

# **MINI PLENARY 5: EXTRA-TERRITORIAL ANTITRUST ENFORCEMENT - HOW AND WHY?**

**Amanda Athayde** - Head of Leniency Unit, CADE/Brazil

**Marcus Bezzi** - Executive General Manager, ACCC

**Antonio Capobianco** - Senior Competition Expert, OECD

**Michael Corrigan** - Competition Partner, Clayton Utz, Sydney

**Christopher Ries** - Antitrust and Channels Counsel, Hewlett Packard

**4 October 2016**

# AGENDA

- ➔ 1) Extraterritorial enforcement under the **law**: US, Brazil, Australia and EC
- ➔ 2) **OECD** Recommendation and **Cooperation**
- ➔ 3) **Challenges** in extraterritorial enforcement
- ➔ 4) **Agency Discretion**
- ➔ 5) **Private Claimants** Perspective
- ➔ 6) Discussion

# CORE APPROACH IN 4 JURISDICTIONS - LAW ON EXTRA-TERRITORIALITY



## United States

involving non-import foreign trade or commerce has a direct, substantial, and reasonable effect on domestic, import, or export commerce



## Brazil

if the act "*in any way intended or otherwise able to produce*" an effect in Brazil "*even if any such effects are not achieved*"



## Australia

if the contravening firm is connected with Australia by residence, incorporation or business presence



## EU

if the effect has direct, indirect, actual or potential effect on the pattern of trade between Member States

Applies when conduct outside domestic borders...

# 1) When is enforcement extraterritorial under the law?

Locus of Act - Conspiracy occurs outside of jurisdiction?

Agreement/Acts in furtherance all occur outside jurisdiction?

What if some acts occur inside jurisdiction?

Locus of Effect - Effect occurs outside jurisdictions?

Imports vs. Exports (DDU/DDP)

Extraterritorial Title Transfer (FCA/EX-W/FOB)

Locus of Victim/Global payments - inside jurisdiction

Intermediate Goods

# 1) When is enforcement extraterritorial under the law?

Can the law apply to a cartel which: -

	US	Brazil	Aus	EU
has no business/presence in the jurisdiction?	✓	✓	✗	✓
is agreed outside jurisdiction but directs their agents/ subsidiaries within the jurisdiction to implement ?	✓	✓	✓	✓
is agreed outside a jurisdiction affecting components which are imported and assembled in domestic jurisdiction?	✓	✓	✓	✓
is agreed outside a jurisdiction affecting components sold outside jurisdiction where only the finished product is imported into jurisdiction?	✓	✓	✗	✓
has presence in jurisdiction if goods produced locally but wholly exported with no effect on domestic jurisdiction?	✗	✗	✗	✗
is formed/has presence in the jurisdiction but all cartel production/sales/activities are extra territorial?	✗	✗	✓	✗

## 2) OECD Recommendations

- i. lack of specific guidance in the Hard Core Cartel Recommendation;
- ii. traditional and negative comity principles as the other side of the jurisdictional concerns



## Cooperation in Extraterritorial Enforcement

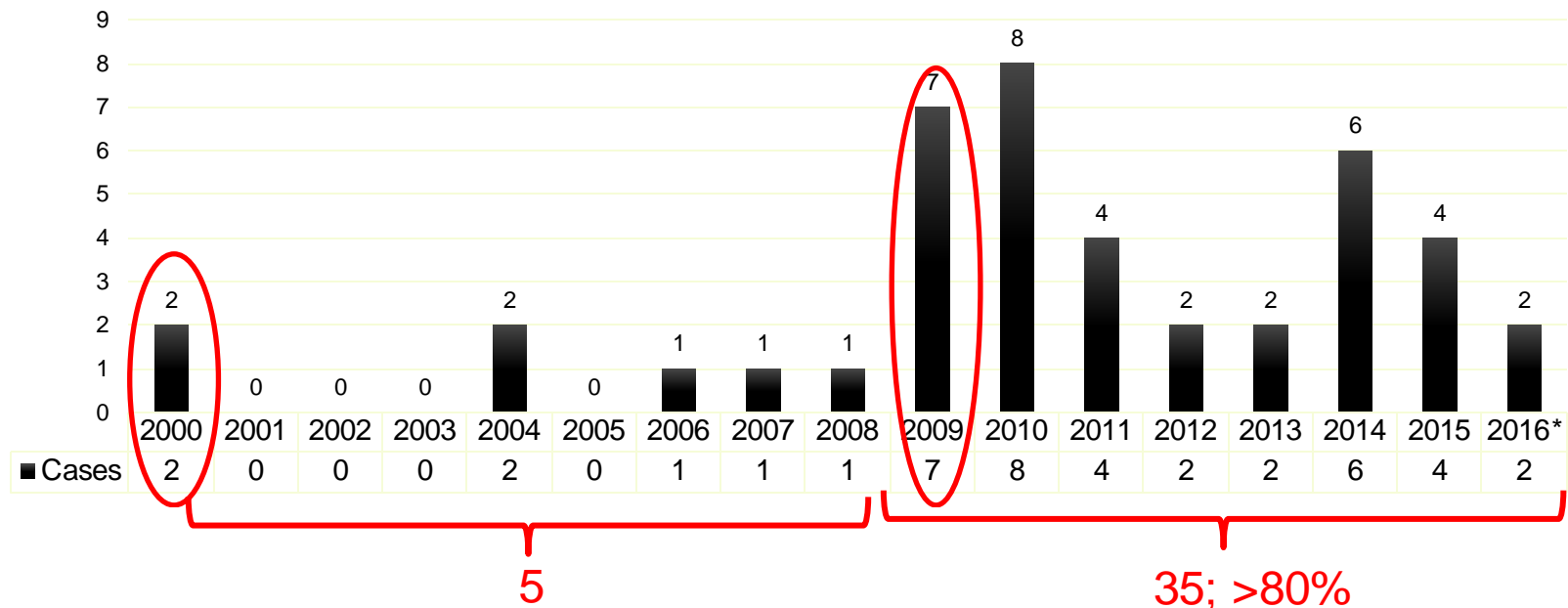
- i. promotion of traditional cooperation tools;
- ii. recommendations on enhanced cooperation

### 3) Challenges in Extraterritorial Enforcement



- International cartel enforcement: top priority in Brazil
- From 2000-2016\*, more than 40 investigations

Number of new proceedings per year in Brazil  
(international cartels only)

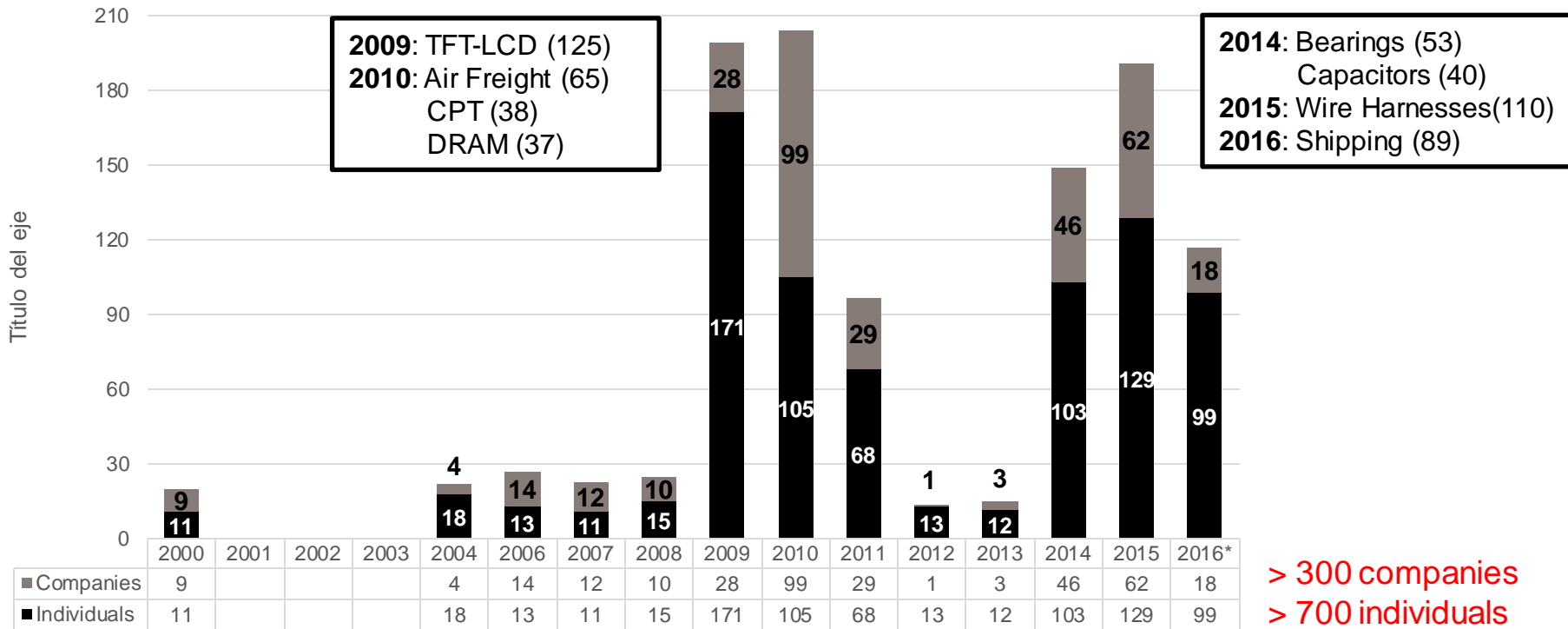


### 3) Challenges in Extraterritorial Enforcement



- From 2000-2016\*, more than **1100 individuals and companies** have been prosecuted in Brazil for international cartels

Number of companies and individuals prosecuted per year in Brazil (international cartels only)





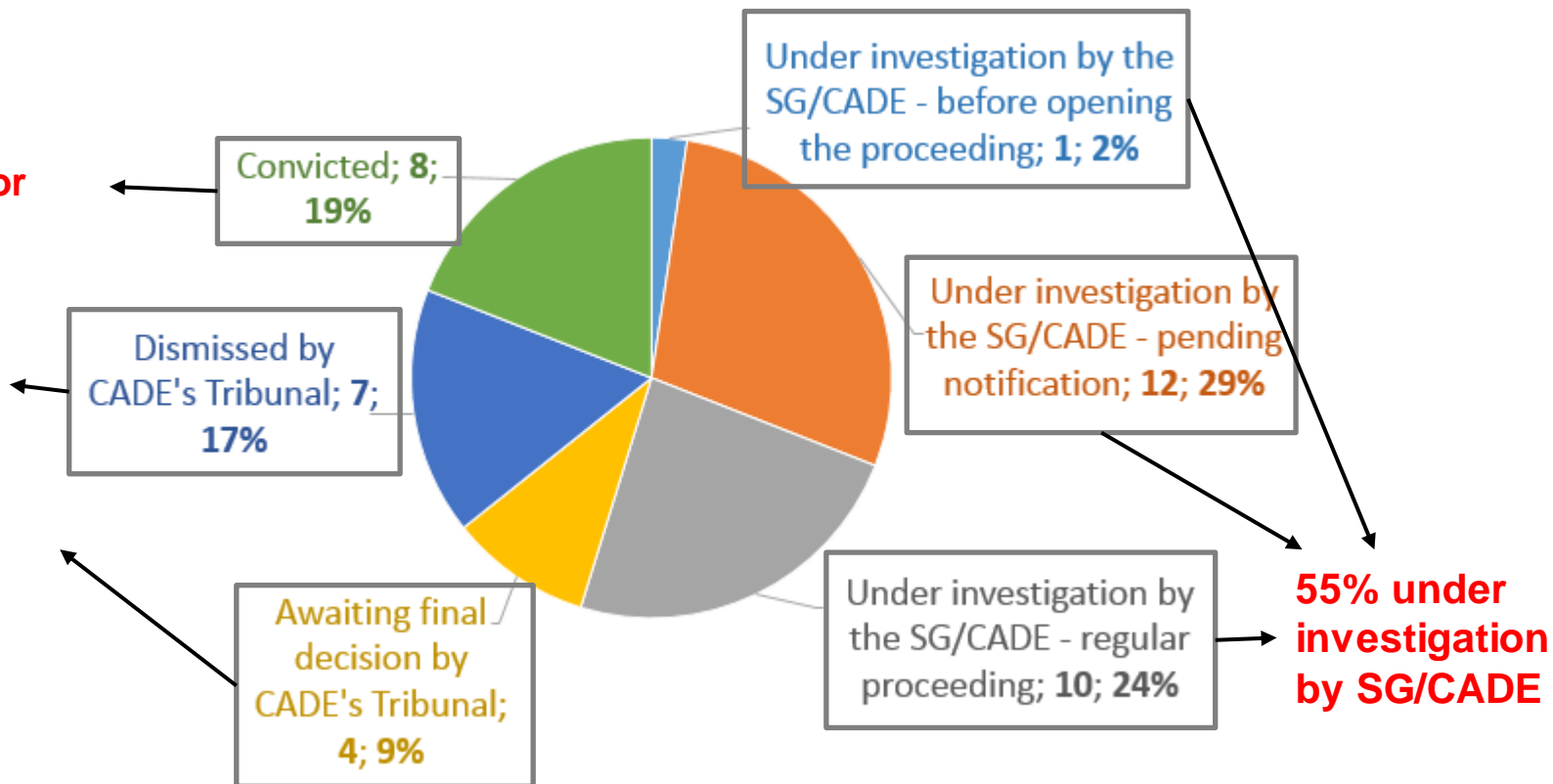
### 3) Challenges in Extraterritorial Enforcement



- What is the **status** of those investigations of international cartels in Brazil?

45% decided or pending decision of CADE's Tribunal

- 14 companies and 27 individuals already convicted



### 3) Challenges in Extraterritorial Enforcement



#### To locate and notify the defendants (specially individuals)

- **Notification:** foreign language + translation
- **Locate:** International notification + former employees

#### Tools to overcome this challenge:

1) New Leniency and TCC Clause: applicant has the duty cooperate with translation, if necessary

2) Collaboration in TCCs: applicants have incentives to provide substantive information on the companies and individuals (*including addresses and location*) → greater discounts

3) Cooperation with Interpol

# CHALLENGES AROUND THE WORLD

- **In which jurisdictions did the international cartel have effects?**
- **How to find evidence of an international cartel?**
- **How to calculate fines/penalties?**
- **How to execute those penalties (fines/jail time)?**

→ **How to overcome them?**



## 4) Agency Discretion

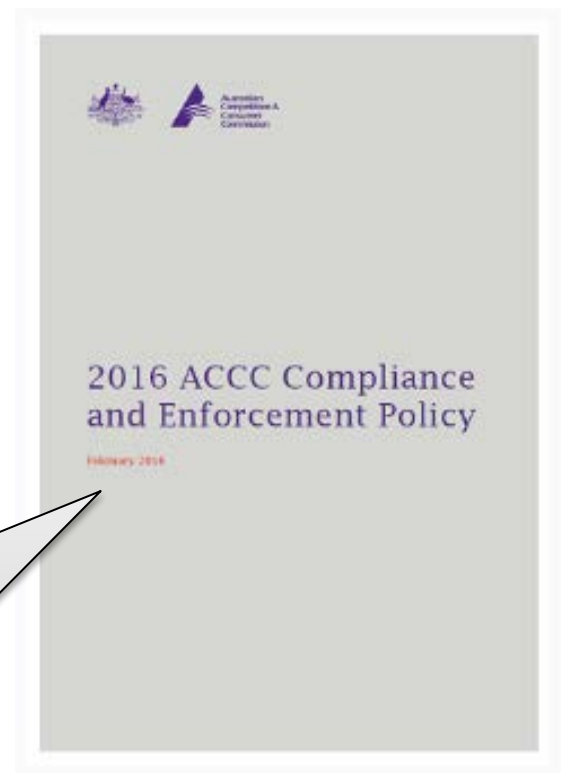
### AUSTRALIA

#### Conduct always prioritised by the ACCC

- Cartels;
- Anti-competitive agreements;
- Misuse of market power

#### **Since 2014:**

- *“When dealing with international cartels, the ACCC will focus on pursuing cartels that have a connection to, or cause detriment in, Australia; that is cartels that involve Australians, Australian businesses or entities carrying on business in Australia.”*



# **AUSTRALIA** **AGENCY DISCRETION**



<b>Current ACCC cartel matters (as at 30 September 2016)</b>	<b>Total</b>	<b>Immunity element</b>	<b>International element</b>
<b>Current litigation</b>	10	6	5
<b>Current in-depth investigations</b>	19	12	8

# **CORE APPROACH IN BRAZIL – AGENCY DISCRETION**



## **GENERAL RULE**

- No discretion
- If there is a cartel → prosecution

## **DISCUSSION:**

- In international cartels: broader or tight interpretation of the effects doctrine
- Prioritization

## 5) Extraterritorial Enforcement/Private Claims

### Why - Basis for Laws

- Promote Competition (Protect Free/Fair Trade)
- Prevent Market Abuses
- Increase Welfare (Consumer/Total) (Public/Private)
- Per Se vs. ROR

### Why - Globalization

- Decreased Barriers to Trade
- Efficiency Benefits
- Increased importance of IP
- Dominant suppliers/
- Oligopolies

### How - Focus on Harm

- Effect On Claimant
- Effect in Jurisdiction (Compare Public Sector)
- Act Less Important (Compare Public Sector)
- BOM Pricing (LCD/Auto Parts/Cap.)

# Questions and comments?





[www.claytonutz.com](http://www.claytonutz.com)