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Old Man and the Sky: The Brazilian Antitrust Implications for Rupert Murdoch's Expansion of the Sky Global Satellite Network

Geoffrey Drake

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NOTES

Old Man and the Sky: The Brazilian Antitrust Implications for Rupert Murdoch's Expansion of the Sky Global Satellite Network

ABSTRACT

To expand its global satellite network to the United States, Rupert Murdoch's News Corporation purchased DirecTV in 2003. Brazil's antitrust regulatory body, CADE, has expressed concern about a potential monopoly in the Brazilian satellite market controlled by Murdoch because News' Sky Latin America competes directly with DirecTV. If News opts to combine the two Brazilian satellite services, it will consolidate control of ninety-five percent of Brazil's satellite market, leaving satellite and cable competitors at a disadvantage. The Author argues that CADE should conditionally approve the acquisition because of the combination's ability to benefit Brazilian consumers, the government, and News Corporation itself through lower costs, lower subscription prices, and higher subscription numbers. At the same time, because of the negative market effects that may potentially arise from News Corporation's monopoly, CADE should place certain behavioral conditions on its approval of the combination.

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I. INTRODUCTION

Rupert Murdoch "revolutionized the economy of sports, of animated films, children's programming, broadcast news, and television networks. [He] led television's trend to get down and dirty.

And [he] has ended up in a race to win absolute control of a [global] media empire. . . ."[1] Conceived as an Australian newspaper company, News Corporation (News), under Murdoch's leadership, "spans far and wide, setting foot on every continent except Africa and Antarctica."[2] With worldwide revenues totaling $12.8 billion, News "truly owns an 'unrivaled platform' that combines unparalleled entertainment and news media-market coverage across the globe."[3] In the United States, News owns the Twentieth Century Fox movie studio; Fox Broadcasting, including thirty-five Fox network stations; Fox Sports; Fox Entertainment; cable channels such as Fox News Channel, Fox Movie Channel, and FX; as well as newspapers such as the *New York Post*.[4] In Asia, News owns STAR TV satellite television, Channel [V] Music Networks, and ESPN STAR.[5] In Australia, News owns FoxTEL, a subscription television service, Sky News Australia, and Sky Channel.[6] In Japan, News owns eleven percent of Sky PerfecTV! satellite television and eighty percent of News Broadcasting Japan.[7] In Britain, News owns forty percent of British Sky Broadcasting (BSkyB), "the world's leading satellite pay television operator" with over 6.5 million subscribers and more than sixteen million viewers.[8] In Latin America, News operates Sky Latin America and cable channels Canal Fox, Fox Kids Latin America, and Fox Sports Americas.[9] Murdoch's holdings enable consumers across the globe to gain access to television, movies, news, and sports programming as never before.

Perhaps Murdoch's largest accomplishment in the last twelve years has been constructing Sky Global, "a worldwide satellite empire that began with BSkyB in Britain, stretched across Germany and Italy through the Middle East, India, Southeast Asia, Japan, covertly in China, down through Australia and New Zealand, through South America, and up to Mexico."[10] For the past several years Murdoch has

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1. NEIL CHENOWETH, RUPERT MURDOCH: THE UNTOLD STORY OF THE WORLD'S GREATEST MEDIA WIZARD xiv-xv (2001). The "trend to get down and dirty" refers to Murdoch's participation in developing reality television, including CBS's *Survivor*. The "race to win absolute control" refers to his attempts to purchase DirecTV from General Motors in order to create a global satellite empire. *See id.* xvi.
2. John T. Soma & Eric K. Weingarten, *Multinational Economic Network Effects and the Need for an International Antitrust Response from the World Trade Organization: A Case Study in Broadcast-Media and News Corporation*, 21 U. PA. J. INT'L ECON. L. 41, 66 (2000).
3. *Id.* at 66-67.
4. *See generally* http://www.newscorp.com (last visited Nov. 10, 2003).
5. Soma & Weingarten, *supra* note 2, at 70-71.
6. *Id.* at 71.
7. *Id.*
8. *Id.* at 72.
9. *Id.* at 71-72.
10. CHENOWETH, *supra* note 1, at 9.

sought to fill the only hole in his network, North America, by acquiring Hughes Electronics (Hughes) and its DirecTV satellite service and merging it into his international network.[11] Acquiring DirecTV and its twelve million U.S. subscribers[12] "would give Murdoch an unbroken world highway that could reach three-quarters of the world's population."[13]

In May 2001, DirecTV was within Murdoch's grasp.[14] In November, however, negotiations with General Motors, the parent company of Hughes and DirecTV, broke down as EchoStar, the number two satellite provider in the United States,[15] stepped in and purchased Hughes.[16] Fortunately for Murdoch, the U.S. Department of Justice (DOJ) blocked EchoStar's purchase of Hughes on antitrust grounds,[17] creating an environment in which Murdoch could finally purchase the last piece of his satellite puzzle.

On April 9, 2003, News purchased a thirty-four percent interest in Hughes from General Motors for $6.6 billion.[18] By the end of 2003, the Federal Communications Commission (FCC) and the DOJ had conditionally approved News' acquisition of Hughes, ignoring fears that News "would raise its programming prices to cable rivals, such as Comcast Corp., or threaten to pull Fox programming in order to drive customers away from cable and to DirecTV."[19] In approving the merger, the FCC cited News' history of adding channels and features, such as interactivity, to its other satellite systems, which would create a "more muscular competitor to the cable industry, which has monopolies in most markets."[20] As a condition of the acquisition, the FCC required News to "beam local channels into 100 of the nation's markets by the end of [2004] and to provide local service to the rest of

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11. *Id.*

12. *Murdoch Expects DirecTV Nod*, CNN.COM, Oct. 15, 2003, *available at* LEXIS, News Library, CNNC File.

13. CHENOWETH, *supra* note 1, at 9.

14. *Id.* at 10.

15. *Murdoch Expects DirecTV Nod*, *supra* note 12 (EchoStar has eight million U.S. subscribers.).

16. CHENOWETH, *supra* note 1, at 26, 29. News had offered General Motors $22 to $23 billion in stock, with $3 billion in cash. General Motors took EchoStar's offer of stock worth $28.5 billion and $4.2 billion in cash.

17. Anne C. Mulkern, *Decision Hard on the Heels of EchoStar-DirecTV Veto*, DENVER POST, Nov. 14, 2002, *available at* LEXIS, News Library, The Denver Post File. The rationale behind the Department of Justice's decision is discussed *infra*, Part IV.A.

18. Tony Smith, *In Brazil, Weak Market Gives Merger Better Chance*, N.Y. TIMES, Apr. 11, 2003, *available at* LEXIS, News Library, NYT File.

19. Frank Ahrens, *FCC Approves Murdoch Purchase of DirecTV*, TECHNEWS.COM, Dec. 19, 2003, *available at* LEXIS, News Library.

20. *Id.*

the country's 210 markets no later than 2008" in order to comply with the agency's goal of localism.[21]

Although the acquisition received approval from U.S. regulators, hurdles must be overcome in Brazil, where antitrust watchdog Conselho Administrativo de Defensa Economica (CADE) and the National Telecommunications Agency (ANATEL) will review the acquisition.[22] With the combination of parent companies News and Hughes, Brazilian regulators worry that in Latin America, the only region where News and Hughes compete directly,[23] a combination of News' Sky Latin America (Sky) and Hughes' DirecTV Latin America (DirecTV) will follow.[24] Although News' purchase of Hughes did not explicitly provide for the fusion of Sky and DirecTV in Brazil, News stated that "[a]ny opportunities to improve operational efficiencies and reduce costs associated with the Latin American operations will be considered by the management and board of [Hughes] after the completion of the transaction. . . ."[25] Additionally, a U.S. Bankruptcy Court's recent approval of DirecTV's reorganization brought News "one step closer to cleaning up and merging its two Latin American digital broadcast satellite platforms" by providing for News, through its control of Hughes, to increase its stake in DirecTV from seventy to eighty percent.[26] The companies' competitor, Tecsat, as well as Brazilian media analysts are "taking a regional merger for granted."[27] Paulo Hisse de Castro, director for new business at Tecsat, said "[i]f . . . Murdoch buys DirecTV, he will certainly merge the operator with Sky to cut costs." [28] Tecsat officials testified before the FCC, to no avail, that approving the acquisition in the United States would provide for "de facto control to be exercised by News Corp. over Hughes and its subsidiaries [allowing] these 2 competitors in Brazil to act in concert to further [hurt] Tecsat in the [direct-to-

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21. *Id.*

22. *See How DirecTV Fits into News Corporation's Media Empire*, ECONOMIST, July 10, 2004, at 54; *News Corp Buy of Hughes/DirecTV Would Face Regulatory Probe in Brazil-CADE*, AFX EUR. FOCUS, Apr. 4, 2003, *available at* LEXIS, News Library, AFXEF File [hereinafter *Regulatory Probe*]; Smith, *supra* note 18.

23. Mary Sutter, *Fox Sports Drops Out of Sky*, DAILY VARIETY, Mar. 26, 2002, *available at* LEXIS, News Library, DLYVTY File.

24. *Id.*

25. *DirecTV Latin America's Operations Not Affected by Split-Off of Hughes Electronics Corporation from GM*, PR NEWSWIRE, Apr. 9, 2003, *available at* LEXIS, News Library, PR NEWS File [hereinafter *Operations Not Affected*].

26. Mary Sutter, *Sat Plan Takes Wing: Reorg. of DirecTV Latin America Flies with Court*, DAILY VARIETY, Feb. 16, 2004, *available at* LEXIS, News Library.

27. Smith, *supra* note 18.

28. *Regulatory Probe*, *supra* note 22.

home] market by restricting access to programs."[29] In May 2004, CADE issued a preliminary ruling concerning the combination.[30]

A combination of Sky and DirecTV would give News control of ninety-five percent of the Brazilian satellite market, leaving Tecsat, a domestic operator with 50,000 subscribers, just five percent.[31] In a country with ten million satellite dishes already installed,[32] an enormous potential market exists for a combined Sky-DirecTV satellite television format. Sky formed in 1995 as an alliance between four mass media companies: News Corporation; Televisa Group, "a Mexican company recognized as a leading producer of television programming for Latin America"; Organization Globo, "which has interests in television production and cable programming; and Liberty Media, a leading U.S. cable television company."[33] At the time of the News-Hughes deal, Sky provided satellite-based digital television service to 730,000 subscribers in Brazil,[34] a 19.7 percent share of the market.[35] DirecTV is the "leading pay television service in Latin America and the Caribbean with approximately 1.6 million subscribers in 28 countries."[36] In Brazil, DirecTV has 500,000 subscribers,[37] an 11.3 percent share of the market.[38] Cutting costs may be particularly important to the long term success of both companies because of the financial hardships both suffered last year. In 2002, Sky lost $386 million, and in March 2003, DirecTV "filed for bankruptcy . . . protection after a loss of $202 million in Brazil the previous year."[39]

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29. *News Corp.-Hughes Still Waiting on Decision from FCC*, SATELLITE WEEK, Dec. 22, 2003, *available at* LEXIS, News Library, SATWK File (second alteration in original).

30. *See Unite and Lehman in Student Venture*, EVENING STANDARD, Apr. 15, 2004, *available at* LEXIS, News Library, ESTAND File ("CADE is placing conditions on News Corp.'s acquisition of US DirecTV, which operates in the country, to ensure fairness in the market while it studies the deal. The regulator said the companies agreed that News Corp. would not discriminate against rival operators in programme [sic] sales.").

31. *Regulatory Probe*, *supra* note 22.

32. Smith, *supra* note 18. To this point the 10 million satellite dishes in Brazil have been used to improve the reception of the channels of the country's seven broadcasters (free television).

33. *Sky Expands Use of Infonet's Network Services in Colombia and Chile; Media Giant Selects High Performance Services to Support Satellite Service Delivery*, BUS. WIRE, July 15, 2003, *available at* LEXIS, News Library, BWIRE File.

34. *Regulatory Probe*, *supra* note 22.

35. *DirecTV Latin America Says it Expects to Break Even by 2005*, SATELLITE WK., Dec. 22, 2003, *available at* LEXIS, News Library, SATWK File [hereinafter *Break Even*].

36. *Operations Not Affected*, *supra* note 25.

37. *Regulatory Probe*, *supra* note 22.

38. *Break Even*, *supra* note 35.

39. Smith, *supra* note 18.

Although regulators worry that giving Murdoch "a near unassailable lead across a region where people watch a lot of television" would be damaging to the Brazilian consumers,[40] other analysts point to News' uncanny ability to improve satellite television, thereby providing more programming options to the developing world.[41] This Note will analyze whether a combination between Sky and DirecTV would be detrimental to Brazilian consumers and how Brazilian antitrust regulators should respond to the combination. Part II of this Note will explore Brazil's antitrust regime in the context of the country's economic progress from a command-and-control to a free-market system. Part III will examine the past mergers and acquisitions in Brazil involving international corporations and the illogical outcomes of CADE's reviews. Part IV will examine past antitrust actions in the satellite industry and recommend that in light of antitrust principles and Brazil's economic goals, CADE should conditionally approve the combination but employ certain targeted behavioral conditions on News to promote the interests of the Brazilian satellite consumer.

II. THE DEVELOPMENT OF BRAZIL'S ANTITRUST REGIME

Between 1964 and 1985, a military dictatorship ruled Brazil, adopting an economic policy of economy-wide price controls, investment in parastatal corporations in key industries, and import substitution.[42] During the period, CADE, established in 1962 as Brazil's antitrust watchdog agency, had very little effect on the economy or responsibility for ensuring a competitive business climate.[43] CADE originally "was nominally an antitrust agency, but had been best known for ordering firms to roll back excessive price increases."[44] There was little need during this period for a governmental agency to ensure competition when the government itself owned many of the nation's industries. These economic polices "combined with a sharp increase in oil prices and interest rates during the early 1980s, led to a catastrophic debt crisis, which forced Brazil to miss interest payments on loans to foreign banks."[45] By the

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40. *Id.*

41. Ahrens, *supra* note 19.

42. William H. Page, *Antitrust Review of Mergers in Transition Economies: A Comment, with Some Lessons from Brazil*, 66 U. CIN. L. REV. 1113, 1119 (1998).

43. Gesner Oliveira, *Antitrust Policy in Brazil: Recent Trends and Challenges Ahead*, 4 USIA ECON. PERSP. 1 (Feb. 1999), *available at* http://www.usinfo.state.gov/journals/ites/0299/ijee/brazil.htm.

44. Page, *supra* note 42, at 1120.

45. *Id.* at 1119.

end of the 1980s, "Brazil faced inflation rates of up to 3000% per year."[46]

Brazil's government changed its course during the 1990s with the adoption of the New Brazil Plan, which "introduced numerous market-based reforms, including gradual privatization of government-owned industries, deregulation, removal of restrictions on foreign direct investment, and the reduction of tariffs and export subsidies."[47] In 1991, Brazil entered into the Mercosur Agreement with Argentina, Uruguay, and Paraguay that created a free-trade zone in South America.[48] These reforms helped reduce inflation rates, increase economic activity, and increase foreign direct investment.[49] As free markets expanded, the Brazilian government formulated a new competition policy, which for the satellite industry involved two regulatory bodies: Conselho Administrativo de Defensa Economica and the National Telecommunications Agency (ANATEL).[50]

A. *Conselho Administrativo De Defensa Economica (CADE)*

As free-market reforms continued, the Brazilian government began to develop its competition policy to respond to the "social demand for the repression and prevention of the abuse of economic power, now more concentrated in the hands of private agents."[51] In 1994, the government enacted Law No. 8.884, the statute that created Brazil's modern antitrust regime.[52] The statute consolidated existing statutes and strengthened enforcement through the creation of three agencies: CADE, "the agency responsible for monitoring and curbing potential abuses of economic power" and autonomous under the Ministry of Justice; the Secretaria de Acompanhamento Economico (SEAE), a department under the Ministry of Economy that reviews cases from an economic standpoint; and the Secretaria de Direito Economico (SDE), a "department under the Ministry of Justice . . . [that] reviews the acts and transactions from a legal standpoint."[53] Ultimately, CADE is "responsible for the final judgment on whether violations have occurred and for the consequent imposition of sanctions, if applicable."[54]

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46. *Id.*
47. *Id.* at 1119-20.
48. *Id.* at 1120.
49. *Id.*
50. Oliveira, *supra* note 43.
51. *Id.*
52. Page, *supra* note 42, at 1120.
53. William M. Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287, 299 (2000).
54. *Id.*

The 1994 law requires that "any transaction involving 20 percent or more of the relevant market or where any party to the transaction has posted gross revenues in the latest year exceeding 400 million Reais [$111 million][55] must be submitted to CADE for review."[56] Additionally, CADE may review any merger that involves firms outside of Brazil if it effects competition and economic conditions inside Brazil.[57] CADE reviews the merger for "violations of the economic order[,]" defined as "acts that have (or are intended to have) defined negative effects, including limiting competition and abusing 'market control.'"[58] A transaction involving a degree of market control is permissible "if parties can demonstrate: that there will be productivity gains, that the benefits will be distributed evenly among consumers and producers . . ., that competition will not be reduced substantially in the relevant market,"[59] and that efficiency will be enhanced.[60] There is "no market share ceiling above which CADE won't approve a deal," but the greater the concentration, the more likely CADE is to "impose conditions on its approval of the deal."[61]

Unlike its 1962 predecessor, CADE is now "relatively autonomous" and free from political influence.[62] Similar to the situation in the United States, courts give deference to regulatory bodies like CADE, overturning regulatory decisions only on procedural or constitutional grounds.[63] In addition, CADE's members are not subject to direct political control, and the 1994 statute requires CADE's members to be competition-law experts capable of assisting Brazil's economic transition.[64] In 1998, three commissioners had doctorates in economics or finance, two held doctoral degrees in law and had written dissertations on topics involving competition policy, and one held the LL.M. degree from Harvard.[65] Upon visiting CADE in 1998, William Kovacic, a professor of antitrust law at The George Washington University Law School, was impressed with how "each of the CADE commissioners revealed a sophisticated understanding of both the technical details and broader policy

55. Michael Kepp, *Brazil's Regulator May OK Airline Merger*, DAILY DEAL, Feb. 8, 2003, *available at* LEXIS, News Library, DADEAL File.
56. Hannay, *supra* note 53, at 300.
57. Page, *supra* note 42, at 1123.
58. *Id.* at 1121 (quoting Law No. 8.884, of June 11, 1994, art. 20, amended by Law No. 9.069, of June 29, 1995, *available at* http://www.cade.gov.br/).
59. Hannay, *supra* note 53, at 300.
60. Page, *supra* note 42, at 1123.
61. Kepp, *supra* note 55.
62. Page, *supra* note 42, at 1121.
63. *Id.*
64. *Id.*
65. William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 369 (2000).

considerations of competition policy analysis."[66] During his visit, Kovacic witnessed a public meeting on a merger in which

> [a]ll six CADE members participated in a free-wheeling discussion of the transaction. They addressed previous CADE merger decisions and examined the transaction in light of current developments in doctrine and policy in the [European Union] and the United States. The members debated fine points of the EU and United States merger guidelines, judicial decisions, and the recent academic literature from economic and legal commentators.[67]

The knowledge of CADE's members demonstrates that Brazil does indeed have an active competition-law regime, relatively vigorous compared to its Latin American counterparts.[68] CADE's members take their role in the country's development seriously and seem to consider themselves essential to the government's plan for future investment and development.

B. *National Telecommunications Agency (ANATEL)*

The 1997 General Telecommunications Act created ANATEL, charged with the objective "to create investment opportunities, and to foster technological and industrial development in a competitive environment."[69] In receiving "legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the powers vested in [CADE]," ANATEL's jurisdiction overlaps with that of CADE.[70] Brazil's antitrust regime rectifies this overlap by giving CADE the responsibility for market structure control of private telecommunications operators, while ANATEL is responsible for preparing legal opinions.[71]

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66. *Id.*
67. *Id.*
68. Hannay, *supra* note 53.
69. Gesner Oliveira & Caio Mário da Silva Pereira Neto, *Second Annual Latin American Competition and Trade Round Table: Regulation and Competition Policy: Towards an Optimal Institutional Configuration in the Brazilian Telecommunications Industry*, 25 BROOK. J. INT'L L. 311, 328 (1999) (quoting Decreto No. 9472, de 16 de julho de 1997, Lex de 8.01.1997, art. 2(V) (General Telecommunications Act)).
70. *Id.* (quoting Decreto No. 9472, de 16 de julho de 1997, Lex de 8.01.1997, art. 19(XIX) (General Telecommunications Act)).
71. *Id.* at 331.

III. THE BRAZILIAN ANTITRUST EXPERIENCE: CADE SHOWING ITS TEETH

Since the establishment of Brazil's modern regulatory framework in 1994, CADE has attempted to serve as an active watchdog, ensuring a competitive marketplace while simultaneously creating an environment attractive to foreign investors.[72] The decentralization of the Brazilian economy during the 1990s caused many international corporations to desire to enter the Brazilian market in order to bring their goods to millions of additional consumers.[73] Four such international corporations—Colgate-Palmolive, Miller Brewing Company, Anheuser-Busch, and Nestle—attempted to enter the Brazilian marketplace in the last two decades to capitalize on the burgeoning Brazilian market.[74] In the late 1990s, CADE conditionally approved Colgate-Palmolive's buyout of the South American toothpaste company Kolynos,[75] Miller Brewing Company's acquisition of the Brazilian brewer Cervejaria Brahma, and Anheuser-Busch's purchase of Brazilian brewer Antarctica.[76] Each acquisition involved large overseas corporations entering into and consolidating production within the Brazilian marketplace, much as News is attempting to do by combining Sky Latin America with DirecTV Latin America. Examining CADE's responses to these acquisitions is helpful in determining how CADE should act with regard to Rupert Murdoch's attempt to bring sophisticated satellite television to Brazil. Much can also be learned from CADE's flat rejection in February 2003 of Swiss food-giant Nestle SA's proposed acquisition of Brazil's Chocolates Garoto.[77]

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72. *See* Geoff Dyer, *Competition Watchdog Shows its Teeth: The Present Government has Encouraged an Assertive Competitions Policy*, FIN. TIMES, July 23, 1997, *available at* LEXIS, News Library ("Brazil has become one of the most attractive locations in the world for direct investment as a result of the transformation of its economy since the launch of a new currency three years ago. These investment flows are doubly important for the economy, for as well as helping finance the expanding current account deficit, which is expected to exceed 4 percent of GDP this year, they also cut dependence on more fickle short-term capital to make up the shortfall.").

73. *See id.*

74. *See* A.E. Rodriguez & M.B. Coate, *Merger Pitfalls in Practice: Three Case Studies*, 20 U. PA. J. INT'L ECON. L. 793, 812 (1999) (discussion of the Miller and Anheuser-Busch acquisitions); Dyer, *supra* note 72 (discussion of the Colgate acquisition); Andrea Welsh, *Brazil's Antitrust Body Grows Bolder*, WALL ST. J., Feb. 25, 2004, at B6A (discussion of the Nestle acquisition).

75. Dyer, *supra* note 72.

76. Rodriguez & Coate, *supra* note 74, at 813.

77. Walsh, *supra* note 73, at B6A.

A. *The Toothpaste Decision: Leaving a Monetary Cavity in the Pockets of Brazilian Consumers*

In 1995, Colgate-Palmolive (Colgate) acquired American Home Products (AHP), and in doing so, AHP's Brazilian subsidiary Kolynos, a leading producer of toothpaste and other oral care products.[78] In its first great undertaking as a regulatory body, CADE engaged in an extensive review of the proposed acquisition for possible negative effects on competition in Brazil.[79] CADE focused its attention on the relevant market and the existing barriers to entry in determining its course of action.[80]

CADE sought to determine the degree of market power a Colgate-Kolynos combination would have.[81] Colgate argued that a single "oral hygiene" market existed in which toothpaste, toothbrushes, dental floss, and mouthwash would constitute one market with four sub-markets.[82] Under this approach, a Colgate-Kolynos combination would result in a new company "of relatively little importance for antitrust law, with its capacity to impede or restrict competition equally limited."[83] CADE, however, rejected Colgate's argument, opting instead to regard each sub-market as a distinct market.[84] Of particular concern to CADE was the fact that the newly merged Coglate-Kolynos group would account for eighty percent of the Brazilian toothpaste market.[85] Furthermore, "CADE defined the relevant geographic market . . . as the national market, given that all of the companies established in the country distribute their products nationally and that the commercial opening of the market has not yet generated a great volume of imports."[86] Given this definition of the relevant market, CADE was concerned with the level of market concentration, with Colgate having an eighty percent share.[87]

At the same time, however, CADE concluded that the barriers to entry in the toothpaste market were quite low, thereby allowing competitors to enter the market in the future which would keep

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78. Page, *supra* note 42, at 1124.
79. *See id.* at 1124-25.
80. Page, *supra* note 42, at 1125; *"Relevant Market" is Key to Understanding Recent Decisions by Brazil's Anti-Monopoly Agency*, LATIN AM. L. & BUS. REP., Nov. 30, 1997, at 9 [hereinafter *Relevant Market*].
81. *Relevant Market*, *supra* note 80.
82. *Id.*
83. *Id.*
84. *Id.*
85. Dyer, *supra* note 72.
86. *Relevant Market*, *supra* note 80.
87. *Id.*

Colgate's prices at reasonable levels.[88] CADE found product differentiation and strong consumer loyalty to be the only substantial barriers to entry in the toothpaste market.[89] Although heavy investment in advertising and the establishment of a large-scale distribution network would be necessary to compete in this market, CADE concluded that these barriers were not significant.[90] Since the barriers to entry were quite low, it would be difficult for Colgate to charge above the competitive price, even if it possessed a large share of the toothpaste market because if Colgate charged prices significantly greater than the market price, a new toothpaste company could easily enter the market and sell at lower prices.[91]

Despite concluding that the combination would have little negative effect on the marketplace because of the minimal barriers to entry, CADE only conditionally approved the proposed Colgate-Kolynos combination.[92] CADE conditioned its approval of the acquisition on Colgate's adoption of one of three measures: "suspend[ing] Colgate's use of the Kolynos trademark in Brazil for four years, licens[ing] the Kolynos trademark to another firm for twenty years, or sell[ing] the trademark to a competitor with a small market share."[93] Colgate chose the first measure to give competitors a chance to establish themselves; it also decided to sell toothpaste in Brazil temporarily under a new brand, "Sorriso," and to sell twenty percent of its stock of toothpaste to third parties for resale under their brands.[94]

Analysts have criticized CADE's actions for leaving Colgate's eighty percent market share intact, while preventing the company from ever maintaining that share "by forcing it to forfeit the goodwill associated with the Kolynos mark."[95] While CADE "has the apparent goal . . . of encouraging new entry or expansion of production by fringe producers . . . it does so by imposing huge additional costs on Colgate."[96] This does little to help consumers who "will be required to incur additional search costs in order to find the brand they prefer."[97] In the end, CADE's remedy "attempts to deconcentrate the market by impeding the productivity of the leading firm and confusing consumers, not by restoring competition."[98] Such inconsistent and

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88. Page, *supra* note 42, at 1125.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*; Dyer, *supra* note 72.
95. Page, *supra* note 42, at 1126.
96. *Id.*
97. *Id.*
98. *Id.*

inappropriate remedies may not only stunt foreign capital investment entering Brazil[99] but will also likely hurt Brazilian consumers by impeding their access to the best goods and services available.[100]

B. *The Beer Decisions: Leaving a Bitter Taste in the Mouths of Foreign Investors*

In 1995, Miller and Anheuser-Busch attempted to strengthen their respective positions in the Brazilian beer market by entering into separate joint ventures with large Brazilian brewers.[101] CADE's initial rejection of the two proposed combinations followed by its eventual backtrack into conditionally approving both ventures demonstrated CADE's attempt to protect Brazilian corporations from foreign competition by "showing its teeth,"[102] rather than by simply preserving a competitive atmosphere.[103] In one agreement, Miller, the world's third largest beer brewer, and Brazilian Cervejaria Brahma, the world's fifth largest beer brewer, entered into an agreement to produce Miller Genuine Draft beer in Brazil.[104] In the other agreement, Anheuser-Busch, the world's largest beer brewer, agreed to purchase five percent of Antarctica, Brazil's second largest beer brewer, with an option to purchase thirty percent.[105] Before these agreements, three large suppliers competed in Brazil's beer market: Brahma, with forty-seven percent of the national market; Antarctica, with twenty-six percent; and Kaiser (backed by Coca Cola),[106] with seventeen percent. In contrast, Miller Genuine Draft and Anheuser-Busch during this time controlled only a negligible share of the market during this time.[107] The competitive nature of the market, combined with the fact that Miller and Anheuser controlled only 0.2 percent of the market, led both industry analysts and executives of the American beer giants to conclude that penetration of the Brazilian market would have been nearly impossible for both brewers without the help of a local partner.[108]

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99. *See* Jonathan Wheatley, *Miller Ordered to End Brazilian Joint Venture*, FIN. TIMES, June 13, 1997, *available at* LEXIS, News Library [hereinafter Wheatley, *Joint Venture*].

100. Page, *supra* note 42, at 1126.

101. Rodriguez & Coate, *supra* note 74, at 812.

102. Dyer, *supra* note 72.

103. *See* Wheatley, *Joint Venture*, *supra* note 99.

104. *Is Brazil Antitrust—or Anti-Foreigner?*, BUS. WK. (international edition), July 21, 1997, *available at* LEXIS, News Library [hereinafter *Brazil Antitrust*].

105. Rodriquez & Coate, *supra* note 74, at 812.

106. Shankar A. Singham, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L L. 363, 381 (1998).

107. *Id.*

108. *Brazil Antitrust*, *supra* note 104.

CADE reviewed and initially blocked both agreements because each proposed acquisition would reduce potential competition.[109] These agreements promised "the usual benefits of foreign direct investment: modernized capital stock, knowhow, jobs, and increased exports (in this case, Brazilian beer)."[110] But CADE worried about the possible effect of reduced potential competition on the Brazilian marketplace.[111] The concept of potential competition

> borrowed from American antitrust law, is that a firm that is not already in a market nevertheless competitively influences an oligopolistic market by the threat of entry. If a potential entrant were to acquire a leading firm in the market, the acquisition might then reduce competition by eliminating the perceived threat of entry and thus allowing existing firms to raise prices.[112]

CADE believed that Anheuser-Busch and Miller were potential entrants because of their respective "economic size, greater efficiency, position in the world market, and principally, business expansion strategy [to target] the main emerging economies for entry."[113] Under the potential competition theory, the threat of entry by Miller and Anheuser-Busch into the Brazilian market prevented Brazilian brewers from raising prices for fear that they could be undercut by the new entrants. Miller and Anheuser-Busch's entry into the Brazilian market as partners with domestic brewers, however, would subsequently reduce competition, thereby lessening the likelihood of continued low prices. Specifically, CADE worried that less competition would result in an increase in the price of beer, which would function like a regressive tax on Brazilian consumers.[114] CADE therefore ordered that both ventures be dissolved[115] because it believed that they would serve to "crystallize[] the shared dominant position between Brahma and Antarctica."[116]

CADE'S decision to forbid the proposed ventures represented a remarkable show of strength by the Brazilian regulator, sending a message to the foreign business community that doing business in Brazil would be difficult and that one should not take merger approval for granted. Less than a year later, however, CADE came to an agreement with both Miller and Anheuser-Busch to conditionally

109. Page, *supra* note 42, at 1127.

110. Russell W. Pittman, *Second Annual Latin American Competition and Trade Round Table: Introduction*, 25 BROOK. J. INT'L L. 263, 266 (1999).

111. Rodriguez & Coate, *supra* note 74, at 813.

112. Page, *supra* note 42, at 1127.

113. Rodriguez & Coate, *supra* note 74, at 813.

114. Pittman, *supra* note 110.

115. Wheatley, *Joint Venture*, *supra* note 99.

116. Rodriguez & Coate, *supra* note 74, at 813.

approve the mergers.[117] CADE conditioned the Miller-Brahma deal upon Brahma's contracting to provide bottling facilities to one small Brazilian brewer and technical assistance to three micro-breweries.[118] CADE ordered Anheuser-Busch to raise its stake in Antarctica from five percent to 29.7 percent by 2002, at a cost of $467 million, which constituted part of a five-year investment of about $1 billion.[119]

The way in which CADE dissolved the agreements and then reversed its decision by granting conditional approval has been criticized vehemently by competition experts as an indication that, because of CADE's difficulty in determining its proper role in the new Brazilian economy, doing business in Brazil is potentially costly and dangerous.[120] In particular, CADE's reliance on the potential competition theory seemed misplaced because even with the entry of Miller and Anheuser-Busch into the Brazilian market, substantial competition still existed.

> While Brahma had 46.6 percent of the market and Antarctica 31.9 percent in 1995, those shares had declined from 50.3 percent and 40.8 percent, respectively, in 1989. During that time, the third leading brewer increased its share from 7.9 percent to 14.6 percent, while the fourth leading brewer increased its share from 0.2 percent to 5.4 percent.[121]

These statistics indicate that substantial competition exists in the Brazilian beer market. Thus, entry by Miller and Anheuser-Busch would not result in a price increase. Rather than protecting consumers, CADE, by commanding Anheuser-Busch to invest more money in Brazil, essentially enacted a "toll to enter Brazil."[122]

Furthermore, the potential competition theory only applies if the acquiring firm is one of only a few likely entrants.[123] Here, "there was little reason to think that Anheuser or Miller had a special advantage over other firms as a potential entrant. CADE noted that the second, third, and seventh leading world brewers had formed alliances with domestic brewers. Seemingly, the fourth, fifth, and sixth leading brewers in the world would also be capable of entry."[124] As such, entry of Anheuser-Busch, even though the largest brewer in the

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117. Jonathan Wheatley, *Miller's Brazil Venture Approved*, FIN. TIMES, May 15, 1998, *available at* LEXIS, News Library [hereinafter Wheatley, *Venture Approved*].

118. *Id.*

119. *Id.*

120. *See Brazil Antitrust*, *supra* note 104 (Gesner Oliveira, President of CADE, and a dissenter in the Miller-Brahma vote, said he saw "signs of xenophobia" among CADE members.).

121. Rodriguez & Coate, *supra* note 74, at 814.

122. Wheatley, *Venture Approved*, *supra* note 117.

123. *Id.*

124. Wheatley, *Joint Venture*, *supra* note 99.

world, would not preclude other entrants into the Brazilian market, and therefore would not reduce potential competition from other world-wide brewers.[125] Despite having one of the most attractive locations in the world for direct investment, CADE's action, which ignored basic antitrust principles by benefiting neither consumers nor businesses, "could cause problems for some prospective joint ventures" in the future.[126]

C. *The Chocolate Decision: Not So Sweet for International Mergers*

In March 2002, Swiss food giant Nestle SA (Nestle) proposed to purchase Brazil's Chocolates Garoto (Garoto) to expand its position in the Brazilian chocolate market.[127] The $442 million acquisition[128] would have yielded Nestle a fifty-four percent share of Brazil's market in chocolate sweets, chocolate bars, and candy bars.[129] Cadbury, a chocolate company that had offered $400 million for Garoto only to be out-bid by Nestle, immediately lobbied CADE to reject the acquisition on antitrust grounds.[130] According to Cadbury, "Nestle's management in Switzerland told its Brazilian unit to do all it could to buy Garoto and prevent the entry of a new competitor in the Brazilian market [i.e., Cadbury]."[131]

CADE flatly rejected Nestle's proposed acquisition in March 2004, "completely reversing a transaction for the first time in its 40-year history."[132] Although CADE may in coming months bow to political pressure from supporters of the acquisition (as it did in the "beer decisions") and reverse its ruling by conditionally approving the acquisition, such a move appears unlikely given the six to one vote by the CADE board rejecting the combination.[133] Using a pricing model based on one used by the U.S. Department of Justice, CADE saw post-combination prices "rising by more than twenty-one percent for blocks of chocolate, nearly seventeen percent for boxes of candies and almost thirty-two percent for solid confectioners' chocolate. In liquid confectioners' chocolates, the merged company would have a

125. *Id.*
126. Dyer, *supra* note 72.
127. Kepp, *supra* note 55.
128. *Id.*
129. *Cadbury Asks Brazil Antitrust to Block Nestle Buy of Garoto*, AFX.COM, Mar. 22, 2002, *available at* LEXIS, News Library.
130. *Id.*
131. *Id.*
132. Welsh, *supra* note 74.
133. *Id.*

monopoly allowing it to raise prices at will."[134] Although CADE took two years to act, it has been applauded for its efforts.[135]

CADE's action in the chocolate decision, however, has made some investors even warier about mergers and acquisition in Brazil.[136] The stock of Brazil's biggest grocer fell six percent when CADE moved in December 2003 to review a joint venture forged with the family-run Sendas chain.[137] As CADE moves closer to becoming a more robust antitrust watchdog, analysts are continuing to watch for negative effects on foreign direct investment.[138]

IV. BRAZILIAN ANTITRUST IMPLICATIONS FOR THE NEWS-HUGHES COMBINATION

In its application of antitrust principles, Brazil has tried to adhere to a model similar to that of the United States and European Union (EU) in which regulators do not consider monopolies to be inherently detrimental to economic efficiency.[139] U.S. regulators once viewed monopolistic behavior as inherently harmful because monopolists always seek to extract monopoly rents from consumers.[140] Now, however, U.S. regulators assess both a merger's effect on competition in the market and its effect on prices when determining whether to approve or reject a merger.[141] The same can be said of EU regulators who are "more concerned with the actual anticompetitive conduct of firms with a dominant position in the market."[142] Similar to U.S. and EU regulators, regulators in Brazil and other developing Latin American countries have tried to "follow a model whereby certain exceptions [to forbidding monopolies] are authorized for practices that help enhance economic efficiency with respect both to market participants and consumers."[143]

Given Brazil's practice of accepting monopolistic concentrations where such ventures benefit market participants and consumers,

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134 Tony Smith, *Bittersweet Decision for Brazil: Nestle Purchase of Chocolate Maker Tests Antitrust Policy*, INT'L HERALD TRIB., July 4, 2003, *available at* LEXIS, News Library.
135 Welsh, *supra* note 74.
136 *Id.*
137 *Id.*
138 *Id.*
139. *See* Singham, *supra* note 106, at 393 (arguing that Brazil looks to the effects of market concentration on market participants and consumers in assessing potential combinations, rather than simply rejecting any monopolistic combination).
140. Singham, *supra* note 106, at 367-68.
141. *Id.*
142. *Id.* at 368.
143. *Id.* at 393.

CADE should not reject the combination of Sky Latin America and DirecTV Latin America. The U.S. and European experiences have demonstrated that under some circumstances a monopolistic environment that creates greater economic efficiency is possible in a particular market.[144] In determining how CADE should act in response to this particular combination, it is first necessary to look at the U.S.'s recent concern about concentration in the satellite market as evidenced by its rejection of EchoStar's proposed acquisition of DirecTV in 2000. Second, the recently accepted combination of News and Hughes in the United States will also be examined. Finally, an application of antitrust principles to the News-Hughes combination in Brazil with an emphasis on Brazil's economic goals demonstrates that CADE should conditionally approve the acquisition, employing certain targeted conditions on News' marketplace behavior to ensure the best experience for the Brazilian satellite consumer.

A. *The U.S.'s Rejection of the EchoStar-Hughes Combination*

In 2001, U.S. antitrust regulators rejected a proposal by EchoStar, the owner of Dish Network, and the number two satellite provider in the United States,[145] to purchase Hughes' DirecTV, America's number one satellite provider.[146] The FCC and the DOJ rejected the proposal amidst concerns that the merger would have resulted in only one satellite provider in the United States and as such "consumers in rural areas who could not get cable would only have one option for [pay] television service."[147] Even in those markets with cable service, the merger would have reduced consumers' choices from three—cable, Dish Network, and DirecTV—to just two.[148] The U.S. regulators' decision reflected traditional antitrust concerns that a lack of competition creates an environment conducive to price increases, which in turn harms consumers. Perhaps the biggest influence in quashing the proposed merger was Rupert Murdoch, who vehemently lobbied lawmakers to nullify the deal.[149]

Whether rejecting the proposal served the consumers' best interests was hotly debated. The merger would have enabled EchoStar and DirecTV to "combine their satellite fleets and save

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144. *Id.*

145. *Murdoch Expects DirecTV Nod*, *supra* note 12.

146. *Id.*

147. Mulkern, *supra* note 17.

148. Jennifer Beauprez & Kris Hudson, *Monopoly Concern Tarnish EchoStar Deal*, DENVER POST, Nov. 4, 2001, *available at* LEXIS, News Library.

149. Mulkern, *supra* note 17 (Murdoch's opposition of the merger stemmed from the fact that EchoStar had beaten him out for DirecTV. Murdoch's lobbying strategy proved fruitful, for the rejection of the merger reopened the door for him once again to try to purchase DirecTV, which this time proved successful.).

millions by beaming down one signal instead of two. Those savings ... would be passed on to consumers."[150] In addition, because the satellite industry survives on subscriptions, the combined satellite company would resist enacting an across-the-board price increase in those markets served by cable providers because such a move would result in losing subscribers. Finally, a combined satellite service would have an improved "capacity to beam local channels into more markets than they do separately," which would quell the FCC's concern that market concentration results in fewer programming options for consumers.[151]

B. *The U.S.'s Approval of the News-Hughes Combination*

On December 19, 2003, the FCC conditionally approved News' acquisition of Hughes and its subsidiary DirecTV.[152] The FCC recognized that the combination would benefit American consumers.[153] Despite the fear that the acquisition would result in News "rais[ing] its programming prices to cable rivals, such as Comcast Corp., or threaten[ing] to pull Fox programming in order to drive customers away from cable and to DirecTV,"[154] U.S. regulators realized that consumers would still benefit from "News's ... [practice] of adding channels and features, such as interactivity, to its other satellite systems, which would create a more muscular competitor to the cable industry, which has monopolies in most markets."[155]

U.S. antitrust regulators, however, did not approve the merger without first placing certain conditions on News.[156] First, the FCC required News to "beam local channels into 100 of the nation's markets by the end of [2004] and to provide local service to the rest of the country's 210 markets no later than 2008" in order to comply with the agency's goal of localism.[157] Second, News agreed to the FCC's demand that it offer its cable channels, such as Fox Sports Net, Fox Movie Channel, and Fox News Channel to cable providers at the same price that it offers them to DirecTV.[158] Third, the approval called for arbitration in programming disputes between cable and satellite providers as an alternative to service interruptions and private negotiations that may contribute to price increases for the

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150. Beauprez & Hudson, *supra* note 148.

151. *Id.*

152. *News-Hughes Merger: FCC, DOJ OK News-Hughes Merger*, CABLEFAX, Dec. 22, 2003, *available at* LEXIS, News Library [hereinafter *News-Hughes Merger*].

153. *See id.*

154. Ahrens, *supra* note 19.

155. *Id.*

156. *Id.*

157. *Id.*

158. *News-Hughes Merger*, *supra* note 152.

consumer.[159] The FCC, supported by America's largest cable companies, hoped that such requirements will allow News to provide consumers with the best service possible while not resulting in price increases or preventing its competitors from airing Fox channels.[160]

C. *Recommendations for CADE's Final Ruling: Conditioning Approval of the News-Hughes Brazilian Venture on News' Adherence to Behavioral Requirements*

CADE's past adventures in antitrust regulation demonstrate a failure to follow the prevalent worldwide model.[161] In the "toothpaste decisions," CADE conditionally approved a monopolistic combination, but did so by imposing conditions that raised costs to both consumers and the companies involved.[162] Likewise, in the "beer decisions," CADE was influenced by the "potential competition" doctrine[163] and imposed conditions on brewers that functioned more like "tolls" required to enter the Brazilian market than structural or behavioral conditions that would enhance economic efficiency.[164] In the "chocolate decision," CADE rejected the acquisition because of a fear of price increases.[165] With respect to the News-Hughes venture, CADE should not flatly reject the proposed combination on the ground that a monopolistic concentration will result. Rather, CADE must follow the prevalent worldwide model of antitrust regulation as used by U.S. antitrust regulators in approving the News-Hughes combination.[166] Where monopolistic combinations enhance "economic efficiency with respect both to market participants and consumers," the worldwide antitrust model calls for targeted structural or behavioral conditions to ensure the best situation for the consumer.[167]

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159. *Id.*

160. *Id.*

161. *See Brazil Antitrust*, *supra* note 104.

162. *See* Page, *supra* note 42, at 1126 (CADE's conditions imposed "huge additional costs on Colgate" while also requiring the consumer to "incur additional search costs in order to find the brand they prefer."). For further analysis *see* page 13 of this note.

163. *See* Rodriguez & Coate, *supra* note 74, at 814 (CADE's reliance on the potential competition doctrine was erroneous here because the statistics indicated "a substantial competitive threat to the leading brewers from existing competitors.").

164. *See* Wheatley, *Joint Venture*, *supra* note 99 (CADE ordered Anheuser-Busch to raise its stake in Antarctica by $1 billion, which amounted to a "toll to enter Brazil." The condition did little to help Brazilian consumers.).

165. *See* Smith, *supra* note 134 (citing the modeled price increases that would result from Nestle's concentration of the market).

166. Singham, *supra* note 105, at 393.

167. *Id.*

As will be demonstrated below, the News-Hughes Brazilian venture will benefit consumers, the Brazilian government, and News alike. Therefore, CADE should approve the merger, conditioned on News' maintaining behavioral practices that will ensure a benefit to Brazilian satellite television consumers. CADE should not follow the precedents of its toothpaste and beer decisions or employ conditions that raise costs for consumers or exact a toll on News. Rather, it should follow closely the FCC's example in the News-Hughes U.S. merger, by permitting the combination and thus benefiting the Brazilian consumers and News alike, while also ensuring in the future that News will not serve its own interests to the detriment of consumers.[168]

In addition, CADE must examine the proposed combination in light of the entire pay-television market, rather than just the satellite television market. In the "toothpaste decisions," CADE considered the "relevant market" in making its decision.[169] Following the DOJ's analysis of the EchoStar-DirecTV proposal, CADE should focus not only on News' control of the satellite market (which would concededly be quite great at ninety-five percent) but also on an examination of the merger in light of the 3.5 million cable television subscribers in Brazil.[170] As the DOJ highlighted in its EchoStar decision, competition between satellite and cable providers can serve to mitigate the negative effects of a concentrated satellite market.[171] Given competition from the cable providers, News would be unable to raise prices and gouge consumers without restraint.

1. Benefits of the News-Hughes Brazilian Combination

In making its decision regarding the News-Hughes Brazilian combination, CADE should examine the numerous benefits of the combination for both the Brazilian consumer and the Brazilian government. Although the combination will give News ninety-five percent of the Brazilian satellite market, CADE should not flatly

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168. *See News-Hughes Merger*, *supra* note 152 (FCC imposed conditions on News to offer its cable channels at the same price to cable providers and DirecTV, and providing for arbitration in disputes between cable and satellite providers); Ahrens, *supra* note 19 (FCC imposed condition on News to provide local service to the country's markets).

169. *Relevant Market*, *supra* note 80.

170. *Sixteen Percent of the Region's Homes Have Cable TV*, LATIN AM. TELECOM, Dec. 1, 2003, *available at* LEXIS, News Library [hereinafter *Homes Have Cable*].

171. *See* Mulkern, *supra* note 17 (U.S. DOJ analyzing the EchoStar-DirecTV combination in light of the fact that "consumers in rural areas who could not get cable would only have one option for television service"); *see also* Beauprez & Hudson, *supra* note 148 (noting that consumer choices after the EchoStar-DirecTV merger would be reduced to two: cable and satellite).

reject the combination simply because of this result. Rather, CADE should follow the prevalent worldwide antitrust model and examine the combination not solely in light of its monopoly characteristics, but also by examining the economic benefits to consumers, News, and the government alike.[172] In particular, CADE must realize that News' control of ninety-five percent of the satellite market will achieve economies of scale,[173] which in turn will enable News to reduce its subscription prices without sacrificing its long-term viability in Brazil.[174] This, in turn, should allow millions of Brazilian consumers to access satellite television for the first time. Over time, more and more Brazilians will enjoy the quality reception and programming associated with Sky Global direct-to-home satellite television.[175] CADE must realize that "[p]ay TV doesn't work unless you have a monopoly or dominant position" in the market.[176]

News' monopolistic control over the Brazilian satellite market will enable Sky Latin America to save money,[177] reduce subscription prices without sacrificing its long-term viability in Brazil, and increase subscriptions to its service.[178] In the current market, where providers compete for the current 1.2 million Brazilian satellite customers[179] and an additional 3.5 million cable subscribers,[180] both satellite companies are failing, making cutting costs particularly important for the long-term success of both companies.[181] In Brazil alone in 2002, Sky Latin America lost $386 million while DirecTV Latin America lost $202 million.[182] In March 2003, DirecTV Latin America filed for bankruptcy protection.[183] These monetary losses distinguish this situation from Nestle's in the "chocolate decision" because neither satellite company will be able to expand adequately

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172. Singham, *supra* note 106, at 393.

173. *See* Beauprez & Hudson, *supra* note 148 (analyzing how a combination of Echo-Star and Hughes in the United States would have allowed for a combination of their two satellite fleets into one, thereby saving millions by enabling the joint company to send down one signal instead of two).

174. *See DirecTV Latin America's Critical Month*, INTERSPACE, Jan. 29, 2003, *available at* LEXIS, News Library ("The challenge [for success] in Brazil is to go after people who have never paid for television before.").

175. *See* Ahrens, *supra* note 19 (citing to News' history of adding channels and features, such as interactivity).

176. Jane Schulze, *Murdoch Makes Pay-TV Pay Off*, THE AUSTRALIAN, Feb. 19, 2004, *available at* LEXIS, News Library (quoting ABN Amro media analyst Peter Shorhouse).

177. Beauprez & Hudson, *supra* note 148.

178. *DirecTV Latin America's Critical Month*, *supra* note 174.

179. *Regulatory Probe*, *supra* note 22.

180. *Homes Have Cable*, *supra* note 170.

181. *See* Smith, *supra* note 18 (arguing that a weaker market in Brazil makes the combination of Sky L.A. and DirecTV L.A. more necessary).

182. *Break Even*, *supra* note 35.

183. *Id.*

and provide services to Brazilian consumers under current conditions. In a country with ten million satellite dishes already installed, the opportunity exists for News to expand it satellite television business.[184] Antonio Rossa, a partner at Dainet, a media consulting firm in Sao Paulo, argues, however, that while "it wouldn't be that difficult to get those people to migrate to pay TV. . . [the satellite providers] won't do it charging what they have been charging so far."[185] "Brazilians consider pay television a luxury[,]" and the current monthly cost of satellite television, $30, is half the minimum monthly wage.[186] Therefore, to expand and capture the large potential market in "a region where people watch a lot of television[,]" the satellite providers must reduce prices.[187]

A price reduction would be possible if CADE permitted News to combine DirecTV with Sky in Latin America because it could reduce operating costs. When analyzing the proposed EchoStar-Hughes combination in the United States, antitrust regulators noted the advantages of the combination, which included the ability of the two satellite providers to "combine their satellite fleets and save millions by beaming down one signal instead of two."[188] Those savings could be passed on to consumers.[189] Moreover, experts expect the Brazilian merger to increase Sky's value from $420 million to $900 million in twelve months.[190] Over time, as News is able to become more efficient absent a significant competitor, it will be able to reduce costs and prices further in order to increase the number of subscribers. CADE should place some faith in free markets and rely on News to decrease prices out of a self-interested need to increase subscription numbers for its long-term economic health.

CADE should also recognize that Sky satellite television benefits consumers immensely. U.S. regulators, in approving the News-Hughes deal, recognized the benefits consumers gain from News operated satellite television: additional channels, features such as interactivity, and rigorous competition with cable operators.[191] Connecting Brazil to a global satellite service that spreads across nearly every continent[192] will give Brazilian consumers access to more programming, the ability to watch their favorite national soccer

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184. Smith, *supra* note 18.
185. *Id.* (quoting Antonia Rosa, a Sao Paulo-based media consultant and partner at Dainet).
186. *Id.*
187. *Id.*
188. Beauprez & Hudson, *supra* note 148.
189. *Id.*
190. Schulze, *supra* note 176 (citing Deutsche Bank media analyst Mike Mangan).
191. Ahrens, *supra* note 19.
192. CHENOWETH, *supra* note 1, at 9.

stars on the European club teams,[193] improved exposure to national and international news, and provide them with a sense of inclusion in the international community.

Furthermore, connecting its citizens to the world through a global television network would assist the Brazilian government in promoting capitalism and becoming a major player on the international stage.[194] To become a capitalist power, a country must "improve the performance in industry sectors that constitute the commercial infrastructure of a vibrant market system."[195] One of "[t]he most important of these sectors [is] communications."[196] By allowing News to have a monopoly of the satellite television industry and by trusting that News will provide the best television services possible out of a desire for long-term financial viability, the Brazilian government can ensure that consumers receive better television service, thereby improving its commercial infrastructure through the communications sector.

Approving the combination would also benefit the Brazilian government by demonstrating its desire to work with, not against, the world community. If CADE rejects the News-Hughes combination while maintaining its sovereignty in antitrust, it may eviscerate the efficient result of the international combination involving an international conglomerate.[197] If Brazil acts to block an aspect of the News-Hughes combination, it may create "negative externalities in the form of unneeded transaction costs and [a] subsequent international business stalemate" for News.[198] "These transaction costs manifest themselves in other companies' hesitance to enter into similar transaction[s] in the future" in Brazil.[199] As a result, "global Pareto efficiency is lost."[200] Although CADE certainly has a legal authority to assert itself in this matter and prevent the merger, it must be aware that its decision to do so will affect the efficiency of the

193. Soma & Weingarten, *supra* note 2, at 77 (British Sky Broadcasting has exclusive live broadcast rights to all Premier Football League matches in the United Kingdom. News also has a multi-year contract with the National Football League. It also owns rights to broadcast games of seventy professional U.S. sports teams in the National Basketball Association, National Hockey League, and Major League Baseball, as well as numerous collegiate teams.).

194. *See* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1110 (Summer 1998) (arguing that developing the infrastructure of the communications sector is essential for a capitalistic economy).

195. *Id.*

196. *Id.*

197. Soma & Weingarten, *supra* note 2, at 102 (arguing that "while China maintains its sovereignty in antitrust, the efficient result disappears").

198. *Id.* at 103.

199. *Id.*

200. *Id.*

combination throughout the world, particularly in the United States, which the primary area in which News to expand its satellite network.[201]

Finally, a rejection of the combination, especially on the heels of the "chocolate decision," may send the dangerous signal to the international community that Brazil is unfriendly to foreign investment. CADE must be aware that if it continues to act as it did in the "beer decisions" by enacting a "toll to enter Brazil[,]"[202] multinationals might stop investing in Brazil, which would impede the country's goal of becoming a capitalist power.[203] Although some analysts do not believe that multinationals will stop investing in Brazil, they at least worry that CADE's behavior may cause problems for other proposed joint ventures that would benefit the Brazilian economy.[204]

2. Concerns About the News-Hughes Brazilian Combination

Although a merger between Sky and DirecTV would have numerous benefits in Brazil, an analysis would be incomplete without recognizing the competitive problems associated with giving Rupert Murdoch's News a ninety-five percent control of the satellite television market. Although News may in the short term keep prices low to increase subscription rates, the possibility exists that without placing limits on News' behavior it may increase prices and gouge consumers in the long run after it eliminates its cable and satellite competitors. Specifically, CADE should be concerned with the dangers associated with concentration in an industry in which the barriers to entry are high, News controls much copyrighted material, and one viewpoint may monopolize the marketplace of ideas. Such concerns would only be exacerbated if News accomplishes its objective of increasing subscription numbers.

In the "toothpaste decision," CADE concluded that the barriers to entry into the toothpaste market were quite low, which would help keep Colgate's prices at reasonable levels.[205] In contrast, here CADE should be concerned with very high barriers to entry in the satellite market.[206] The largest costs to a satellite provider are associated with establishing service to the network area.[207] Licensing costs are high because of the limited number of broadcast windows and the

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201. CHENOWETH, *supra* note 1, at 9.
202. Wheatley, *Venture Approved*, *supra* note 117.
203. *Brazil Antitrust*, *supra* note 104.
204. Dyer, *supra* note 72.
205. Page, *supra* note 42, at 1125.
206. Soma & Weingarten, *supra* note 2, at 57.
207. *Id.*

transactions costs associated with negotiating with the government.[208] In addition, satellite access to a region, "whether granted via an existing satellite or a new dedicated satellite, is also a large start-up cost."[209] With high barriers to entry, new competitors are unlikely to emerge, and News, regardless of its need to keep prices low in the short run to increase subscription numbers, may potentially be free to raise prices in the long run.

Sky Global's worldwide success resulted not just from the construction of the satellite infrastructure but also from News' control of copyrighted material.[210] Through its control of Twentieth Century Fox, Fox Broadcasting, and Fox Sports in the United States,[211] cable channels Canal Fox, Fox Kids Latin America, and Fox Sports Americas in Brazil,[212] and its licensing agreements with the National Football League and the British Premier Football League,[213] News owns and provides substantial content for its satellite network. This content has been essential in getting subscribers for Sky Global networks.[214] Control over so much copyrighted material, however, may enable News (if it obtains a monopoly in Brazil) to obtain further dominance by either not allowing competitors to show its content or by charging its competitors a higher price to do so. These possibilities concerned U.S. antitrust regulators in the News-Hughes combination and prompted the FCC to condition approval of the combination upon News' agreeing to offer its content to cable channels at the same price it offers it to its own satellite broadcaster.[215]

Some antitrust analysts favor an "antitrust-plus" analysis for media mergers.[216] When mergers involve companies whose business is primarily to communicate ideas, "there is more at stake than high prices or low quality to consumers—there is a more fundamental issue of avoiding control over access to the marketplace of ideas."[217] This idea, however, "is out of favor among many who would rely more on economic efficiency to the exclusion of diversity or political considerations in making an antitrust evaluation, particularly

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208. *Id.*

209. *Id.*

210. *See id.* at 45 ("The News Corporation network, given its control over key copyrighted content, makes the development of a competing network extremely unlikely.").

211. *Id.* at 69.

212. *Id.* at 72.

213. *Id.* at 77.

214. *See id.* at 79 (Content and sports broadcasting "is very much the key to unlocking the door to the efficiencies of scale that the network brings.").

215. *News-Hughes Merger, supra* note 152.

216. Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1019 (Summer 1996).

217. *Id.* (quoting Robert Pitofsky, Chairman, Federal Trade Commission).

considering scale efficiencies that larger enterprises . . . typically generate."[218] Although a provider may "not always be responsible" if it has a large market share,[219] and News certainly has been accused of having a right-wing bias,[220] "it is difficult to predict that large owners vis-à-vis small ones are more inclined towards antidemocratic values. . . . If anything, large, publicly-held companies, who face the shareholder version of democracy and an array of . . . regulators, may be less inclined to veer far from the middle."[221]

3. Recommendation: Conditional Approval

In making antitrust decisions, the DOJ and CADE have both used the "increasingly popular type of merger enforcement decision"—namely, conditional approval.[222] In the "toothpaste decision" and "beer decisions" in Brazil, as well as in the approval of the News-Hughes combination in the United States, regulators have placed conditions, both structural and behavioral, upon approval.[223] A structural condition is "where one of the merging parties divests certain assets in order to prevent harm to competition."[224] These types of conditions have been imposed in the beer and toothpaste decisions in that the monopolistic entity was required to invest in competitors or to invest more in the acquired company.[225] A behavioral condition calls for the new enterprise to "promise to behave in a certain way in the future . . . accept[ing] the existence of the competitive problem but seek[ing] assurances that the merged firm will not behave anticompetitively."[226] Such behavioral conditions require "future monitoring and enforcement by the competition tribunal"[227] and have been imposed in the U.S. News-Hughes decision, as well as in the "toothpaste" and "beer" decisions in

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218. *Id.* at 1019.

219. *Id.* at 1033.

220. Rupert Murdoch and his media outlets are generally recognized as being politically right-of-center. The *New York Post* and Fox News Channel are two prime examples. *See* Ken Auletta, *VOX FOX; How Roger Ailes and Fox News are Changing Cable News*, NEW YORKER, May 26, 2003 (discussing News' Fox News Channel and its right-of-center perspective).

221. Brenner, *supra* note 216, at 1033-34.

222. Pittman, *supra* note 110, at 268.

223. *See supra* Part III.

224. Pittman, *supra* note 110, at 269.

225. *See* Page, *supra* note 42, at 1125 (CADE forced Colgate to stop selling the Kolynos brand for four years to give competitors a chance to establish themselves, to sell toothpaste in Brazil under a new "alternative" brand, and to sell twenty percent of its stock of toothpaste to third parties for resale under their own brands.).

226. Pittman, *supra* note 110, at 269.

227. *Id.*

Brazil.[228] While structural remedies are typically preferable to behavioral remedies because they "attack the root of the problem and do not require long-term monitoring to assure their effectiveness," in certain situations, such as the News-Hughes Brazilian combination, behavioral conditions are more useful. CADE should approve the News-Hughes combination, conditioned upon certain behavioral requirements, namely commitment not to engage in price discrimination against competitors for content it owns, and a commitment to localism (i.e., airing local broadcast channels on its satellite network).

First, similar to the conditions imposed by the FCC on the News-Hughes combination, CADE should condition its approval upon News' commitment not to engage in price discrimination against competitors for content. To this end, CADE should require News to offer its Brazilian and U.S. copyrighted content to its competitors, both satellite (Tecsat) and cable providers, at the same price at which it offers them to Sky Latin America.[229] Since News controls much copyrighted content through its ownership of Brazilian and U.S. cable channels,[230] the threat exists that News may charge its competitors exorbitant licensing rates to gain access to such content, thereby using its monopoly position to gain a serious competitive edge. The benefit to Brazilian consumers from News' virtual monopoly relies on News' need to lower subscription prices for Sky in order to increase subscription numbers.[231] Were News to charge Tecsat or the cable operators a higher content rate for access to Canal Fox or pull such content from their competitors' systems, then News would be simply running its competitors out of business. Although News would still have to decrease subscription prices to a slight degree in order to lure consumers away from free television, it would not need to lower subscription prices to lure the 3.5 million Brazilian cable television consumers. Those consumers would pay higher subscription rates because they desire News' programming, like Canal Fox, and would have no alternative to Sky for such access.[232]

Also, Brazilian consumers would benefit from a condition whereby all programming disputes between cable and satellite providers would be settled by arbitration.[233] Taking guidance from

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228. *See supra* Part III.

229. *See News-Hughes Merger*, *supra* note 152 (FCC required News to offer its cable channels to cable providers at which the same price as it offers them to DirecTV.).

230. Soma & Weingarten, *supra* note 2, at 66, 72.

231 This analysis is developed in detail on pages 19-23.

232. *See* Ahrens, *supra* note 19 ("FCC studies show that pulling [channels] from cable systems drives customers to satellite services faster than any other factor.").

233. *See News-Hughes Merger*, *supra* note 152 (FCC required News to enter into arbitration resolution for disputes with cable providers over programming).

the FCC decision on the News-Hughes combination, this condition would benefit consumers by ensuring that any disputes would be resolved rather than dragged out through private negotiations that often result in interruptions of service.[234] An inefficient system with service interruptions risks causing price increases as the negotiation costs of satellite and cable providers increase.[235] Furthermore, the arbitration system would "prevent News Corp. from threatening to pull its popular [broadcasting channels] from rival cable systems to extract higher payments."[236]

Second, also in light of the FCC News-Hughes decision, CADE should condition approval upon a commitment by News to promote localism.[237] CADE should require News to carry Brazil's seven free broadcast channels on the Sky satellite system. This condition would promote an efficient result because consumers who switch to satellite service would not be required to keep their antennas or have multi-input television sets whereby they could switch between satellite and free television. By carrying the local broadcasters on the satellite system, Sky would provide clear and crisp reception not only of stations new and interesting to Brazilian consumers, but also of the stations Brazilians are used to viewing. Such a behavioral condition would further ensure that Brazilian consumers benefit from the News-Hughes combination.

Finally, CADE should not impose a "benchmark pricing" condition on News whereby News would agree to a ceiling for the price it charges its customers.[238] While CADE could mandate to News that it can only offer Sky service for as much as "$X" per month, such a condition would be both impractical and ineffective. First, for News to become viable in the long run, which will in turn benefit Brazilian consumers, it must have some flexibility to lower prices at the

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234. *See id.; see also* Paul Tharp, *EchoStar, Viacom Say Truce is in Works*, N.Y. POST, Mar. 11, 2004, at 33 (An example of such inefficiency can be seen recently as EchoStar and program provider Viacom were in a dispute over how to split the $3 monthly hike paid by EchoStar consumers as well as EchoStar's refusal to accept all of Viacom's bundled cable network programming in order to gain retransmission rights to all of CBS' stations. As a result, Viacom's programming was blacked out on EchoStar service in millions of homes for two days, causing as many as 2,000 EchoStar subscribers to switch to competing cable companies).

235. *See News-Hughes Merger*, *supra* note 152 (FCC required News to enter into arbitration resolution for disputes with cable providers over programming).

236. Ahrens, *supra* note 19.

237. *See id.* (FCC requires News to "beam local channels into 100 of the nation's markets by the end of [2004] and to provide local service to the rest of the country's 210 markets no later than 2008" in order to comply with the agency's goal of localism).

238. *See id.* In the News-Hughes ruling "[t]he FCC had considered imposing a 'benchmark pricing' condition on News Corp., but found the contracts regarding regional sports programming too complex and feared that hard benchmarks could eventually be maneuvered around."

moment when it best fits into News' business plan. Any forced reduction would hurt News' viability, which would damage any chance for consumers to benefit from the combination. Second, any such benchmarks may easily be maneuvered around in the long run, which makes imposing them impractical and wasteful.[239] If benchmarks are imposed and several years later News goes to CADE and argues that "conditions have changed," what is CADE to do?[240] It is better to allow the market to permit News to correct its prices as necessary. Third, competition watchdogs in developing countries, like Brazil, lack "the resources to devote to long-term regulation of particular sectors of the economy."[241]

Fourth, for Brazil to truly develop a powerful capitalist economy, it must to some degree have faith in free markets. It must rely on News not to gouge consumers because doing so would reduce subscription numbers, which would prevent News from becoming economically viable. While "the implementation of antitrust policy can provide actual or symbolic assurance to the public and its elected officials that the move to a market system does not leave citizens at the mercy of the market,"[242] antitrust policy "does not and should not protect the citizen from the market, except in the narrow sense of preserving competition. If the expectation is that antitrust is somehow a substitute for state dictation of 'fair' market outcomes, it is likely that antitrust will be interpreted in ways that conflict with the goal of establishing a market economy."[243]

V. CONCLUSION

After years of economic failure, Brazil moved away from an economic system in which the government owned the nation's major industries to one in which private, profit-seeking companies operated free of government intrusion.[244] In response to excessive economic concentration in the hands of private corporations, CADE has increased its regulatory oversight.[245] When it acted, however, CADE

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239. *See id.* (FCC believed such benchmarks could be maneuvered around).

240. *See* Pittman, *supra* note 110, at 269 (arguing that benchmark prices are infeasible because marketplace conditions are ever-changing).

241. *Id.*

242. Manisha M. Sheth, Note, *Formulating Antitrust Policy in Emerging Economies*, 86 GEO. L.J. 451, 454-55 (Nov. 1997).

243. Page, *supra* note 42, at 1116.

244. *See* Oliveira, *supra* note 43 (arguing that the Brazilian government began to develop its competition policy to respond to the "social demand for the repression and prevention of the abuse of economic power, now more concentrated in the hands of private agents"); Page, *supra* note 42, at 1119-20.

245. *See supra* Part II.A.

often failed to implement antitrust policies that benefited consumers, private corporations, and the interests of the Brazilian government alike.[246] With the combination of Brazil's two largest direct-to-home satellite television services, CADE has an opportunity to act in a way consistent with its mission by allowing for the development of Brazil's communications infrastructure, while simultaneously helping consumers gain access to a service with in the global community.

By conditionally approving the News-Hughes Brazilian combination, CADE can ensure that Brazilian consumers enjoy the benefits associated with satellite television.[247] By approving the merger, CADE would allow for Sky Latin America to become a viable participant in the Brazilian television market, enabling it to compete with cable television and free-television. Through the merger, Sky will be able to cut costs, enabling it to offer its satellite television services at a lower price, which will in turn increase subscription numbers because more Brazilians will be capable of affording Sky's services. Consumers will have more programming options, an increased ability to access the same information as consumers in other parts of the world, and a chance to save money when purchasing pay television (a luxury item in Brazil). Furthermore, Brazil can demonstrate its desire to attract foreign investment and international capitalism.

CADE can quell its concerns over the merger by demanding that News comply with certain behavioral conditions.[248] First, News should be prohibited from engaging in price discrimination and be required to sell its own content to other cable and satellite providers at the same cost as it does to Sky. CADE's approval should include a provision directing any programming dispute to an independent arbitrator. Second, News should also be required to carry local programming on Sky. Finally, in order to truly benefit consumers without hurting News, CADE should not enforce "benchmark pricing," which would be an ineffective and inefficient way of keeping prices low.

CADE and the Brazilian government should not fall prey to fears and concerns about capitalism or concerns about a concentration in the satellite industry by following their instincts to over-regulate. Although regulation is necessary in certain situations to maintain a competitive market, in situations where consumers benefit from the concentration, as in the News-Hughes combination, regulators must resist their inclination to over-regulate. CADE and Brazil should put their faith in capitalism, which should see News' desire for

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246. *See supra* Part III.
247. *See supra* Part IV.D.1.
248. *See supra* Part IV.D.3.

profitability in Brazil lead to a reduction in prices, thus benefiting the millions of Brazilians seeking a premium satellite television service.*

*Geoffrey Drake***

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* I would like to thank my parents and my grandfathers, whose lifelong involvement in the legal and broadcast media worlds inspired my interest in the legal issues affecting the media industry.

** J.D. Candidate 2005, Vanderbilt University Law School.

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