent reforms to Brazilian competition law and regulatory institutions can be linked to similar approaches in other jurisdictions and follow closely the ideal of the “regulatory state” and recommendations made in “peer reviews” of Brazilian competition law by international antitrust experts and agencies such as the ICN and OECD. The first part of this article will examine the transfer and impact of these harmonized regimes and “soft laws” in emerging and developing countries. The second part will trace these issues in a particular policy area: the shift in Brazilian competition law from judicial review to the increasing “settlement” of competition disputes, particularly for cartels. It will evaluate

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\* Associate Professor School of Law, University of Warwick, United Kingdom. Some of the themes of this paper were presented to Courts and ‘*The Regulatory State of the South*’: *The Case of Brazil*, Workshop, August 7th, 2014, FGV Law School, São Paulo, Brazil. My thanks to David Fraser and Pedro Florencio for helpful comments on an earlier draft of this paper.

how the local institutional context acts to constrain and modify (with implications for its effectiveness) an imported, harmonized regime.

## I. INTRODUCTION

Brazil is a BRICS economy with the ninth largest GDP in the world.<sup>1</sup> Unlike many other emerging and developing countries where competition laws have only recently been enacted, Brazil has had a much longer history of the application of antitrust laws and policies, culminating in its most recent legislative reforms in 2011.<sup>2</sup> Brazilian competition agencies are also internationally commended as a success story, particularly for their strong stance against, and criminalization of, cartel activity.<sup>3</sup> But, Brazil also experiences difficulties with lengthy court delays and under-resourced enforcement agencies.<sup>4</sup>

The story of Brazilian competition law is also inextricably linked to its unique political history transitioning from military dictatorship and state ownership to a more market-oriented economy with the enactment of the 1988 Constitution, which laid an explicit constitutional foundation for competition law incorporating an “economic order” with due regard for “free competition.”<sup>5</sup>

In recent years, the Brazilian constitutional courts have become important sites of social change as they adjudicate in areas such as health, telecommunications, and financial markets.<sup>6</sup> This growth of judicial review has shifted the balance towards the interests of individual rights over those of health care providers and financial institutions, and has had a vital supervisory impact on the procedural design and effectiveness of regulatory institutions.<sup>7</sup> Notwithstanding the constitutional foundation for competition law, there have been comparatively fewer applications

1. In 2015, Brazil's GDP was \$1.775 Trillion. *Information About Brics*, BRICS MINISTRY OF EXTERNAL RELATIONS, <http://brics.itamaraty.gov.br/about-brics/information-about-brics> (last visited Mar. 5, 2017); *Gross Domestic Product 2015*, WORLD BANK, <http://data.worldbank.org/data-catalog/GDP-ranking-table> (last updated Feb. 1, 2017).
2. Francisco Ribeiro Todorov, Marcelo Maciel & Torres Filho, *History of Competition Policy in Brazil: 1930-2010* 57 ANTITRUST BULL. 207, 243 (2012).
3. *Id.* at 246.
4. *Id.*
5. Constituição Federal [C.F.][Constitution] art. 170, 173 (Braz); see Todorov, Maciel & Filho, *supra* note 2, at 219, 230.
6. See generally Octavio Ferraz, *Between Activism and Deference: Social rights adjudication in the Brazilian Supreme Federal Tribunal*, in SOCIAL & ECONOMIC RIGHTS IN THEORY AND PRACTICE: A CRITICAL ASSESSMENT (Helena Alviar Garcia, Lucy Williams & Karl Klare eds., 2015); Octavio Ferraz, *The right to health in the courts of Brazil: Worsening health inequalities?*, 11 HEALTH AND HUMAN RIGHTS J. 33 (2013); Viviane Muller Prado, *The Judicial Interference on the Regulation of the Brazilian Capital Market: The Case of Executive Remuneration and Transparency* (Dec. 2013), available at [https://www.academia.edu/6567797/The\\_Judicial\\_Interference\\_in\\_the\\_Regulation\\_of\\_the\\_Brazilian\\_Capital\\_Market\\_The\\_Case\\_of\\_Executive\\_Remuneration\\_and\\_Transparency](https://www.academia.edu/6567797/The_Judicial_Interference_in_the_Regulation_of_the_Brazilian_Capital_Market_The_Case_of_Executive_Remuneration_and_Transparency).
7. Viviane Muller Prado, *The Judicial Interference on the Regulation of the Brazilian Capital Market: The Case of Executive Remuneration and Transparency* (Dec. 2013), available at [https://www.academia.edu/6567797/The\\_Judicial\\_Interference\\_](https://www.academia.edu/6567797/The_Judicial_Interference_)

for judicial review and private damages in this area, and those who have litigated have been subject to increased costs and lengthy court delays.<sup>8</sup> Brazilian competition law is increasingly characterized by a shift to the extra-judicial resolution of disputes where settlement (and leniency for cartels) agreements are concluded at an early stage of the investigation process.<sup>9</sup> This decline in judicial supervision has had important consequences on the identification of the boundaries of substantive conduct provisions and legal certainty, potentially opening the way to inconsistent and discretionary regulatory interventions.

Many of the recent reforms to Brazilian competition law and regulatory institutions can be linked to similar approaches in other jurisdictions. They also follow views of the “regulatory state” and recommendations made in “peer reviews” of Brazilian competition regulation by international antitrust experts and agencies such as the International Competition Network (ICN) and Organisation for Economic Co-operation and Development (OECD).<sup>10</sup> The first part of this article will examine the transfer and impact of these harmonized regimes and “soft laws” in emerging and developing countries in the context of divergent institutional, cultural, and economic circumstances. The 2016 signing of a Memorandum of Understanding (MoU) between Brazil and other BRICS countries, for the creation of an Institutional Partnership for multilateral cooperation and exchange of information on competition law issues, is both a recognition of these trends and an effort to propose alternative voices and solutions for the institutional and economic challenges faced by the BRICS jurisdictions.<sup>11</sup>

The next part of this article will trace such concerns in a particular policy area: the shift in Brazilian competition law from judicial review to the increasing use of extra-judicial “settlement” of competition disputes. It will demonstrate how the local institutional context acts to constrain and modify the importation (and perhaps effectiveness) of a harmonized settlement regime, particularly for cartels.

## II. THE HISTORY OF BRAZILIAN COMPETITION LAW

More than 120 countries now have some form of competition legisla-

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in\_the\_Regulation\_of\_the\_Brazilian\_Capital\_Market\_The\_Case\_of\_Executive\_Remuneration\_and\_Transparency.

8. Luciana L. Yeung and Paulo F. Azevedo, ‘Measuring efficiency of Brazilian courts with data envelopment analysis (DEA)’ 22 *IMA Journal of Management Mathematics* 343-356 (2011); Paulo Furquim de Azevedo, ‘What’s the Role of Judicial Review in Latin American Countries,’ 7 (1) *CPI Antitrust Chronicle* 2-7 (2014).

9. Todorov, Marciel & Filho, *supra* note 2, at 233 n.79.

10. *See id.* at 241.

11. *See* Ioannis Lianos, *Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy* (Centre for Law, Econ. and Society, Research Paper Series: 5/2016).

tion.<sup>12</sup> Many of these regimes have only recently been enacted in developing and emerging economies.<sup>13</sup> Competition regimes and the concept of “competition as the regulator” were seen as key technocratic tools in the arsenal of the “regulatory state” in the 1990s as the processes of liberalization and privatization were being incorporated under the Washington Consensus.<sup>14</sup> As part of this initiative, competition laws were implemented to attract Foreign Direct Investment (FDI) and to ensure that trade liberalization and the removal of price controls were not undermined by the creation of artificial barriers to entry, cartels, and protectionist policies.<sup>15</sup> While international development theory may have moved on from the purely neo-liberal market-oriented reforms emblematic of the Washington Consensus,<sup>16</sup> strong competition laws are still seen as an essential arbiter of neo-liberal market reforms and privatized former government monopolies.<sup>17</sup>

Unlike many of these recent enactments in other jurisdictions, competition policies and laws have been present in Brazil for a much longer period.<sup>18</sup> These include early attempts to introduce competition policy during the process of industrialization in the 1930s and the enactment of legislation in 1962.<sup>19</sup> The 1962 Act created the regulatory body, CADE (Administrative Council for Economic Defense, Conselho Administrativo de Defesa Econômica), but the legislation was largely unenforced under the military government (1964-1985), which favored a more interventionist industrial policy focusing on public ownership, price control, and subsidies.<sup>20</sup> The enactment of the 1988 Constitution signaled a shift towards more market-oriented policies.<sup>21</sup>

However, competition law enforcement in Brazil was not really effec-

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12. Fiona M. Scott Morton, *How Do You Enforce Antitrust Law in a Global Marketplace?*, YALE INSIGHTS (June 16, 2016), <http://insights.som.yale.edu/insights/how-do-you-enforce-antitrust-law-in-global-marketplace>.

13. As many as 75 percent of countries with a competition regime are emerging or developing countries. Eleanor Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 SW. J. OF LAW AND TRADE IN THE AMERICAS, 101, 104 (2013); Taimon Stewart, Julian Clarke & Susan Joekes, *Competition Law in Action: Experiences from Developing Countries*, 4 (2007).

14. John Williamson, *The Progress of Policy Reform in Latin America* (Institute for International Economics, 1990).

15. Eleanor Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1788-89 (2000); Frank Emmert, Franz Kronthaler & Johannes Florian Stephan, *Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies*, at 30 (Halle Institute for Economic Research 2005/1, June 2005).

16. The value of these market reforms was also questioned when the promised outcomes of the Washington Consensus and import replacement programs did not materialize. See David Kennedy, *The “Rule of Law,” Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M Trubek & Alvaro Santos eds., 2006).

17. See *id.* at 141.

18. See Todorov, Marciel & Filho, *supra* note 2.

19. *Id.* at 208.

20. *Id.* at 217.

21. *Id.* at 225.

tive until the 1994 statute.<sup>22</sup> At that time the “Brazilian Competition Authorities” were comprised of the Secretariat for Economic Monitoring (SEAE), a unit within the Ministry of Finance, and the National Secretariat of Economic Law (SDE) (Secretaria Nacional de Direito Econômico), a unit responsible for investigation and CADE, which was given independent regulatory status from the executive and was empowered to determine final enforcement decisions.<sup>23</sup> Competition law received prominence during the movement from a highly concentrated and controlled economy to the implementation of more market-oriented reforms.

While competition law regimes in many emerging economies may still struggle to achieve enforcement goals, the Brazilian regime has largely been considered a success.<sup>24</sup> Cartel conduct has been criminalized in Brazil since 1990 and leniency provisions, which encourage cartel participants to confess their involvement in return for immunity or a reduction in fines were also implemented in 2000.<sup>25</sup> Powers to conduct “dawn raids” were also introduced to bolster investigation processes and uncover evidence.<sup>26</sup> While these measures considerably enhanced the success of enforcement, as well as imposing of some large fines particularly for cartel conduct,<sup>27</sup> institutional problems remained. CADE was under-resourced and faced problems of overlapping jurisdiction and the inability to initiate independent investigations.<sup>28</sup>

### III. REFORM OF BRAZILIAN COMPETITION LAW IN 2011

The reforms introduced in 2011 addressed many of these procedural difficulties and overlapping competencies in the former legislation.<sup>29</sup> They included the requirement for pre-merger notification, which deals with problems arising from post-merger decisions where the agreement had to be unraveled, resulting in a lengthy appeals process.<sup>30</sup> The new legislation also created longer term appointments for commissioners, improving independence and autonomy, considerably streamlining the division of work among the competition agencies, and removing the former complicated regulatory system involving the three regulatory institutions where CADE could only proceed to enforcement once an investigation had been concluded by SDE.<sup>31</sup> SDE no longer exists as a separate entity

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22. *Id.* at 234.

23. *Id.* at 234, 243 n.105.

24. *Id.* at 243.

25. *Id.* at 238. The law came into force on December 21, 2000.

26. *Id.*

27. See generally Ana Paula Martinez, *Challenges Ahead of Leniency Programmes: The Brazilian Experience* 6 J. OF EUROPEAN COMPETITION L. & PRAC. 1 (2015).

28. See Todorov, Marciel & Filho, *supra* note 2, at 243.

29. *Id.* at 243-244. The law entered into force on May 29, 2012; see also Martinez, *supra* note 27.

30. See Todorov, Marciel & Filho, *supra* note 2, at 244.

31. Org. for Econ. Cooperation and Dev. [OECD], *Note by Brazil, Roundtable on changes in Institutional Design of Competition Authorities*, at 3 DAF/COMP/WD(2014)129, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/>

and its antitrust functions have been transferred to CADE, which is now made up of the investigative branch of the General Superintendence, the Administrative Tribunal and Department of Economic Studies.<sup>32</sup> SEAE remains responsible for advocacy and promoting competition policies to government agencies.<sup>33</sup>

#### IV. COMPETITION LAW AND DEVELOPMENT

In spite of these recent reforms, competition law enforcement in Brazil faces many obstacles. The competition agencies are still under-resourced with respect to the size of the economy, as well as lengthy court delays for judicial review. While the Brazilian economy has undertaken a process of more openness to external competition and privatization since 1994, it still remains highly concentrated with a significant level of government ownership and a historical policy of nationalistic pro-development (*desenvolvimentismo*), which downplayed market forces and promoted state intervention, industrialization, and import substitution.<sup>34</sup>

The 2008 global financial crisis also lent political support to more protectionist policies. More recently, Brazil has struggled with political instability, a corruption crisis, and large public debt, leading to the contraction of its GDP. Brazil also faces concerns in common with all emerging economies that grapple with the priority that should be given to competition law when there are limited resources and other conflicting demands, such as the right to an adequate standard of living, including health and housing.<sup>35</sup> Competition law, in fostering the free market and preserving existing power relationships, is seen to have little effect on issues and inequalities.<sup>36</sup> On the other hand, under-enforcement of com-

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?cote=DAF/COMP/WD(2014)129&doclanguage=en [hereinafter Roundtable on changes].

32. Todorov, Marciel & Filho, *supra* note 2, at 243-244.

33. See generally Roundtable on changes, *supra* note 31, at 3; Org. for Econ. Cooperation and Dev. (OECD), *Annual Report on Competition Policy Developments in Brazil – 2014*, 8-9, DAF/COMP/AR(2015)19 (May 19, 2015), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2015\)19&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2015)19&docLanguage=en) [hereinafter Annual Report]; Alexandre Wagner Nester, *Brazilian Antitrust Law*, in *BRAZIL INFRASTRUCTURE LAW* (Marçal Justen Filho, Cesar Pereira & Maria Augusta Rost eds., 2016).

34. See Org. for Econ. Cooperation and Dev. (OECD), *OECD Global Forum on Competition: Contribution from Brazil*, 18, CCNM/GF/COMP/WD(2002)3 (Jan. 29, 2002), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD\(2002\)3&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD(2002)3&docLanguage=en) [hereinafter OECD Global Forum]; Paulo-Tarso Flecha De Lima, *Liberalism versus Nationalism: the Prodevelopment Ideology in Recent Brazilian Political History (1930-1997)*, 29 *PRESIDENTIAL STUD. Q.* 370, 386 (1999); Todorov, Marciel & Filho, *supra* note 2, at 219-220.

35. See Fox *supra* note 13, at 111; see generally Jens Arnold & Joao Jalles, *Dividing the Pie in Brazil: Income Distribution, Social Policies and the New Middle Class*, at 16 (OECD Econ. Dept. Working Papers, No. 1105, 2014)

36. See *id.* at 108; see also HERBERT J. HOVENKAMP, *DISTRIBUTIVE JUSTICE AND CONSUMER WELFARE IN ANTITRUST*, UNIV. OF IOWA WORKING PAPER 1, 17 (2011); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEORGETOWN L.J.* 1, 14 (2015).

petition law is problematic in developing and emerging economies because international trade and globalization is disproportionate to the detrimental impact of international cartels and the abuse dominance by foreign firms.<sup>37</sup> Domestic and international cartels, which have raised the price of many staple commodities, can have a real impact on consumer purchasing power and, thereby, the poverty levels of developing and emerging economies.<sup>38</sup> Competition can also promote social mobility by removing barriers to entry, strengthening equality of bargaining power and fostering the new entry of small enterprises. Strong enforcement of competition law has also been linked to increased economic growth.<sup>39</sup> Such enforcement can also have a political dimension because a state dominated by a few concentrated interests and wealth transfers can be considered antidemocratic.<sup>40</sup> In Brazil, the enforcement of competition law can also have a direct impact on equality and welfare policies because pecuniary penalties are paid into the Fund for Defense of Diffuse Rights (Fundo de Defesa de Direitos Difusos) (FDD), which supports projects on the environment; free competition; consumer rights; and historical, cultural and artistic heritage.<sup>41</sup>

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37. Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689, 726 (2003); Margaret Levenstein & Valerie Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801,851 (2004). Competition authorities in developed jurisdictions also have little incentive to prosecute or assist other agencies to prosecute anti-competitive conduct where the detrimental welfare effects are external to their domestic market. See generally Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142,1152 (2001); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1523 (1998); Michal S. Gal & Jorge A Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, 76 ANTITRUST L.J. 899,912 (2010).
  38. In Brazil, the uncovering of cartels and prevention of anticompetitive behavior in the retail fuel, cement, industrial and medicinal gas and salt markets have been identified as directly beneficial to the poorest consumers. Org. for Econ. Cooperation and Dev. [OECD], *Competition and Poverty Reduction: Contribution from Brazil*, Global Forum on Competition, DAF/COMP/GF/WD(2013)4, 3 (Jan. 15, 2013), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2013\)4&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2013)4&docLanguage=en). Cf. *Comp. Comm'n v Pioneer Foods (Pty) Ltd* 2010 ZACT 9, (SA) (effectively dismantling the bread cartel in South Africa).
  39. Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, at 20 (Preprints of the Max Planck Institute for Res. on Collective Goods Bonn 2011/3) (Jan. 2011).
  40. See *Competitive Advantage and Competition Policy in Developing Countries* (Paul Cook, Raul Fabella & Cassey Lee eds., 2007). Cf. Todorov, Marciel & Filho, *supra* note 2, 256-257; Simon J. Evenett, *Links Between Development and Competition Law in Developing Countries*, at 5 (Case Stud. for the World Dev. Rep. 2005: Inv. Climate, Growth and Poverty, 2003).
  41. Org. for Econ. Cooperation and Dev. [OECD], *Relationship Between Public and Private Antitrust Enforcement – Brazil*, DAF/COMP/WP3/WD(2015)23, 2 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2015\)23&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)23&docLanguage=en) [hereinafter Relationship Between Public and Private Antitrust Enforcement]; *Diffuse rights fund*, INSTITUTO SOCIO-AMBIENTAL, <https://uc.socioambiental.org/en/fundos/diffuse-rights-fund> (last visited Mar. 4, 2017).



## V. THE TRANSFER OF GLOBAL ANTITRUST EXPERTISE AND VOLUNTARY "SOFT NORMS"

The recent reforms to competition law and institutions in Brazil closely follow the recommendations of international antitrust experts and agencies such as the ICN,<sup>42</sup> UNCTAD,<sup>43</sup> and the OECD.<sup>44</sup> "With the collapse of global initiatives to enact a multilateral competition agreement,<sup>45</sup> multi-jurisdictional issues are addressed by the extraterritorial application of domestic competition law,<sup>46</sup> bilateral and regional agreements,"<sup>47</sup> and international antitrust institutions, which have been instrumental in exporting expertise and institutional frameworks through the harmonisation of competition rules and procedures by means of the convergence of soft norms and "best practice".<sup>48</sup>

Brazil was subject to "peer reviews" of its competition agencies by the OECD in 2005<sup>49</sup> and again in 2010.<sup>50</sup> While not a member of the OECD,

42. The ICN was established in 2001 as a forum for competition agencies. Today its membership includes 117 competition agencies and a number of non-governmental advisors (NGAs). ICN STEERING GROUP, THE ICN'S VISION FOR ITS SECOND DECADE 1,7 (May 2001); Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current, and Future Role*, 20 MINN. J. OF INT'L L. 274, 274 (2011).

43. The United Nations Conference on Trade and Development (UNCTAD) provides technical assistance to competition agencies in developing countries. U.N. Conference on Trade and Development. See *The U.N. Set of Principles and Rules on Competition*, at 18, U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000).

44. *Pro-competitive Policy Reforms*, OECD, <http://www.oecd.org/competition/reforms/> (last visited Mar. 4, 2017) [hereinafter *Pro-Competitive Policy Reforms*].

45. Many developing countries rejected the proposal for a multilateral competition agreement through the World Trade Organization (WTO). World Trade Organization, *Working Group on the Interaction between Trade and Competition Policy (WGTC)*, WTO, [http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm#documents](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm#documents); see also WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1; Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES OF ECON. INTEGRATION 7 (2004); Aditya Bhattacharjee, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. OF INT'L ECON. L. 293-294, 302-303 (2006); David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 10 J. OF INT'L ECON. L. 707, 710-711 (2007); D Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 51 (2007); Kathryn McMahon, *Competition law and developing economies: Between "informed divergence" and international convergence* in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 209,211 (Ariel Ezrachi ed., Edward Elgar, 2012).

46. While a number of decisions have expanded the extraterritorial application of U.S. antitrust law, the U.S. Supreme Court reasserted the importance of comity to deny damages suits to foreign victims of the international global vitamins cartel. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). But see *Hartford Fire Ins. Co. v. California*, 509 US 764, 769-770 (1993).

47. See generally, Michal Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 UNIV. OF TORONTO L. REV. 239, 240 (2010).

48. ICN Steering Group, *supra* note 42.

49. Org. for Econ. Cooperation and Dev. [OECD], *Competition Law and Policy in Brazil: A Peer Review*, at 7 (2005), <https://www.oecd.org/brazil/35445196.pdf>.

50. Org. for Econ. Cooperation and Dev. [OECD], *Competition Law and Policy in Brazil: A Peer Review*, at 3 (2010), <https://www.oecd.org/daf/competition/45154362.pdf> [hereinafter *Competition Law and Policy*].

Brazil has “observer” status and undergoes peer review on a voluntary basis.<sup>51</sup> These reviews were supplemented by a “follow-up” in 2012.<sup>52</sup> These OECD reviews are comprehensive and contain an important level of detail, scrutiny, as well as assessment of Brazilian competition law regulation.<sup>53</sup> The impact of its recommendations on the reform process in Brazil was acknowledged in their 2010<sup>54</sup> Review:

The [2005] Report contained several recommendations for further improving competition policy in the country, many of which required amendments to the competition law. Those amendments may now finally be enacted. The 2005 Report also made other recommendations that did not depend on new legislation, most of which were adopted. Finally, the report suggested changes to improve the legislation that was then pending in the Congress, and many of those were also accepted.<sup>55</sup>

The 2011 legislative reforms mirror the recommendations from these OECD reviews including: streamlining and removal of overlapping administrative functions between and among the competition agencies and extension of commissioners’ terms.<sup>56</sup> Formal settlement procedures were also introduced for mergers and anticompetitive conduct.<sup>57</sup> Changes to the merger review process included a more expedited review, introduction of pre-merger notification, the removal of a twenty percent market share threshold and introduction of a local nexus requirement (calculated on the basis of local relevant sales and/or the assets of the acquired party) for merger notifications.<sup>58</sup> In referring to these changes the Inter-Ameri-

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51. An “observer” agrees “to associate themselves to certain Council Recommendations, to undergo a peer review exercise, to make written contributions to Committee roundtables, to actively participate in the Committee’s outreach events and to disseminate the Committee’s recommendations and best practices to other authorities . . . . At the expiration of the two year period . . . a review of the results achieved by non-members invited during the expired period will be important. There will be no presumption of renewal; it will be earned by performance.” Org. for Econ. Cooperation and Dev. (OECD), *Pro-Active Strategy vis-à-vis non members*, DAF/COMP(2005)26 at 2 (June 16, 2005), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=DAF/comp\(2005\)26](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=DAF/comp(2005)26).

52. Org. for Econ. Cooperation and Dev. [OECD], *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries: Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru* (2012), [http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review\\_en.pdf](http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_en.pdf) [hereinafter Follow-up].

53. Competition Law and Policy, *supra* note 50, at 9.

54. *Id.*

55. *Id.* at 9.

56. *Follow-up*, *supra* note 52, at 37–40.

57. *Competition Law and Policy*, *supra* note 50, at 74–81.

58. See generally Abel M. Mateus, *The New Brazilian Merger Control Regime*, in EUROPEAN COMPETITION LAW ANNUAL 2010: MERGER CONTROL IN EUROPEAN AND GLOBAL PERSPECTIVE (Philip Lowe and Mel Marquis eds., 2013). The threshold for mergers has been increased so that only larger transactions need to be notified with a state-wide turnover of one of the companies of R\$750 million. Organisation for Economic Co-operation and Development (OECD), *Annual Report on Competition Policy Developments in Brazil: 2012*, at 4, OECD Doc. DAF/COMP/AR(2013)19 (May 21, 2013). The turnover threshold can be modified by a specific

can Development Bank (IDB)/OECD stated: “[i]n the case of Brazil, the new competition law eliminated the market share criterion in line with the peer review recommendation.”<sup>59</sup> In its report to the OECD, Brazil specifically notes that the change to merger thresholds and removal of the market share reference “is in accordance with international recommendations, that state that notification thresholds should be based exclusively on objectively quantified criteria”.<sup>60</sup>

The amendments to the Brazilian merger regime also closely followed the recommended practices of the ICN,<sup>61</sup> which together with the OECD,<sup>62</sup> has devoted a great deal of work to the harmonisation of merger guidelines, with the goal of reducing transaction costs for the review of multi-jurisdictional mergers through the streamlining of notification procedures. The ICN invests considerable time and effort in advocacy, the collection of data and monitoring compliance with these merger practices.<sup>63</sup> Many competition agencies, including Brazil,<sup>64</sup> have brought their merger regimes into closer conformity with the ICN recommendations.<sup>65</sup> The ICN reports, for example, that “[t]wo-thirds of ICN

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executive act, without discussion by Congress. Working Party No. 3 on Co-operation and Enforcement, *Jurisdictional Nexus in Merger Control Regimes: Note by Brazil*, at 2, OECD Doc. DAF/COMP?WP3/WD(2016)23 (June 7, 2016).

59. The OECD observed that a number of economies, including Brazil, had amended their notification thresholds in line with the Recommendation. See Organization for Economic Co-operation and Development [OECD], *Report on Country Experiences with the 2005 Recommendation on Merger Review*, (2013), <http://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf>; Organization for Economic Co-operation and Development (OECD), *Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Doc. DAF/COMP?WP3(2016)4 (Mar. 10, 2016).
60. Working Party No. 3 on Co-operation and Enforcement, *Jurisdictional Nexus in Merger Control Regimes: Note by Brazil*, at 2, OECD Doc. DAF/COMP?WP3/WD(2016)23 (June 7, 2016) [hereinafter Working Party No. 3]. CADE still retains some discretion to review mergers that do not comply with turnover thresholds but have an anticompetitive effect in Brazil.
61. In particular, the ICN Merger Working Group’s “Recommended Practices for Merger Notification and Review Procedures.” See International Competition Network, *Recommended Practices for Merger Notification and Review Procedures*, INTERNATIONALCOMPETITIONNETWORK.ORG, (Mar. 4, 2017), <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.
62. Organization for Economic Co-operation and Development [OECD], *Recommendation of the Council on Merger Review*, OECD Doc. C(2005)34 (Mar. 23, 2005).
63. Simon J. Evenett & Alexander Hijzen, *Conformity with International Recommendations on Merger Reviews: An Economic Perspective on “Soft Law,”* 1–51 (University of Nottingham & Leverhulme Centre, Research Paper No. 2006/04, 2006), <http://ssrn.com/abstract=893034>.
64. The introduction of a ‘local nexus requirement’ for merger review was particularly attributed to ICN recommendations. See Working Party No. 3, *supra* note 60. Jenny notes that Brazil “adopted other measures recommended by the ICN such as the fact that there is no deadline for pre-merger notification or the fact that the Superintendent-General must explain his reasons when he declares a transaction complex.” Frédéric Jenny, *Substantive convergence in merger control: An Assessment*, 1 REVUE DES DROITS DE LA CONCURRENCE No. 1-2015, 21, 29 n. 15 (2015).
65. See Mariana Tavares de Araujo, *Brazil: Implementing ICN’s Recommended Practices*, Annual Conference, INTERNATIONAL COMPETITION NETWORK [ICN] (2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc420.pdf>; MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES: A CASE

members that made changes to their merger control regimes cited the ICN Recommended Practices for Merger Notification and Review Procedures as having influenced their reforms.”<sup>66</sup>

The ICN and OECD belong to the emerging networks of decentralised economic ordering in the global economy where rules are formulated by regulators and technocrats, not sovereign states.<sup>67</sup> This is described as a form of “normative isomorphism” brought about by networks of expert epistemic communities and international organizations who induce regulatory changes through the promotion of “best practices” and “peer reviews.”<sup>68</sup> As the OECD notes, “[t]here is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process.”<sup>69</sup>

Peer pressure and the promise of technical assistance are powerful means for the achievement of conformity and compliance.<sup>70</sup> In this manner developed countries can “effectively export their rules to the rest of the world.”<sup>71</sup> These rules are presented as purely technical standards, which stand outside politics and do not require democratic deliberation. As Pistor points out, “[t]he external supply of best practice law, while facilitating more radical change than might be feasible without external pressure, sterilizes the process of law-making from political and socio-economic development, and thereby distances it from the process of continuous adaptation and innovation.”<sup>72</sup>

The OECD peer review system, particularly the economic surveys, has been compared to a form of soft coordination through multilateral sur-

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STUDY ON BRAZIL AND ARGENTINA (2011); Marco Botta, *The Impact of Multi-Jurisdictional Concentrations on the New Competition Law Jurisdictions, Case Study on Brazil*, in NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS, 260 (Richard Whish and Christopher Towley eds., 2012).

66. ICN Steering Group, *supra* note 42, at 2.

67. Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS, 177 (Michael Byers ed., 2001); Chris Brummer, *Why Soft Law Dominates International Finance – and Not Trade*, 13 J. INT’L ECON. L. 623 (2010). Imelda Maher and Anestis Papadopolous, *Competition Agency Networks Around the World* in Research Handbook on Int’l Comp. Law, 60 (Ariel Ezrachi ed. 2012).

68. Paul J. DiMaggio and Walter M. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992); Frank Dobbin, Beth Simmons, and Geoffrey Garrett, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. 449 (2007).

69. *Follow-up*, *supra* note 52, at 3.

70. Eleanor M. Fox, *Competition, development and regional integration: in search of a competition law fit for developing countries*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES, 273 (Josef Drexler, Mor Bakhoun, Eleanor M. Fox, Michal S. Gal & David J. Gerber eds., 2012).

71. Brummer, *supra* note 67, at 642.

72. Katharina Pistor, *The Standardization of Law Its Effect on Developing Economies*, G-24 Discussion Paper Series No. 4, at 2, (June 2000), <http://www.g24.org/PDF/g24-dp4.pdf>.

veillance where effectiveness depends on persuading reluctant actors. As Armin Schäfer points out:

Multilateral surveillance rests on peer review, i.e. on the mutual monitoring and evaluation of national policies by other governments. It is targeted at bringing states to behave in accordance with a code of conduct or specific goals, at developing common standards and at acquiring best practices through international comparison. Precisely because there are no sanctions, this mode of governance builds on a co-operative effort to criticize existing policies and generate new ones.<sup>73</sup>

While more research is required regarding the impact and desirability of these reforms in Brazil before any firm conclusions can be drawn, to the extent that they closely follow the recommendations of international experts, we can nevertheless begin to question their democratic basis and legitimacy. While some of these reforms were subject to extensive debate in both houses of Congress for a number of years, other adopted recommendations, as the OECD points out, “did not depend on new legislation.”<sup>74</sup> Democratic legitimacy questions are also raised by the work of the ICN when norms are created by officials from competition agencies who are joined by Non-Governmental Advisors (NGAs) from private firms, think-tanks, and consultancies.

The views of global bodies and experts are persuasive in these circumstances and the adoption of these ideas can link regulatory institutions together with international like-minded peers potentially bypassing more pressing local concerns and democratic scrutiny. As the IDB/OECD noted in its 2013 follow up to the Peer Review, “[t]he peer review thus serves as a powerful international management tool for competition authorities and it provides solid background support when arguing for legislative change to improve a country’s competition law and its overall competitive environment.”<sup>75</sup>

The value of ICN recommendations to the Brazilian reform of the merger regime and cartel enforcement was acknowledged by Mariana Tavares de Araujo, a former member of SDE: “[a]mendments to the law were supported by ICN materials, which were all very important to convince government and private sector of need for change.”<sup>76</sup>

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73. Armin Schäfer, *A new form of governance? Comparing the open method of co-ordination to multilateral surveillance by the IMF and the OECD*, 13 J. EUR. PUB. POL’Y 70 (2006); Fabrizio Pagani, *Peer Review: A Tool for Co-operation and Change, An Analysis of an OECD Working Method*, OECD Doc. SG/LEG(2002)1 (Sept. 11, 2002), <http://www.oecd.org/dac/peer-reviews/1955285.pdf>. cf. The Open Method of Co-ordination (OMC) in the EU operates a similar system of multilateral surveillance through the use of guidelines and monitoring devices through mechanisms such as the European Competition Network. See CHARLES F. SABEL AND JONATHAN ZEITLIN EDS., *EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE* (2010).

74. *Competition Law and Policy*, *supra* note 50, at 9.

75. IDB/OECD, *supra* note 59, at 1.

76. Araujo, *supra* note 65, at 8.

The OECD reviews are also followed up by extensive survey questions where each jurisdiction is expected to answer a number of standardized questions focused on justifications for non-implementation of recommendations such as: “[i]f the recommendations have not been fully implemented, describe those parts that have not been implemented and give the reasons why, in your opinion, they have not been implemented.”<sup>77</sup>

The adoption of global norms and the similar practices of peer organizations, supported by burgeoning studies and research by experts, have the advantage of economies of scale and efficiencies arising from network effects.<sup>78</sup> This is particularly true when policy choices are otherwise constrained by “bounded rationality,” complexity, uncertainty, and an absence of “information and cognitive capacity to assess the cost and benefits of each and every alternative.”<sup>79</sup> In these circumstances, “organizations are rewarded for being similar to other organizations in their fields”<sup>80</sup> and divergence, while possible, is costly.<sup>81</sup> Harmonized regimes also foster cooperation and exchange of information. Investment and trade opportunities are also enhanced, as the “follower” jurisdiction has demonstrated its commitment to the control of dominance and prosecution of cartels.<sup>82</sup>

It is also true, however, that harmonized regimes and the streamlining of procedures for merger review align most clearly with the interests of global commerce and its demands for standardized rules, removal of regulatory trade burdens, and reduction of transaction costs for global mergers. These approaches, not surprisingly, have tended to serve the domestic welfare interests of the more powerful and developed antitrust jurisdictions, and have had limited success as far as developing countries are concerned. As Fox observes, “the ICN agenda is principally set and the norms principally forged by the developed world.”<sup>83</sup>

The invocation of the ICN and OECD standards as international best practices becomes a powerful and apparently apolitical and neutral standard for critique of local law and regulatory processes. The Merger Streamlining Group, for example, which has representatives of the private bar and multinational firms, actively engages in the monitoring of compliance with the ICN merger guidelines by individual competition agencies.<sup>84</sup> The Group claimed to be influential in the adoption by Bra-

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77. *Follow-up*, *supra* note 52, at 64.

78. See DiMaggio and Powell, *supra* note 68; Fox, *supra* note 70.

79. Dobbin et al., *supra* note 68, at 452.

80. DiMaggio and Powell, *supra* note 68, at 153.

81. Fox, *supra* note 70.

82. Gal and Padilla, *supra* note 37.

83. Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 152 (2009).

84. The Merger Streamlining Group is “a group of multinational firms interested in ensuring that international merger review regimes operate effectively and efficiently and do not impose undue burdens . . . . [It] pursues this mission through direct submissions to competition agencies and governments . . . . The International Competition Network’s *Recommended Practices for Merger Notification* are used as a benchmark for identifying and advocating changes to non-compliant re-

zil, and other jurisdictions, of the “local nexus requirement” for merger notifications.<sup>85</sup>

In order to optimize the benefits of the design and implementation of competition legislation for developing and emerging economies, it is important that the particular market context of the jurisdiction be taken into account.<sup>86</sup> In this way the simple transfer/transplant of an existing regime, chosen from one of the dominant and established models in the United States or European Union, is not the optimal solution. While homogeneity and convergence of global competition laws may be desirable for the efficient transaction of international business, this approach fails to recognize that the success of these regimes more often demands attention to divergence, adaptation, and learning.<sup>87</sup> Programs of technical assistance are found to be more effective to the extent they do not merely impose simple solutions but consider the political, cultural,<sup>88</sup> and economic context of each jurisdiction.<sup>89</sup> While the success of the ICN may be measured by convergence, reducing the “[p]otential chilling effects from differing substantive standards and polices” and “duplicative procedures,”<sup>90</sup> the divergent interests of developing countries remain largely unrecognised.<sup>91</sup> A failure to acknowledge these factors may account for the mixed results of competition law transplants in various jurisdictions.<sup>92</sup>

The achievement of perfect international convergence is also an impossible goal. As Frédéric Jenny argues, attempts towards full harmonization of merger rules will always prove elusive (and unrealistic) given the number of competition regimes in the global economy.<sup>93</sup> There will al-

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gimes.” McMillan Ltd. Liab. P'Ship [LLP], *Merger Streamlining Group*, McMillan LLP, <http://www.mcmillan.ca/webfiles/Merger%20Streamlining%20Group.pdf> (last visited Mar. 6, 2017, 11:20 AM).

85. *Id.*

86. Eduardo P. Motta, *Competition Policy and Trade in the Global Economy: Towards and Integrated Approach*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT & WORLD ECONOMIC FORUM (2016), [http://www3.weforum.org/docs/E15/WEF\\_Competition\\_Policy\\_Trade\\_Global\\_Economy\\_Towards\\_Integrated\\_Approach\\_report\\_2015\\_1401.pdf](http://www3.weforum.org/docs/E15/WEF_Competition_Policy_Trade_Global_Economy_Towards_Integrated_Approach_report_2015_1401.pdf).

87. Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Competition Policy Implementation Working Group, *Lessons To Be Learnt From The Experiences Of Young Competition Agencies*, INT'L COMPETITION NETWORK (May 3-5, 2006), <http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf>.

88. Thomas K. Cheng, *How Culture May Change Assumptions in Antitrust Policy*, in THE GLOBAL LIMITS OF COMPETITION LAW 205 (Ioannis Lianos and D. Daniel Sokol eds., 2012).

89. Michael W. Nicholson, D. Daniel Sokol, and Kyle W. Stiegert, *Assessing the efficiency of antitrust/competition policy technical assistance programs*, INT'L COMPETITION NETWORK (May 3-5, 2006), <http://internationalcompetitionnetwork.org/uploads/library/doc428.pdf>.

90. ICN Steering Group, *supra* note 42.

91. Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1 (2009). Alternatives to the dominance of the US and EU models are beginning to emerge, however, such as the signing of the MoU by the BRICS competition authorities.

92. Berkowitz et al., *supra* note 87, at 165-165.

93. Jenny, *supra* note 64.

ways be legitimate justifications for substantive and procedural divergence grounded in the pursuit of differing competition goals, market size, and industrial policy, particularly for developing and emerging economies.<sup>94</sup> In Brazil, the introduction of pre-merger review may, for example, place a strain on already limited resources<sup>95</sup> and shift them away from other priorities. While the changes to the merger threshold should reduce the number of transactions subject to review,<sup>96</sup> CADE approval will become necessary for the conclusion of transactions and there will be increased pressure on officials within tight time frames.<sup>97</sup>

Brazilian Supreme Court Judge Ricardo Villas Bôas Cueva has also argued that some aspects of “transplanted” antitrust regimes are not immediately suited to a civil law jurisdiction:

The judicial examination of antitrust cases might be hampered not only by the intrinsic complexity of economic analysis but also by unnecessary misuse of a legal jargon derived from uncritical import of legal concepts, mostly from the common law-based American system. The practitioners of antitrust law in Brazil, as well as the staff and members of the competition authorities, tend indeed to clutter up their petitions, reports and decisions with language that is not easily understandable by judges, who are usually not familiar with the common law culture—and are not supposed to know it anyway—since the legal system in Brazil is based on the civil law model from continental Europe.<sup>98</sup>

He goes on to describe one example of this “cultural misapprehension” as the import of American standards of proof for antitrust infringements, which he argues are better suited to jury trials.<sup>99</sup> Cueva acknowledges that standards of proof and safe harbors<sup>100</sup> can foster legal certainty and predictability in competition law adjudication where the alternative would be a full-scale “rule of reason” assessment of economic facts.<sup>101</sup> He, however, also suggests that these can be absorbed in the civil law system through better clarification, and greater utilization, of the formal nature of the infringement as “formal” (*per se*) or “material” (dependence on effect) rather than reliance on standards of proof.<sup>102</sup> The difficulty with this approach is that in competition law it is often impossible to draft a legislative provision (even in civil law jurisdictions) that would encapsulate the multiple instances of abusive conduct.

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94. *Id.*

95. Todorov, Marciel & Filho, *supra* note 2, at 253.

96. *Id.* at 251.

97. *Id.*

98. Ricardo Villas Bôas Cueva, *Judicial Review of Antitrust Decisions in Brazil*, 2013 FORDHAM COMPETITION L. INST. 395, 399.

99. *Id.*

100. An agreement or merger may have to reach a certain market share threshold before it will be evaluated for anti-competitive concerns.

101. *Id.*

102. Cueva, *supra* note 98, at 399-400.



## VI. INSTITUTIONAL REFORM OF COMPETITION AGENCIES AND THE "REGULATORY STATE"

The reforms to the institutional structure of competition law in Brazil also coincide with the value placed on depoliticized, autonomous institutions and the technocratic application of neutral rules in the "regulatory state"<sup>103</sup> where there is a concern for market outcomes rather than redistribution (in a "welfare state") and "legitimacy is accorded to depoliticized expert knowledge."<sup>104</sup>

A number of semi-autonomous regulatory institutions, known as "autarchies," were created in Brazil in order to carry out decentralized state economic activities during the period of liberalization and privatization in the late 1990s.<sup>105</sup> These institutions were relatively new and not always a welcome phenomenon in Brazil since their role was closely associated with the "state in transition" as it withdrew from economic activities.<sup>106</sup>

Since 1994, competition agencies in Brazil have been similarly created as an "autarchy," linked to the Ministry of Justice.<sup>107</sup> The 2011 reforms aimed to further increase the independence and regulatory powers of the competition institutions, streamlining and removing overlapping roles.<sup>108</sup> The increase in the terms of office of the CADE President and Commissioners to four years, and new provisions for reappointment were made in "line with the suggestions made by the OECD's report."<sup>109</sup> This coincided with a growing professionalization and specialization of the regulatory personnel. The number of economists and level of training in economics for regulators were prioritized,<sup>110</sup> and professionals with North American educational credentials<sup>111</sup> were sought after, and appointed to, the agencies. Luciano Timm notes that many of CADE's economists have U.S. doctorates and that U.S. antitrust law is therefore "highly persuasive," although "CADE would not refrain from judging a

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103. THE NEW INSTITUTIONAL ECONOMICS ALSO LINKS INSTITUTIONAL PERFORMANCE WITH ECONOMIC GROWTH. See generally DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (Cambridge Univ. Press, 1991); Karen Yeung, *The Regulatory State*, in THE OXFORD HANDBOOK OF REGULATION 64-85 (Robert Baldwin et al., 2010); Colin Scott, *From Welfare State to Regulatory State: Meta-Regulation and Beyond*, 11 U. OF TOKYO J. OF L. & POL. 2, (2014); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17.3 WEST EUR. POL. 77-101 (1994).

104. NAVROZ K. DUBASH & BRONWEN MORGAN, THE RISE OF THE REGULATORY STATE OF THE SOUTH: INFRASTRUCTURE AND DEVELOPMENT IN EMERGING ECONOMIES, 10 (Oxford Univ. Press, 2013).

105. *An Overview of Brazilian Law*, *supra* note 33, at 13.

106. Alexandre W. Nester, *supra* note 33, at 20.

107. *Roundtable on changes*, *supra* note 31, at 7.

108. *Id.*

109. *Annual Report*, *supra* note 58, at 7.

110. In 2009, CADE created a Department of Economic Studies (DEE), comprising full time economists, which were to be integrated with the Technical Group in Economics, created in 2008. Their activities included conducting a number of "internal training sessions, participating in international forums on antitrust economics, and in bi-lateral consultations with expert economist from other jurisdictions." *Competition Law and Policy in Brazil*, *supra* note 50 at 38-39.

111. *Id.*, *supra* note 50, at 46.

case adapted to the Brazilian market.”<sup>112</sup> As DiMaggio and Powell point out:

To the extent managers and key staff are drawn from the same universities and filtered on a common set of attributes, they will tend to view problems in a similar fashion, see the same policies, procedures and structures as normatively sanctioned and legitimated, and approach decisions in much the same way.<sup>113</sup>

Brazilian expertise has also been exported.<sup>114</sup> Brazilian officials have provided technical assistance and trainee programs for other competition agencies in Latin America, as transferred knowledge and expertise are further circulated to other institutions and jurisdictions.<sup>115</sup>

Dubash and Morgan point out, however, that the regulatory state in the South does not always correspond to a depoliticized entity.<sup>116</sup> Rather it is positioned on a spectrum between “rules and deals”, and shaped by a modified and expanded range of contextual factors<sup>117</sup> where autonomous institutions applying neutral rules give way to a more “embedded” regulatory state. Politicized institutions engage in “deals” with stakeholders to achieve distributive, perhaps more politically expedient, outcomes such as equitable access to water and electricity.<sup>118</sup> A broader regulatory space emerges, which is inhabited by the courts, civil society, and bureaucratic networks.<sup>119</sup>

Increased specialization and insulation from politics may therefore not always be desirable in an emerging or developing economy. Competition agencies, for example, may want to assume a number of roles with mixed and broader functions normally undertaken by sector-specific regulators such as licensing, standard-setting, utility access regulation, and consumer protection legislation.<sup>120</sup> This has not been the approach in Brazil; however, the competition agency is solely vested with the competition regulation of sector specific areas (subject to some remaining jurisdictional disputes in areas such as banking<sup>121</sup>) leaving non-competition issues to be resolved by the specialist sector regulators. In keeping with this desire to

112. Luciano B. Timm, *Jurisdiction, Cooperation, Comity, and Competition Policy in Brazilian International Antitrust Law*, in COOPERATION, COMITY, AND COMPETITION POLICY 80 (Andrew T. Guzman 2011).

113. DiMaggio & Powell, *supra* note 68, at 153.

114. *Competition Law and Policy in Brazil*, *supra* note 50 at 50-51.

115. *Id.*

116. Dubash & Morgan, *supra* note 104, at 2.

117. *Id.*

118. *Id.* at 283.

119. *Id.*

120. Michal S. Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, 15 (N.Y. U. Law & Econ, Working Paper, 2004), [http://www.unctad.org/en/docs/ditccpl20041ch1\\_en.pdf](http://www.unctad.org/en/docs/ditccpl20041ch1_en.pdf).

121. CADE shares authority for review of banking mergers with the Central Bank (BACEN). PINHEIRO NETO, *DOING BUSINESS IN BRAZIL* 26-23 (2013); *Competition Law and Policy in Brazil*, *supra* note 77 at 67; \*Alexandre W. Nester, *Control of the Regulatory Agencies in INFRASTRUCTURE LAW OF BRAZIL* (Marçal J. Filho et al., 2016); Bruno M. Salama & Thiago J. Pinheiro, *Citizens vs. Banks: Institutional Drivers of Financial Market Litigiousness in Brazil*, 11-13, 16 (Working Pa-

“depolitize” and streamline roles, the 2012 reforms also separated the consumer protection functions from the competition agency and created a new body, the National Consumer Secretariat.<sup>122</sup>

Competition agencies in developing and emerging economies can also be expected to play an important role in “competition advocacy,” which includes the promotion of government policy to assess industrial policy, regulatory review of anticompetitive legislation, reviews of technical standards, competition market studies, and the implementation of measures to remove antitrust immunity and ensure competitive neutrality between public and private enterprises.<sup>123</sup> In Brazil, this role has been an important counterweight to the powerful producer groups, which have lobbied for price controls and special protections, for example.<sup>124</sup> Regulatory independence and autonomy are valued in these circumstances in order to diminish the potential for rent-seeking, political influence, and capture.<sup>125</sup> But as Frédéric Jenny points out, more politicized institutions also have an important role to play.<sup>126</sup> There can be a trade-off between the independence of the competition authority and the ability to access important “insider” government information available to a more politicized body with strong links to the executive, which is required to achieve effective advocacy.<sup>127</sup>

In Brazil, SEAE historically had an important role in competition advocacy.<sup>128</sup> The OECD cautioned, however, that its home in the Ministry of Finance made it “more susceptible to political influence than would that of an independent agency”<sup>129</sup> but also observed that it may be useful to have “integration of the agency into the government system to be better-placed to engage and influence policy-making.”<sup>130</sup> It is not surprising, therefore, that the OECD specifically recommended setting up mechanisms to enable SEAE to participate in legislative reform of the regulated sectors.<sup>131</sup> The 2011 reforms put this recommendation in place.<sup>132</sup> While SEAE still maintains a role in competition advocacy, with more recent reforms it has been removed completely from competition law enforcement, and SDE has been dismantled.<sup>133</sup> It remains to be seen whether this demarcation of functions will have an adverse effect on competition

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per, 2013), [http://direitosp.fgv.br/sites/direitosp.fgv.br/files/arquivos/anexos/draft\\_of\\_may\\_31\\_2013\\_-\\_bruno\\_m.\\_salama.pdf](http://direitosp.fgv.br/sites/direitosp.fgv.br/files/arquivos/anexos/draft_of_may_31_2013_-_bruno_m._salama.pdf).

122. *Annual Report*, *supra* note 58, at 7.

123. *Competition Law and Policy*, *supra* note 50, at 50-51.

124. *Center for Co-operation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs*, *supra* note 34, at 18.

125. Frédéric Jenny, *Competition Authorities: Independence and Advocacy in the Global Limits of Comp. Law 205* (Joannis Lianos and D. Daniel Sokol eds. 2012).

126. *Id.*

127. *Id.* at 169.

128. *Competition Law and Policy in Brazil*, *supra* note 50 at 68-72.

129. *Id.* at 69.

130. *Follow-up*, *supra* note 52, at 10.

131. *Id.*

132. *Id.*

133. *Id.*

advocacy in the future, or whether a more politicized role may have permitted the pursuit of other legitimate industrial policy goals. These industrial policy goals, together with competition law, are similar to the position between “rules and deals,” characteristic of institutions in the “regulatory south.”<sup>134</sup>

This more political role for competition law institutions is not confined to the “regulatory south.” Western governments throughout history have readily intruded on the “autonomy” of competition agencies. During the global financial crisis, for example, competition authorities were either not consulted by the executive on crucial issues impacting competition policy, or their recommendations were side-stepped or ignored.<sup>135</sup> The courts have also had a fundamental role to play in the political development of competition policy. For example, Kovacic and Shapiro have traced how the U.S. Supreme Court has shaped U.S. antitrust policy for over a century since the early interpretation of the Sherman Act in 1890, its reaction to political and economic events such as the Great Depression and the New Deal, and its changing attitudes to collusion and cooperation, protectionism, and global competition.<sup>136</sup>

These brief examples demonstrate that autonomous and depoliticized competition institutions are merely idealized versions of the transplanted “western model.” The use of competition law and policy as an enforcement tool has always been highly political and inextricably linked with ideas surrounding the role of the state within the economy.<sup>137</sup>

134. Dubash & Morgan, *supra* note 104, at 2.

135. In 2008 the UK competition regulator, the Office Fair Trading (OFT) (now the Competition & Markets Authority (CMA)) had advised that the merger of two major banks Lloyds TSB and HBOS should be referred to the Competition Commission (now CMA) because it could threaten competition in banking services to small and medium sized enterprises and in mortgage markets. *Anticipated Acquisition by Lloyds TSB PLC of HBOS PLC: Report to the Secretary of State for Business Enterprise and Regulatory Reform*, OFFICE OF FAIR TRADING 97 (Oct. 24, 2008), [https://assets.publishing.service.gov.uk/media/5592bba440f0b6156400000c/LLloydstsb.pdf\\_jsessionid\\_4EBCDA0A4B36535AF8355B90D18E00A2.pdf](https://assets.publishing.service.gov.uk/media/5592bba440f0b6156400000c/LLloydstsb.pdf_jsessionid_4EBCDA0A4B36535AF8355B90D18E00A2.pdf); The UK Secretary of State however cleared the merger with no reference to the Competition Commission. The Competition Appeals Tribunal on judicial review upheld the decision. *Helen Davies & Richard Blakely, Merger Action Group v. Secretary of State for Business, Enterprise and Regulatory Reform*, GCP 2 (2009), [https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Davies-May-09\\_1\\_.pdf](https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Davies-May-09_1_.pdf).

136. William Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. OF ECON. PERSPECTIVES 43, 45, 47-48 (2000), <http://faculty.haas.berkeley.edu/shapiro/century.pdf>.

137. These same political concerns, for example, have influenced the changing attitudes to the regulation of cartel behavior. While today most would recognize cartels as the “supreme evil of antitrust,” this was not the dominant view in Europe where in the early part of the twentieth century European cartels were not merely tolerated but embraced as a remedy for unstable market behavior during the period of industrialization. *Verizon Comm’n v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 408 (2004); see generally CHRISTOPHER HARDING & JULIAN JOSHUA, *REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY* 27 (1st Ed., Oxford Univ. Press, 2003).

Many of the recent reforms to Brazilian competition law and regulation can be traced to similar approaches in other jurisdictions and follow closely conceptions of the “regulatory state” and recommendations made in “peer reviews” of Brazilian competition regulation by international antitrust experts and agencies such as the ICN and OECD. While the implementation of international harmonized regimes can have beneficial effects, it is also true that they are often applied, particularly in emerging and developing countries, with little regard for the institutional, cultural, and economic context. The second part of this article will trace these concerns in a particular policy area: the shift in Brazilian competition law from judicial review to the increasing use of extra-judicial “settlement” of competition disputes. It will demonstrate how the local institutional context acts to modify the importation (and perhaps effectiveness) of a harmonized settlement regime.

## VII. THE USE OF SETTLEMENTS IN BRAZILIAN COMPETITION LAW

In “peer reviews,” the OECD encouraged CADE to make more use of its settlement powers<sup>138</sup> and promoted the model, used by many international competition agencies, that settlements together with leniency, provide an effective deterrent to cartel behavior. Deterrence is very much dependent, however, on the institutional framework for enforcement.<sup>139</sup> It requires the intersection of a number of finely balanced factors, which reduce uncertainty and risk for the applicant by minimizing exposure to criminalization and/or private damages.<sup>140</sup> The operation of the Brazilian cartel settlement program provides a good example of how institutional and cultural factors can demand adaptation and even resistance to the mere transfer of an international harmonized model. Extensive modification, however, can also disrupt expected outcomes and undermine effectiveness. In Brazil, the dominant driver for settlements was not to just to promote deterrence but also to alleviate court bottlenecks and save agency resources.<sup>141</sup> As the OECD suggests, a settlement scheme in the absence of a strong and effective system of enforcement and penalty by the judiciary can undermine its deterrent value and should be used “very cautiously.”<sup>142</sup>

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138. *Competition Law and Policy*, *supra* note 50, at 80; *Follow-up*, *supra* note 52, at 40.

139. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 175 (Oxford Univ. Press, 2011).

140. *Policy Roundtables: Plea Bargaining*, OECD 13, 43 (2006), <https://www.oecd.org/competition/cartels/40080239.pdf>.

141. *Id.* at 9.

142. *Id.* at 43.

### VIII. THE DECLINE IN EFFECTIVENESS OF JUDICIAL REVIEW OF COMPETITION LAW DECISIONS

The 1988 Brazilian Constitution laid down a constitutional foundation for competition policy, Article 173, paragraph 4 provides that “[t]he law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition, and the arbitrary increase of profits,” and Article 170 states that the “economic order” of Brazil shall be “founded on the appreciation of the value of human work and on free enterprise” and shall operate “in accordance with the dictates of social justice” with “due regard” for certain principles, including “free competition.”<sup>143</sup> A constitutional foundation for competition law is rare and has few equivalents in other jurisdictions.<sup>144</sup> Unlike other areas of social policy where courts have played a more interventionist and redistributive role, these provisions have not translated to actionable individual rights in the area of competition law.<sup>145</sup> Therefore, the courts unlike the United States, have not played a dominant role in development and evolution of competition law and policy in Brazil.

Competition law also does not readily give rise to individual socio-economic rights, which can be used by consumers to challenge anti-competitive conduct in courts. Damages to consumers as a result of anticompetitive action are usually small and fragmented. While competition law benefits consumers, it does so indirectly through the fostering of competitive markets.<sup>146</sup> Collective actions and litigation by consumer groups can be a solution but these require a receptive and developed civil litigation system.<sup>147</sup>

The effectiveness of enforcement is also largely dependent on the quality of tools for the detection of infringements and the efficacy of investigations, decision-making, and judicial appeals. While recent legislative reforms have been important, competition law in Brazil still faces institutional deficiencies particularly in regard to the considerable delays in judicial proceedings and delayed payment of fines.<sup>148</sup> CADE has a

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143. Constituição Federal [C.F.][Constitution] art. 170, 173 (Braz.).

144. It does have similarities, however, to the European notion of an “economic constitution” which is linked to the historical foundations of European Union competition law in the economic ideas of the German “ordo-liberalists.” DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS*, 232 (Oxford Univ. Press, 1998); Heike Schweitzer, *The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC*, in *EUROPEAN COMPETITION LAW ANNUAL: A REFORMED APPROACH TO ARTICLE 82 EC*, (Dieter Ehlermann & Mel Marquis 2007).

145. This more interventionist role for the court is also considered to go beyond merely ‘a bolstering of the boundaries of the regulatory state.’ Dubash & Morgan, *supra* note 104, at 13.

146. See generally Kovacic and Shapiro, *supra* note 136

147. See discussion of private damages below.

148. Carlos Ragazzo & Diogo Andrade, *Beyond Detection: The Management of Cartel Cases*, COMPETITION POL’Y INT’L, INC. 1,2 (2012), [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com).

relatively small budget for the number and length of investigations.<sup>149</sup> While there has been a steady increase in fines, particularly for abuse of dominance and cartels, there are few cartel prosecutions relative to an economy ranked ninth largest by GDP in the world.<sup>150</sup>

A shortage of human resources and procedural instruments thaaaaat permit both an increased number of suits and number of appeals has also contributed to court delays.<sup>151</sup> CADE's final decisions cannot be appealed at the administrative level, but a Constitutional guarantee, which permits judicial review of "any injury or threat to a right," potentially opens up all competition law decisions to substantive review.<sup>152</sup>

Azevedo points out that the average length of court proceedings, at just below five years,<sup>153</sup> is considerably above the average of three years in countries surveyed by the ICN, including Brazil, in their review of "Competition and the Judiciary."<sup>154</sup> Lawsuits where a CADE decision is contentious can last up to ten years.<sup>155</sup> This is particularly problematic for mergers. For example, some complex merger cases have been unresolved for seven to ten years.<sup>156</sup> This is within the context of a general court system, which is already under strain.<sup>157</sup>

Cueva claims that the delays in litigation in Brazil can be partly attributed to the "lack of clear definition of the standard of judicial review of administrative acts."<sup>158</sup> The problems faced by judicial review in Brazil are exacerbated by the problems faced in all competition law jurisdictions that determine the appropriate boundary between deference to the "tech-

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149. The volume of cases undertaken by CADE is large. In 2012 there were "over 300 cases involving anticompetitive practices roughly 120 of which are cartel investigations in several markets." *Id.* at 3.

150. Todorov & Filho, *supra* note 2, at 207, 242.

151. Yeung & Azevedo, *supra* note 8, at 344.

152. Constituição Federal [C.F.][Constitution] art. 5 (Braz.). For a discussion of the legal basis for judicial review of CADE's decisions see Pedro Cristofaro, *Judicial Review of CADE's Decisions*, in OVERVIEW OF COMPETITION LAW IN BRAZIL 372, 397 (Cristianne Zarzur et al., 2015).

153. Azevedo, *supra* note 8, at 4. The data (which relates to Law 8.884) is based on a lengthy study of judicial decisions in Brazil. See Juliano Souza de Albuquerque Maranhão et. al, *Direito Regulatório e Concorrencial no poder Judiciário* (Singular ed., 2014).

154. Azevedo, *supra* note 8, at 4; International Competition Network, *Competition and the Judiciary: a Report on a Survey on the Relationship between Competition Authorities and the Judiciary* 15 (2006).

155. Azevedo, *supra* note 8, at 4-5; Todorov & Filho, *supra* note 2, at 251.

156. The Nestle-Garoto merger case was under review for 14 years. Azevedo, *supra* note 4, at 4-5.

157. Yeung and Azevedo point out that in the Supreme Court (Supremo Tribunal Federal) an average process takes 14 years to complete and "the 11 justices at the STF collectively decided more than 130,000 cases in the year 2008 and 150,000 in 2007. This heavy workload is not particular to the Supreme Court: any judge in Brazil is, on average, responsible for 10,000 cases at any moment in time." Yeung & Azevedo, *supra* note 8, at 344.

158. Cueva, *supra* note 98, at 397. The difficulty in drawing appropriate lines of authority between the regulator and the courts in competition law is readily apparent in a number of EU judicial decisions. See Case T-342/99, *Airtours v Comm'n*, 2002 E.C.R. II-2585; Case T-5/02, *Tetra Laval BV v Comm'n*, 2002, 5 C.M.L.R. 28.

nical discretion” of the regulator and the assessment of “legality” by the courts.<sup>159</sup> Decision-making by both regulators and courts about competition law is highly fact-intensive with significant reliance on experts and economic theory for both the formulation of legal rules and their application in complex contexts.<sup>160</sup>

Brazil, together with other Latin American countries, has adopted the French civil law system of administrative law.<sup>161</sup> Traditionally, the civil law system permitted substantive merits-based review of administrative action while, in the common law, there has been more willingness to defer to the expertise of the decision-maker while ensuring procedural regularities (such as procedural fairness) and legality based on rational and reasonable decision-making.<sup>162</sup> These questions about the appropriate institutional role and boundaries of administrative discretion vis-à-vis the courts are further complicated in the context of an extensive and complicated system of judicial review in Brazil, which not only has a weak system of precedent,<sup>163</sup> but also has a jurisprudence that emerged from a long history of military dictatorship and a more interventionist role for government in the economy and civil society.<sup>164</sup>

The perceived response of international agencies to this complexity seeks to strengthen the technocratic economic knowledge base of the judiciary.<sup>165</sup> In its review of “Competition and the Judiciary,” the ICN concluded that there was a “lack of specialized knowledge on competition issues by the judiciary”<sup>166</sup> and stated that “[w]hat is identified by the results of the report is the urgency to bring judges closer to the technical analysis made by competition authorities, especially in developing countries.”<sup>167</sup> Furthermore, it called this “an important conclusion for providers of technical assistance. . . .”<sup>168</sup> The OECD has also suggested designating specialist judges and establishing appellate panels to resolve competition law issues, and judges in Brazil already attend judicial seminars on competition policy.<sup>169</sup> But, this may only serve to further confine

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159. See generally, Jose Carlos Laguna de Paz, *Understanding the limits of judicial review in EU competition law*, 2(1) JOURNAL OF ANTITRUST ENFORCEMENT 203-224 (2014).

160. *Id.*

161. See generally, Frances Bignami, *Comparative Administrative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 145-170 (Mawro Bussami & Ugo Mattei eds. 2012).

162. See generally, Francis Bignami, *Comparative Administrative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 145-170 (Mauro Bussani & Ugo Mattei eds., Cambridge Univ. Press, 2012).

163. Keith Rosenn, *Judicial Review in Brazil: Developments under the 1998 Constitution*, 7 SW. J.L. & TRADE IN THE AMS. 291, 291-319 (2000).

164. *Id.* at 305.

165. See generally, International Competition Network, *Competition and the Judiciary: a Report on a Survey on the Relationship between Competition Authorities and the Judiciary*, 17 (2007).

166. *Id.* at 17.

167. *Id.*

168. *Id.*

169. *Competition Law and Policy*, *supra*, note 50, at 80.



judicial decision-making to a purely technocratic/ “scientific” adjudication and exclude the possibility of taking into account broader “constitutional” public policy issues.<sup>170</sup>

The threat of judicial review and the number of appeals under the 1994 Act did, however, have a positive impact on the quality of CADE’s substantive decision-making and administrative processes, including improvements to its by-laws, increased transparency, and due process.<sup>171</sup> More recently there has been a decline in the number of appeals, and the judicial review which does take place is also unlikely to have a real effect on modifying or streamlining administrative procedures given that those who seek judicial review are more likely to use it tactically, taking advantage of court delays to challenge the fine and CADE decision.<sup>172</sup> As Azevedo argues, this adverse selection of cases “subverts the role of the judiciary, whose capabilities should be employed to adjudicate legitimate disputes and not to postpone a predictable outcome and, hence, unintentionally mitigate the enforcement of competition law.”<sup>173</sup> Postponement can also be a useful strategy for the firm because the responsible executive board may have been replaced by the time the fine is due.<sup>174</sup>

## IX. THE SHIFT TO SETTLEMENT

The delays and costs of court proceedings have provided a strong incentive for an increased number of extra-judicial settlements.<sup>175</sup> Settlements or Cease and Desist Agreements (Termo de Compromisso de Cessação (TCC)) were introduced for antitrust decisions in 1994,<sup>176</sup> but they were prohibited in cartel decisions so as not to discourage use of leniency, which was introduced in 2000 (the first application was in 2003).<sup>177</sup> CADE also actively promoted settlements in its negotiations with defendants, introducing training in negotiation for its staff and im-

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170. *See generally id.*

171. Azevedo, *supra* note 8, at 6.

172. Azevedo points out that courts confirmed 73.9% of CADE’s decisions and that this has been steadily increasing to over 80% since 2008. *See id.* at 5.

173. *Id.* at 6.

174. *See generally*, Wouter Wills, Is Criminalization of EU Competition Law the Answer?, 28 World Comp. 117 (2005). Further reforms now require a mandatory deposit of the fine or similar bond or guarantee, pending final decision by the court, and elimination of the alternative of a fine to jail time. *See Todorov & Filho, supra* note 2, at 233, 251.

175. Daniel L. Rubinfeld, *Antitrust Settlements in THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS* 173 (Roger D. Blair & D. Daniel Sokol, eds., Oxford, 2014).

176. Decreto No. 8.884, de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 6.6.1994 (Braz.).

177. Decreto No. 10.149, de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.21.2000 (Braz.); Decreto No. 12.529, de 30 de Novembro 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.) art. 86; Administrative Counsel for Economic Defense, *Guidelines – CADE’s Antitrust Leniency Program* 14 (2016). <http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf>. For the relationship between leniency and settlements see discussion below.

plementing a settlement policy as an alternative to judicial review<sup>178</sup>

The introduction of leniency agreements for cartels and the possibility of making dawn raids with court authorization equipped the competition authorities with more effective tools of investigation and improved techniques for the uncovering of evidence, such as electronic surveillance.<sup>179</sup> While this increased the number of cartel prosecutions,<sup>180</sup> it also led to a growth in court cases that contributed to bottlenecks in judicial review.<sup>181</sup> In the absence of the possibility of settlement for cartel proceedings, those unable to take advantage of leniency shifted their interest from challenging the substance of an infringement to questioning the procedural issues regarding the legality and validity of evidence.<sup>182</sup> These court proceedings reallocated limited agency resources from enforcement to defending these legal challenges.<sup>183</sup>

The 1994 law was amended again in 2007 to permit CADE to include cartel decisions among those that could be settled.<sup>184</sup> Various reforms to the settlement procedures were introduced in 2012,<sup>185</sup> and in 2016 CADE issued *TCC Guidelines* for cartel cases.<sup>186</sup> Brazil also adopted the ICN's "Anti-Cartel Enforcement Template" to provide information to ICN members on its cartel enforcement strategy.<sup>187</sup>

There are powerful incentives for the company to settle including sav-

178. Azevedo, *supra* note 8, at 6.

179. Decreto No. 10.149, de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.21.2000 (Braz.); See Leonardo Maniglia Duarte & Rodrigo Alves Dos Santos, *Cartel Settlements in Brazil: Recent Developments and Upcoming Challenges*, in OVERVIEW OF COMPETITION LAW IN BRAZIL, 288, 285-313 (Cristianne Zarzur et al. eds, IBRAC, 2015).

180. Paulo Furquim de Azevedo & Alexandre Lauri Henriksen, *Cartel Deterrence and Settlements: the Brazilian Experience*, in THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES (Roger Zach et al., eds., 2010) at 211-212. The number of convictions obtained by CADE has been increasing. In 2013 CADE had convictions in 22 cases which was more than the total number of convictions in the previous five years put together.

181. *Id.*

182. Azevedo & Henriksen, *supra* note 180, at 213; Duarte & Dos Santos, *supra* note 179, at 289; Ragazzo & Thomson de Andrade, *supra* note 148, at 2.

183. Ragazzo and Thomson de Andrade, *supra* note 148, at 2.

184. Decreto No. 11.482, 31 de maio de 2007, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.31.2007 (Braz.); in September 2007, the CADE issued Resolution No. 46/2007 setting out the negotiation rules.

185. See Gabriel Nogueira Dias et al, *Unraveling the Brazilian Antitrust Settlement Practice*, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 73 (Barry E. Hawk ed., Juris, 2014).

186. CADE, Guidelines: Cease and Desist Agreement for Cartel Cases (2016), [http://en.cade.gov.br/noticias-anexos/guidelines\\_tcc.pdf/view](http://en.cade.gov.br/noticias-anexos/guidelines_tcc.pdf/view). The guidelines are non-binding and were provided for in Article 85 of Law No. 12.529/2011. It is not the purpose of this paper to describe in detail the procedures but to identify some issues arising from this strategy.

187. See generally, Administrative Counsel for Economic Defense, *ICN Anti-cartel Enforcement Template*, CARTEL WORKING GROUP (2016), available at [http://en.cade.gov.br/topics/multilateral\\_cooperation\\_/multilateral-cooperation/arquivos/copy2\\_of\\_ICNAnticartelEnforcementTemplate2016\\_CADE.pdf](http://en.cade.gov.br/topics/multilateral_cooperation_/multilateral-cooperation/arquivos/copy2_of_ICNAnticartelEnforcementTemplate2016_CADE.pdf).

ings in litigation costs and reduction in fines.<sup>188</sup> These savings are magnified in a system where there are inordinate court delays.<sup>189</sup> On the other hand, as we have seen, these court delays can be advantageous for the guilty defendant and counter the otherwise powerful incentive for the risk-averse defendant to settle.<sup>190</sup> A firm can also avoid the publicity of a court judgment. But, as Rubinfeld notes, the greater the reputational benefit from a trial victory, “the less likely the case will settle.”<sup>191</sup> Once again this presupposes an efficient and effective judicial system.

As noted, the OECD had encouraged CADE to “make more use of its settlement powers” and promoted the model as an effective deterrent device for cartel behavior.<sup>192</sup> The OECD also cautioned that effective deterrence is compromised if there is not a credible threat that substantial sanctions would be imposed if the case went to trial and suggested that settlements and “plea agreements should be used very cautiously, if at all, early in the development of a jurisdiction’s anti-cartel enforcement efforts, before credible sanctions have been established and courts have been persuaded to approve or impose high fines.”<sup>193</sup> Competition authorities are encouraged to resist the “temptation to use settlements in the first place to quickly clear an agency’s docket and get rid of ‘difficult’ cases, rather than to pursue the public interest in maximizing deterrence.”<sup>194</sup> In the context of lengthy court delays, Brazilian agencies may be willing to make concessions and seek those cases which can settle earlier or more easily even without a full assessment of the facts of the cartel.<sup>195</sup> While this may achieve certain procedural efficiencies and conserve valuable resources, which may be utilized for other investigations, it might equally be counter to the broader public interest.

The shift from judicial review to settlements can remove an important level of judicial scrutiny of regulatory processes and prevent the judiciary from having a role in the shaping of competition policy, particularly in tempering a more technocratic regulatory focus on “economic efficiency” with broader “constitutional” concerns and distributive outcomes.<sup>196</sup> The decline in judicial review may also miss opportunities to clarify important substantive areas of law.<sup>197</sup> In addition, without a formal court decision, it may also mean that private damages suits are discouraged.<sup>198</sup> Judicial review is also particularly important in circumstances where regulatory

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188. Rubinfeld, *supra* note 175, at 173; Cf. Wouter Wils, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, 31(3) *WORLD COMPETITION: LAW & ECONOMICS REVIEW* 16 (2008).

189. *Id.*

190. Azevedo *supra* note 8, at 5.

191. Rubinfeld, *supra* note 175, at 173.

192. *Competition Law and Policy in Brazil*, *supra* note 50, at 79; *Follow-up*, *supra* note 30, at 40.

193. *Policy Roundtables: Plea Bargaining*, *supra* note 140, at 10.

194. *Id.* at 43.

195. *Id.* at 30.

196. See generally Dubash and Morgan, *supra* note 10.

197. See generally *Policy Roundtables: Plea Bargaining*, *supra* note 140.

198. See discussion of private damages below.

agencies may be subject to capture.<sup>199</sup>

The increasing use of settlements and absence of judicial review ultimately pose a significant risk to the deterrent effect (“the benign big gun”) of high fines and criminalization.<sup>200</sup> While the fine which is imposed as a result of settlement should amount to the present value of the expected sanction in a court action (so not to put the defendant in a more favorable position than leniency),<sup>201</sup> the usefulness of this benchmark is likely to diminish as fewer court decisions are available. Predicting optimal punishment for deterrence is also notoriously difficult for cartels,<sup>202</sup> and the level of fine and discount for cooperation varies greatly.<sup>203</sup>

An institutional framework that increasingly uses negotiated settlements and downplays the importance of judicial review is also perhaps in direct opposition to the French system of administrative law adopted in Brazil.<sup>204</sup> Pagotto argues that this system requires authorities to act in the face of infringement.<sup>205</sup> He views settlements as a “subversion of the traditional principle of inalienability of the public interest”<sup>206</sup> and as an import from a U.S. model based on different institutional settings “without analysis and reflection on the peculiarities related to this transplant.”<sup>207</sup>

Similar to the U.S. model but different from the E.U. model, leniency in Brazil is only permitted to the firm “first-in” to the agency. The first mover is granted full immunity from fines in return for cooperation and disclosure. Additional firms who seek finality in the outcome and a reduction in fines in return for cooperation, and are unable to obtain leniency, must proceed through the settlement route.<sup>208</sup>

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199. This is particularly true in jurisdictions where competition agencies find it expedient for the purposes of “competition advocacy” and “sector-specific regulation” to maintain a certain “mixture” of functions and a more politicized role. Neutrality and accountability may be compromised as these agencies combine the functions of adjudication, investigation, and policy formulation. *See generally*, Int’l Competition Network, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004).

200. Leopoldo Ubiratan Carreiro Pagotto, *To What Extent Will the Possibility of Executing Agreements with Cartel Members Impact on Brazilian Antitrust Policy?* in *Competition Law and Policy in Latin America*, 127, 133-134 (Eleanor M. Fox & D. Daniel Sokol eds., Hart, 2009).

201. The 2011 law states that the fine may not be less than the minimum fine set by law and takes into account the expected fine that could be imposed in case of conviction, minus a discount for settling. *See* Decreto No. 12.529, de 30 de Novembro 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.) art. 37-38.

202. *See* Wils, *supra* note 174.

203. *Id.*

204. Pagotto, *supra* note 200.

205. *Id.* at 121.

206. *Id.*

207. *Id.*

208. Similar to leniency, settlements therefore can uncover important evidence and broaden the investigation and rate of conviction of other parties. Vinicius Marques de Carvalho, *Brazil: Administrative Council for Economic Defence*, ANTITRUST REV. OF THE AMERICAS, GLOBAL COMPETITION REVIEW 93, 93 (2016).

The settlement process introduced certain advantages over leniency, including the ability to negotiate at any time regardless of the stage of investigation; the immediate suspension of the negotiation; the possible inclusion by CADE of a promise to refrain from bringing further charges against parties related to the defendant, even if they are not identified at the time of the agreement (a so-called “umbrella” provision); and (initially) the absence of a requirement to plead guilty.<sup>209</sup> The defendant only has one opportunity to negotiate an agreement (“one-shot game”), but CADE has a fairly broad discretion as to the content of any settlement agreement.<sup>210</sup> A reduction in fine can be obtained as a result of a negotiated decision or for information or evidence against other cartel participants.<sup>211</sup> An agreement can also include the application of commitments such as behavioral or structural remedies (for a merger or abuse of dominance).<sup>212</sup> While this discretion permits bespoke agreements, it can also create uncertainties and risks for the defendant. Settlements are encouraged when there are transparent and predictable rules, where rewards for cooperation are clear.

In 2013 CADE amended its bylaws to encourage better guidance, incentives to settle, and procedures to ensure that the authority negotiating is best placed to extract the best outcome.<sup>213</sup> These reforms were in line with “international best practice”, particularly the E.U.’s fining and leniency guidelines.<sup>214</sup> Larger discounts in fines were given to encourage parties to come forward and cooperate with additional information at the earliest stage of investigation.<sup>215</sup> The previous practice of little or no cooperation by the defendant was replaced by the requirement of “meaningful cooperation”.<sup>216</sup>

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209. Martinez, *supra* note 27, at 265; The International Bar Association (IBA) suggested that CADE extend the benefit of this ‘umbrella’ provision to those signing leniency agreements so as to remove disincentives to international firms. IBA, Cartels Working Group Comments on the Public Consultation Version of the Draft Guidelines on Leniency Published by the Administrative Council for Economic Defense (CADE) –Brazil (2016), ¶4.2, [http://www.ibanet.org/LPD/Antitrust\\_Trade\\_Law\\_Section/Antitrust/WorkingGroupSubmissions.aspx](http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/WorkingGroupSubmissions.aspx); see discussion of guilty plea below.

210. Martinez, *supra* note 27, at 265.

211. *Id.*

212. In Brazil the first applicant will receive a thirty to fifty percent discount from the estimated fine, the second applicant, twenty-five to forty percent, the third and other applicants up to twenty-five percent. If the approach is made after the files are sent to the Tribunal, the possible reduction is a maximum of fifteen percent. CADE Regulation 1/2012 art. 187–88.

213. Duarte and Dos Santos note that the fact-finding authority at the time, the Secretariat of the Economic Defense of the Ministry of Justice (SDE/MJ) did not participate in the negotiations, ‘which limited the possibilities of extracting more effective cooperation from the defendants settling’. Reforms permitted negotiations to occur with the Superintendent as well as the Tribunal. Duarte & Dos Santos, *supra* note 179, at 290, 294.

214. *See id.* at 305.

215. *Id.* at 293.

216. Martinez, *supra* note 27, at 265. CADE (TCC Guidelines), *supra* note 186, at 10-17.

Leniency programs are important tools for the detection and investigation of cartels and CADE needs to ensure that clear and separate processes are in place for settlements and commitments so as not to undermine leniency and raise any concerns regarding uncertain or discretionary interventions. The OECD has cautioned that settlements could undermine leniency if they do not maintain a clear difference between the reward for the first to report a cartel (for outright immunity) and those who report later for a settlement.<sup>217</sup> Firms will be encouraged to wait for settlements “if they lead to unreasonably generous combined discounts for cooperation and settlement.”<sup>218</sup>

The European Union maintains this distinction by clearly differentiating the procedures for commitments, leniency, and settlements. Settlements are only available when the investigation is concluded and the reduction in fine is limited to 10%.<sup>219</sup> The reduction in fine is related to procedural efficiencies only, rather than the collection of evidence, so that no possible disincentive or uncertainty arises for the application of leniency or immunity agreements.<sup>220</sup> Commitments are also not intended for hardcore cartels.<sup>221</sup>

The model of “negotiated settlements” that has emerged in Brazil differs from this E.U. approach. It is very much based on the U.S. common law system that does not necessarily distinguish between the rewards for cooperation and disclosure of evidence under leniency and a plea bargain.<sup>222</sup> This approach may not be appropriate in a civil law jurisdiction where the negotiating parties may not be in a position to deal with all aspects of liability, including criminal liability.<sup>223</sup> In the United States, the negotiated plea bargain is also strongly linked to the requirement for judicial approval. Consultation and the creation of a public “Competitive Impact Statement” is mandatory for a consent decree in the United States, which must then be approved by the courts.<sup>224</sup> As Rubinfeld notes “when resolved through a formal consent decree, settlements can

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217. The Organization for Economic Co-operation and Development (OECD), *Experience with Direct Settlements in Cartel Cases*, at 9, DAF/COMP(2008)32, (Oct. 1, 2009), <https://www.oecd.org/competition/cartels/44178372.pdf> [hereinafter *Experience with Direct Settlements*].

218. *Id.*; see also Duarte & Dos Santos, *supra* note 179, at 289–90, 293. Azevedo and Henriksen provide an analysis of how the design of the settlement scheme can impact on the incentive to seek leniency. Azevedo & Henriksen, *supra* note 180, at 219–227.

219. Settlement in the EU is for the purpose of achieving finality in decision and reducing litigation costs rather than a broadening of the investigation. Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases, 2008 O.J. (C 167) 1, 5.

220. *Id.* at 2.

221. Council Regulation 1/2003, preamble ¶13, 2002 O.J. (L 1) 1, 3 (EC).

222. Azevedo & Henriksen, *supra* note 180, at 214–217.

223. See discussion below.

224. Rubinfeld, *supra* note 175, at 183.

have significant precedential value.”<sup>225</sup> Confidentiality of information obtained in leniency and settlement agreements also raises obstacles for the effectiveness of private enforcement.<sup>226</sup> The appropriateness of allowing the defendant in Brazil to waive a constitutional right to judicial review for “any injury or threat to a right,”<sup>227</sup> thereby excluding the courts entirely in the context of a settlement negotiation,<sup>228</sup> is also problematic from the perspective of the institutional dynamics of an emerging Brazilian competition law regime. In addition there are also few “public interest” groups in Brazil ready and able to litigate as a counterpoint in the event of regulatory capture and corruption.<sup>229</sup>

Concerns have also been raised about the manner in which the reforms to the settlement process were proposed and implemented in Brazil. Amendments to the 1994 law in 2007 delegated to CADE powers to establish rules for settlement agreements through bylaws and regulations.<sup>230</sup> The bylaws themselves and their future amendment have therefore been subject to little congressional scrutiny. In this context CADE has looked more often to adopt “international best practice” during the reform process.<sup>231</sup> For example, a working group to train negotiators is encouraged “to study more effective negotiating techniques based on the best international practices” including training abroad and exchanging experiences with antitrust authorities from other jurisdictions.<sup>232</sup> While the adoption of these international practices can be beneficial, they may also signal missed opportunities to develop a bespoke scheme that could be better adapted to the Brazilian institutional constraints identified above.

## X. THE REQUIREMENT TO ACCEPT A GUILTY PLEA

While the OECD recommended that settlements should always record a plea of guilty, there was initially no requirement for such a plea in the Brazilian cartel settlement scheme except in circumstances where a leniency agreement was also executed.<sup>233</sup> There were concerns that the ex-

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225. *Id.*; The OECD also cautions that too much interference by courts can undermine the effectiveness of plea agreement by introducing uncertainty into the negotiations.

226. See discussion below.

227. Constituição Federal [C.F.] [Constitution] art. 5 (Braz.).

228. The OECD state that on ‘the one hand, it can be argued that the right of appeal should not be treated differently than other rights that the defendant typically may waive in plea agreements’. *Policy Roundtables: Plea Bargaining*, *supra* note 140, at 44. While the waiving of this right may increase certainty for the authority it may also result in the negotiation of a sub-optimal penalty.

229. Pagotto, *supra* note 200, at 133-134.

230. CADE Resolution 1/2012 art. 204.

231. Duarte & Dos Santos, *supra* note 179, at 308.

232. *Id.* at 291. Similar calls to embrace international practice included proposals to adopt an ‘amnesty plus’ scheme whereby leniency applicants are encouraged to confess involvement in additional and separate cartel activities during investigation process.

233. *Experience with Direct Settlements*, *supra* note 217, at 8, 85-86.

traction of a guilty plea could lead to sub-optimal penalties and thereby potentially undermine deterrence.<sup>234</sup> The absence of a guilty plea, however, undermined the incentive to seek leniency over a settlement agreement.<sup>235</sup> A guilty plea could also expose the defendant to possible criminal liability in contrast to a leniency agreement, which protected the “first in” defendant from both civil and criminal prosecution.<sup>236</sup>

In the first year of its operation, only four settlement agreements were concluded (from sixteen applications), and three did not involve a guilty plea because they were not concluded in conjunction with a leniency agreement.<sup>237</sup> SDE issued opinions in 2007 and 2008 critical of CADE’s decision to settle cartel cases without the extraction of a guilty plea, citing the negative effect on deterrence in light of the direct evidence available of hardcore cartel activity.<sup>238</sup> In response to these concerns, CADE in 2013, introduced the requirement that a cartel settlement include the defendant’s “acknowledgement of participation in the investigated conduct.”<sup>239</sup> But, as Martinez points out, “the provision does not refer to a ‘confession’ and the requirement ‘to acknowledge participation’ may allow for some flexibility with respect to its terms, compared with a strict ‘confession’ requirement.”<sup>240</sup> Therefore, some ambiguity still remains regarding how this acknowledgment will impact criminal proceedings.

Other institutional factors in Brazil also increase this uncertainty. Unlike the United States, where the settlement forms part of a plea bargain with a single judicial body granting civil and criminal immunity, more than one institution deals with these issues in Brazil.<sup>241</sup> The absence of a single authority imposes a risk to parties who seek settlement and increases the uncertainty about criminal liability being decided elsewhere.<sup>242</sup> In an attempt to deal with this issue in 2016, CADE signed a memorandum of understanding with the Federal Prosecution Service of São Paulo with the intent of increasing transparency and improving coordination of both the civil and criminal aspects of a TCC.<sup>243</sup> The *TCC Guidelines* state that CADE may assist any party who wishes to obtain a plea bargain in its communication with the Public Prosecutor.<sup>244</sup> Uncer-

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234. Duarte & Dos Santos, *supra* note 179, at 286; International Competition Network (ICN), Cartel Settlements, at 7 (Apr. 2008), <http://www.internationalcompetition-network.org/uploads/library/doc347.pdf>.

235. Pagotto, *supra* note 200, at 126.

236. Decreto No. 12.529, de 30 de Novembro 2011, Diário Oficial da União [D.O.U.] de 1.12.2011 (Braz.) art. 87.

237. Azevedo & Henriksen, *supra* note 180, at 229.

238. The decisions were made in 2007-2008. Experience with Direct Settlements, *supra* note 217, 89-90.

239. CADE Resolution 1/2012 art. 185; CADE states that this requirement has been approved by the Brazilian courts. CADE (TCC Guidelines), *supra* note 186, at 37.

240. Martinez, *supra* note 27, at 265.

241. Azevedo & Henriksen, *supra* note 180, at 215.

242. See Duarte & Dos Santos, *supra* note 179, at 3.

243. See Ministério da Justiça, Memorando de Entendimento No 1/2016, (15 mar. 2016), <http://www.cade.gov.br/noticias/cade-e-mpf-sp-assinam-memorando-de-entendimentos-para-fortalecer-atuacao-no-combate-a-carteis>.

244. CADE (TCC Guidelines), *supra* note 186, at 9.



tainties still remain, however. The *TCC Guidelines* are not binding and no absolute guarantees of immunity are raised by these negotiations.<sup>245</sup> CADE's role in protection from criminal liability (in both leniency and settlements) will also continue to pose questions of legitimacy, given administration nature of its authority.<sup>246</sup>

Effectiveness of enforcement as a deterrent mechanism is also largely dependent on the perception of punishment, both by participants in the cartel and consumers at large. In Brazil, there is a general cultural perception that participation in cartels may not be punishable conduct,<sup>247</sup> and this perception can reduce the incentives for a guilty plea. Fewer guilty pleas, together with a reduced number of convictions by courts, can exacerbate and re-enforce this public perception. Similarly the use of a "leniency regime" may also not sit well in Brazil, where "accusations against peers are not part of the culture (and are actually seen by some as unethical)."<sup>248</sup> Competition policy, particularly the criminalization of cartels, is often in direct opposition to a culture and industrial policy that favors more cooperation. Historically, the Brazilian "government itself expected industries to coordinate," including price collusion, for the purposes of industrialization.<sup>249</sup> Brazil, like many emerging economies, has an ambivalent political and cultural attitude towards competition as a value, either due to the strong presence of the state or the view that excessive competition is detrimental to infant industries, wasteful of limited resources, and imposes negative externalities on sustainability and the environment.<sup>250</sup>

As Maurice Stucke also points out, drawing on the insights of behavioral economics to examine the relationship between competition law and intent, increased penalties and criminalization are seldom fully applied by agencies and courts.<sup>251</sup> Criminalization and punitive fines are often perceived as unfair for cartel cases because the underlying offence can lack specificity.<sup>252</sup> In highly concentrated markets, for example, economists cannot easily distinguish collusion from pro-competitive (and therefore desirable) market behavior.<sup>253</sup> The alleged perpetrator's involvement may also be unclear or he or she may not have directly benefited from the cartel profits.<sup>254</sup> The economic harm to markets caused by price fixing/

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245. *Id.* at 6.

246. Martinez, *supra* note 27, at 211. CADE has therefore regularly involved the Prosecutor's Office in the execution of the leniency agreements. *Id.*

247. Azevedo & Henriksen, *supra* note 180, at 211.

248. Todorov & Filho, *supra* note 2, at 247.

249. *Id.* at 249.

250. DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION*, 237–241 (2010).

251. Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 487 (2006); see generally Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the 21st Century*, 38 LOY. U. CHI. L. J. 513, 514 (2007).

252. Enterprise Act 2002, Part 6 (UK).

253. Todorov & Filho, *supra* note 2, at 254.

254. Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 455 (2006).

cartels does not easily translate to clear legal rules and probative evidence to determine moral blame.

With leniency and settlement, cooperation and detection is valued over punishment. For the European Commission, the “interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.”<sup>255</sup> As more cartel participants obtain leniency (and settlements), the perceived pernicious nature of these cartel offences and the appropriateness of increased penalties and criminalization is further undermined.<sup>256</sup>

The perception of punishment is further complicated when CADE may take into account the existence of a “Compliance Program”<sup>257</sup> in a settlement agreement as a mitigating circumstance for the reduction of a fine, as evidence of the good faith of the offender. The program must be related to the subject matter of the TCC, e.g. by uncovering the infringement, and “relate directly to the decision to propose a TCC and/or resulting from cooperation presented within the scope of the TCC.”<sup>258</sup> This approach is problematic for both immunity schemes and fine reduction because the “higher the fine reduction, the more compliance programmes thus become a cheap insurance policy against full antitrust liability.”<sup>259</sup>

## XI. LIABILITY FOR PRIVATE DAMAGES

A guilty plea may also expose a defendant to private damage suits.<sup>260</sup>

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255. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17, para. 3.
  256. The desire not to threaten domestic leniency applications was also at the basis of amicus briefs by the EU and other foreign agencies to the Supreme Court in *F. Hoffmann-La Roche Ltd v Empagran S.A.*, 124 S.Ct 2359 (2004), calling for a limitation on foreign private suits for damages. See Brief Amicus Curiae of European Banks in Support of Petitioners at 5, *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 124 S.Ct 2359 (2004) (No. 03-724), 2004 WL 234124; see also Brief of the United Kingdom of Great Britain and Northern Ireland et al. in Support of Petitioners at 13, *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 124 S.Ct 2359 (2004) (No. 03-724), 2004 WL 226597.
  257. Cf. Christine Parker & Sharon Gilad, Internal Corporate Compliance Management System: Structure, Culture and Agency, in *Explaining Compliance: Business Responses to Regulation*, 170, 174 (Christine Parker ed., 2011) (explaining that a compliance program sets out the firm’s strategy to ensure that its conduct is in accordance with competition law, thereby minimizing the risk of a breach); An examination of the level of local compliance with competition laws can be an indicator of the extent to which global norms are “socially embedded”. John Gillespie, *Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective*, 64 INT’L & COMP. L. Q., 935, 940 (2015).
  258. CADE (TCC Guidelines), *supra* note 186, at 31; CADE states with respect to the settlement procedure: “the compliance program or the commitment to its adoption/ restructuring can influence the discount granted”. Cf. CADE, Guidelines Competition Compliance Programs (2016), para 3.3.2.
  259. Wouter Wils, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement*, 1 JOURNAL OF ANTITRUST ENFORCEMENT 52, 68 (2013).
  260. See Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 698 (2010).

In Brazil (and many other jurisdictions), members of a cartel, even if signatories to a leniency or settlement agreement, are jointly and severally liable for damages caused by anticompetitive action.<sup>261</sup> Private enforcement, through actions for damages, can be an important supplement to public action and an effective tool to achieve the goals of competition law—deterrence and compensation.<sup>262</sup> Effectiveness depends, however, on access to courts and a civil procedure conducive to private plaintiffs. The level of private enforcement of competition law in most jurisdictions, other than the United States, is still struggling to have any real impact.<sup>263</sup> As we have seen, institutional constraints also impact the likelihood of private damages in Brazil, as costly and difficult access to the civil justice system and a formal and rigid system of civil procedure result in the filing of fewer suits.<sup>264</sup> The relative certainty and predictability of a private damages suit based on a “follow-on” action, where the plaintiff can rely on a settled and final ruling by the competition agency, is also problematic in a civil system where all the evidence of the administrative investigation may be re-examined by the courts.<sup>265</sup>

Applicants are keen to maintain confidentiality of information disclosed as part of a leniency or settlement agreement in order to minimize risk of further civil liability.<sup>266</sup> In Brazil, information made available throughout the course of settlement negotiations is, treated as confidential; access is restricted to the immediate parties to the proceedings and is only disclosed when it is submitted to the CADE administrative court.<sup>267</sup> A generic document containing a less detailed summary of the information is made available to the public and disclosed to other defendants “only for purposes of exercising their right of defense.”<sup>268</sup> Additionally, documents are returned or destroyed if an agreement is not reached.<sup>269</sup> The extent of this protection in actual cases is subject to fairly broad discretion in the Brazilian system.<sup>270</sup> Efforts to maintain confidentiality may be futile if information is made available through parallel actions, such as the evidence required for judicial authorisation for a dawn raid or a separate criminal investigation.<sup>271</sup> This lack of clarity can undermine cer-

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261. Martinez, *supra* note 27, at 264.

262. See generally Crane, *supra* note 260.

263. *Id.* at 722.

264. See Duarte & Dos Santos, *supra* note 179, at 300; see also generally Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AMERICAN J. OF COMP. L., 311, 311–408 (2003); but see Martinez, *supra* note 27, at 263–265 (arguing the numbers of private actions and class actions are slowly increasing in Brazil).

265. This is due to the fact that CADE’s decisions “lack collateral estoppel effect.” Martinez, *supra* note 12, at 263.

266. See Martinez, *supra* note 27, at 264; see also Duarte & Dos Santos, *supra* note 179, at 301.

267. Duarte & Dos Santos, *supra* note 179, at 296.

268. *Id.* at 301, 309.

269. *Id.* at 296–297; TCC Guidelines, *supra* note 186, at 10.

270. Duarte & Dos Santos, *supra* note 179, 296.

271. Martinez, *supra* note 27, at 264.

tainty and risk exposure to further proceedings.<sup>272</sup>

While the promise of confidentiality can strengthen the bargaining position of the government negotiator, we should also consider the impact on private damages suits. As Rubinfeld points out, “secret settlements are troubling; they keep valuable information from the public-information that could inform the decisions of future litigants.”<sup>273</sup> The authorities’ priorities in saving public resources and deterrence may place less incentive to fostering private enforcement.<sup>274</sup>

The European Commission has set out rules to prevent the disclosure of documents obtained through leniency to claimants in private action suits,<sup>275</sup> but the European Courts have sought to apply different rules. In a number of decisions, the courts have stated that the public interest in the encouragement of leniency must be balanced against the well-established right of individuals to bring a claim for damages and that it is up to national courts to balance these interests on a case by case basis.<sup>276</sup> The balancing of public and private interests by European Courts imposes an important layer of constitutional scrutiny on the European Commission’s decision to withhold documents. Once again, the absence of an effective system of judicial review in Brazil means these principles may not always be considered by the Brazilian competition authorities.<sup>277</sup>

## XII. APPLICATIONS BY INTERNATIONAL FIRMS

As noted, the settlement regime was slow at the beginning, and in the first year of its operation, only four out of sixteen applications settled.<sup>278</sup> Following the 2007 amendments to the 1994 law and bylaws, there was a marked increase in the number of settlement agreements in cartel cases with twenty-one executed between 2007 and 2010.<sup>279</sup> After further reforms to the settlement programs in 2011 and 2013, the number of concluded applications increased from six in 2013 to thirty-eight in 2014, of which, twenty-two were cartel cases.<sup>280</sup> Overall, CADE has signed fifty-four leniency agreements since the beginning of the program and has entered into 100 TCCs related to cartels.<sup>281</sup>

272. *See id.*

273. Rubinfeld, *supra* note 175, at 173.

274. *See id.* at 198.

275. EU, Directive 2014/104, of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, art. 6, 2014 O.J. (L 349) 13, 14.

276. *See* Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, 2011 E.C.R. I-5202; *see e.g.*, Case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG*, 2013 EUR-Lex CELEX LEXIS 366 (June 6, 2013).

277. *See supra* Parts VIII, IX.

278. Azevedo & Henriksen, *supra* note 180, at 228.

279. Duarte & Dos Santos, *supra* note 179, at 290; Azevedo, *supra* note 8, at 6.

280. *Id.* at 308; *Annual Report*, *supra* note 33, at 4.

281. U.N. Conference on Trade and Development, *Intergovernmental Group of Experts on Consumer Protection Law and Policy*, 6 (Oct. 2016).

The majority of leniency and settlement agreements in Brazil, particularly in the early years of their operation, have been disproportionately executed by multinational firms.<sup>282</sup> As Azevedo and Henriksen point out:

Pleading guilty or committing to collateral obligations in one jurisdiction may have adverse spillovers on the prosecution of a cartel in other jurisdictions, particularly in the case of international cartels. That is probably why part of the demand for settlements in Brazil, similar to the experience with leniency agreements, is from multinational companies that are settling simultaneously in several countries.<sup>283</sup>

As we have seen, harmonized procedures can be beneficial for global corporations who may face civil and criminal liability for conduct in multiple jurisdictions. Unharmonized regimes with divergent procedures can pose huge risks and uncertainties to these firms, as the OECD points out:

Incentives to cooperate and to seek settlements might be undermined if there is no uniform approach to settlements and if a settlement in one jurisdiction is perceived to increase exposure to sanctions in continuing investigations elsewhere and/or in private follow-on actions.<sup>284</sup>

It is not surprising, therefore, that the procedures for the use of leniency and settlement regimes in Brazil have been subjected to keen scrutiny by the international organisations that have a particular interest in increasing harmonization and reducing exposure for international firms. In commenting on CADE's draft *Brazilian Leniency Guidelines*, the International Bar Association (IBA) was critical of the requirement to provide a written, rather than oral, admission of the participation of the company or individual in the conspiracy.<sup>285</sup> This requirement, the IBA

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282. The OECD notes that the SDE signed 15 leniency agreements between 2003 and 2009 and 60% of these were with parties to international cartels where leniency agreements had been signed in other countries. *Competition Law and Policy*, *supra* note 50, at 16. The OECD has also detailed TCC's signed in response to international cartels e.g. cement, marine hoses, and international submarine and underground cables cartel. *Annual Report*, *supra* note 33, at 6–7.

283. Azevedo & Henriksen, *supra* note 180, at 229–230 (referring, for example to the applications for settlement of international hard-core cartels by Lafarge Brasil S/A [*Cement*] and Bridgestone Corporation [*Marine Hose*]). Brazil noted in its submission to the OECD the growing number of members of international cartels, citing the *Vitamins* and *Marine Hose* cases, who were applicants to the leniency program. Org. for Econ. Co-operation and Dev., Working Party No. 3 on Co-operation and Enforcement, Roundtable on Cartel Jurisdiction Issues, Including the Effects Doctrine, DAF/COMP/WP3/WD(2008)94, at 4–5 (2008). In 2013 CADE fined companies and individuals involved in price fixing in the international fuel surcharge case. A leniency agreement was entered into by CADE with Lufthansa and Swiss International and settlement agreements were entered into with Air France and KLM. Org. for Econ. Co-operation and Dev., Airline Competition – Note by Brazil (CADE), DAF/COMP/WD(2014)25, at 5.

284. *Experience with Direct Settlements*, *supra* note 217, at 10.

285. See IBA, *supra* note 209. “The confession of wrongdoing may be [presented] orally or in writing.” CADE, *supra* note 124, at 16.

argued, created a disincentive to international firms:

The potential risk that leniency applicants would face in numerous key jurisdictions could exceed the benefits that could be expected from receiving leniency in a single country. This could create major disincentives for potential applicants to seek leniency in Brazil, thereby posing a risk of marginalizing Brazil's significance in international cartel enforcement and diminishing Brazil's ability to cooperate with counterparts in other developed antitrust jurisdictions. Even more far reaching in consequence, in global cartel situations, the absence of an effective oral leniency regime in one significant jurisdiction (such as Brazil) could prevent a potential leniency applicant from applying for leniency at all.<sup>286</sup>

In support of their argument, the IBA cites "international practice" and notes that "the United States, Canada[,] and European Union have adopted policies that provide for paperless leniency application."<sup>287</sup> Once again, the recommendations are drawn from developed jurisdictions and are driven by the risk to international firms.<sup>288</sup> They caution that Brazil's "significance in international cartel enforcement" will be marginalized, rather than concern for the negative impact confidentiality may have on a fledgling system of private damages and the weaker system of judicial enforcement in Brazil.<sup>289</sup> They also ignore, as noted above, the judicial safeguards the E.U. courts have in place in this area.<sup>290</sup>

Many of the international settlements Brazil enters into are not the outcome of independent investigations by Brazilian authorities.<sup>291</sup> They often rely on "U.S. court convictions to open an investigation in order to assess the effects of conduct on the Brazilian market. Evidence gathered by E.U. and U.S. agencies has been used as a source and probable alternative to the insufficient number of technicians needed to cover all the necessary investigations abroad."<sup>292</sup>

Resource constraints and information asymmetries may mean that Brazilian authorities will "not [have] much opportunity to handle competition law violations occurring outside Brazilian territory, nor do they possess the structure and know-how to do so."<sup>293</sup> International parties may also prefer settlement over a trial because of the absence of procedural instruments in civil litigation, discovery, and cross-examination in Brazil, as compared to the United States.<sup>294</sup>

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286. IBA, *supra* note 209, at 3.

287. *Id.*

288. *See id.*

289. *See id.*; *see also* Martinez, *supra* note 27, at 264.

290. *See supra* note 276.

291. *See* Timm, *supra* note 112, at 80.

292. *Id.*

293. *Id.* at 69.

294. *See generally id.*; *cf.* Gidi, *supra* note 264.

## XIII. CONCLUSION

Many of the recent reforms to the legal and regulatory institutions of competition law in Brazil have closely followed the recommendations of global experts and international agencies, such as the ICN and OECD, in "peer reviews" and guidelines regarding "international best practice." These recommendations have proved useful and powerful means to effect domestic legislative and regulatory reform. To the extent that some of these reforms may bypass other forms of governmental scrutiny, they have posed questions regarding their democratic legitimacy. It is also true that many of these "international best practices," especially reforms which aim to streamline procedures for international mergers and maintain confidentiality for information submitted through leniency and settlements, coincide more with the interests of multinational companies and the flow of international commerce than the divergent needs of emerging economies, potentially side-stepping more immediate political concerns and industrial policy that may require bespoke and national solutions. The move to establish autonomous, apolitical, and single-function competition institutions, in line with views of the "regulatory state," may similarly mean compromising goals, such as competition advocacy and sector-specific regulation in an emerging economy, which may benefit from more political intrusion and information.

The second part of this paper examined this reform process in a particular policy area in Brazilian competition law: the sharp decline in level of judicial review and an increasing resort to extra-judicial means of settling disputes through "settlement agreements," especially for public enforcement against cartels. The shift from judicial review to settlements can remove an important level of scrutiny of regulatory processes and prevent the judiciary from having a role in shaping competition policy in Brazil, potentially compromising certainty, transparency, accountability, and deterrence. The increasing resort to settlements, in the context of weak judicial enforcement, poor access to private damages suits that is exacerbated by nondisclosure of evidence, and low risk of exposure to criminalization, weakens the overall deterrent effect of these agreements. The largely discretionary nature of negotiated penalties that are not subject to judicial consent, including the consideration of mitigating factors such as compliance programs also works against other reform processes that value transparent, autonomous, and accountable regulatory institutions and the application of specific technocratic rules. Additionally, it is true that many of these settlement and leniency agreements have been taken advantage of by international firms who desire to minimize their exposure to public and private enforcement in multiple jurisdictions.

While international agencies have encouraged the use of settlement programs as a means to increase deterrence, their effectiveness as a deterrent device is very much dependent on the institutional framework for enforcement. It requires the intersection of a number of finely balanced factors that reduce uncertainty and risk for the applicant by minimizing

exposure to criminalization, private damages, or both. The operation of the Brazilian cartel settlement program provides a good example of how institutional, particularly in the civil law context, and cultural factors can demand modification, adaptation, and, even, resistance to the mere transfer of an international harmonized model and, thereby, disrupt its potential benefits and outcomes.

Brazil is a BRICS economy with a long and effective history of competition law enforcement. It is important that it continues to strengthen and improve the transparency and accountability of its settlement procedures so that they are not just a mechanism “to quickly clear an agency’s docket and get rid of “difficult” cases.”<sup>295</sup> Therefore, settlements must operate alongside efforts to promote and sustain strong judicial review, including judicial consent of settlements. In doing so, deterrence will be maintained and efforts towards public advocacy of competition rules are not undermined. These objectives are challenging and difficult, but it is important that the agenda for competition reform be fully informed by national, alongside regional and global, concerns to avoid a new form of undemocratic governance by international agencies in the absence of effective judicial review.

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295. Policy Roundtables: Plea Bargaining, *supra* note 140, at 43.



