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**PERGUNTAS FORMULADAS AO CONVIDADO RUSSELL PITTMAN DO DEPARTAMENTO DE JUSTIÇA – DOJ - USA DURANTE A VI SEMANA INTERNACIONAL DO CADE**

**1. *What are the main differences between the legislation of competition policy in USA and Brazil?***

The two principal differences in the Brazilian and US competition laws concern the treatment of cartels and the notification requirements for mergers and acquisitions. Regarding cartel enforcement, US law treats cartels as both *per se* illegal (so that, for example, there is no legal exception for cartels that collectively account for only a small share of a market) and *criminal* violations of the law. Our courts have determined that cartel behavior is so obviously harmful to the economy that such harsh treatment is warranted. However, the laws of most other countries concerning cartels are not so harsh as the US law – they are more similar to the Brazilian law in this area. Concerning mergers, the US law, like a growing number of laws around the world, requires notification to the authorities of a merger *before* that merger takes place. The authorities then have a fixed amount of time to analyze the proposed merger – and to acquire more information if necessary – before the merger is allowed to take place.

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**3. *What are the main differences among CADE, FTC and DOJ?***

FTC is an independent regulatory agency, much like Cade. It has five commissioners who are nominated by the President to fixed six-year terms and confirmed by the Senate, with the President designating which commis-

sioner serves as chairman. However, unlike Cade, the FTC is a self-contained and self-sufficient agency that includes both the commissioners who decide the cases and the staffs that investigate them. It is divided for antitrust purposes into two bureaus – the Bureau of Competition, which is made up of lawyers, and the Bureau of Economics. (There is also a Bureau of Consumer Protection that deals with cases of unfair competition, fraud, misleading advertising, and so on.) Members of the two bureaus cooperate in investigating cases, which are then brought (if the Bureau managements think appropriate) to the commission for a hearing. The commission reaches a decision on the merits of the case, and can issue orders, fines, and so on. These decisions can then be appealed to the courts. The Antitrust Division of DOJ, as a part of the Department (Ministry) of Justice, is a part of the administrative branch of the government – that is, a part of the President’s government. The Division is a prosecutorial agency that can reach no decisions and issue no rules of its own – its power is to bring a case before the courts of general jurisdiction to seek enforcement of the law. Like the FTC, the Division is composed of both legal and economic sections that work together to investigate cases. The Division is headed by a single person – the Assistant Attorney General for Antitrust – and it is this person who makes all decisions as to what cases are brought before the courts.

#### ***4. How do you evaluate the plenary sessions of CADE?***

The plenary sessions of Cade seem to me quite productive and well-organized. When I have been able to attend these sessions, I have been quite impressed with the degree of thoughtfulness and care with which the issues

are presented and debated, and at the high level at which the debate takes place.

**5. *Do you think that the integration among CADE's commissioners related to the case analyzed are enough to provide efficiency for the judgment?***

The integration and interaction among the commissioners themselves seems to me very good. In the US, there are laws against more than two commissioners meeting for any reason outside of announced public meetings; this seems to me excessively restrictive. Of course, it is meant to prevent commissioners having secret meetings in which the real decisions are made, in advance of the public debates and votes. So far as I am able to observe, the Cade commissioners are able to discuss issues and cases among themselves in a professional and productive manner without undermining the integrity of the plenary sessions.

**6. *The period spent in Brazil for investigative judgmental procedures in Brazil are appropriate for a global economy?***

My opinion, based purely on anecdotal and observational evidence, is that the combined SAE/SDE/Cade investigative and decision-making process still takes too long, in spite of efforts by the President to find ways to speed things along. Certainly a complex merger case in the US typically takes much longer than the thirty days or so that would be the minimum time allowed the agencies under the merger prenotification law, but even in such a complex merger case the investigation would typically be completed within, say, four to six months. (I'm sure there are statistics available on this. I am

again relying on my experience and observations.) The very small number of US cases that actually go to court may require considerably more time, especially if the judge is slow in rendering his judgment. And non-merger cases, especially those investigating the possible abuse of a dominant position, may also go on for a very long time – even a year or more on occasion – if the issues are sufficiently complex. Overall, focusing especially on merger enforcement, I think it is fair to say that the majority of competition laws around the world that, unlike the Brazilian law, provide for pre-merger notification and at the same time limit the amount of time for analysis by the competition authorities, satisfy both the needs of the agency for information and the needs of business for timely agency action better than does the Brazilian law.

***7. What do you think about the intervention of the claimants in the investigation and judgment of mergers and anticompetitive practices?***

My observation has been that claimants and intervenors in Cade deliberations are able to present their cases completely, in an atmosphere of respect for their arguments and healthy give-and-take regarding facts, issues, and interpretations. (Of course, my sample may be biased; I cannot remember seeing intervenors other than Mr. Francheschini!) In the case where I have read post-hearing submissions by the parties and responses by commissioners, I have once again felt that the debate took place on a high level and that serious arguments were made and answered.

***8. What do you think about publications and meetings sponsored by CADE in respect of the need of dissemination of competition culture in Brazil? Do you have any suggestion in this area?***

Cade's own publications and its press relations seem to me very good. *Cade and Brazil are also fortunate to have an organization like IBRAC that facilitates the discussion of competition issues with the private bar and the business community. But the very success of IBRAC seems to me to be evidence of one weakness in the system: IBRAC helps those business people who are interested in competition law, but who helps those business people who are not (yet)?* Clearly it is important to the success of Cade and of economic reform in Brazil that entrepreneurs know the competition law, both because in all market economies most competition law "enforcement" takes place when businesses themselves decide to comply with the law (and this has to be especially the case in Brazil, where, as I suggest below, competition law enforcement resources are woefully inadequate), and because businesses need to know where to complain if they feel they are the victims of anticompetitive behavior. (Notwithstanding the fact that most complaints to the competition authorities are without merit, a great many important investigations and cases are the direct result of complaints.) Cade does not, to my knowledge, spend a great deal of energy reaching out to educate the business community, for example by supplying speakers to meetings of trade associations or other business groups. This kind of effort is considered a vital part of the educational mission of competition authorities in the US. (Again, the lack of enforcement resources in Brazil may be partly to blame. And of course there may be plenty of activity here of which I am unaware.)

9. *What is your opinion about the reform of CADE's internal rules and the new ethics code? Do you have specific comments about these two points?*

I don't think I know enough to comment on this.

**10. *What is your evaluation about the administrative structure of CADE?***

The structure of the enforcement agencies in Brazil seems to me by far the most important weakness in the system. The number of people working on enforcement is completely inadequate for an economy the size of Brazil's, and these relatively few people are then inefficiently divided among three different organizations. In my experience, Cade commissioners have far too few professional staff to conduct the investigations that they conduct – this may be one reason why investigations go on for so long – and these investigations to some degree duplicate those of SDE and SAE, whose staffs are also far too small to do the work that needs to be done. (I must emphasize here that I do not claim to fully understand the structure and respective competencies of these three agencies.) I know of very few competition laws and regimes in the world that divide responsibilities among agencies in this way, and in at least two of these – those in the UK and Romania – these divided structures are considered to be weaknesses and problems, hopefully to be addressed in the future. (I do not include here my own agency, the Antitrust Division of the US Department of Justice, since the division of employees here simply reflects the fact that the Division is a prosecutor that must take its cases to the courts. My own opinion is that most countries benefit when the competition judge of first resort is a specialized rather than a generalized authority, but in my experience US judges tend to be well enough informed as to competition laws and the workings of a market economy that our structure has not been a serious impediment to competition law enforcement.) I also know of no competition agency in the world that limits its commissioners to two-year terms. (FTC commissioners in the US serve terms of six or seven years.) Such short terms, coupled with the total service limit of two terms, seem to me both to force the commissioners to be excessively sensitive to political

forces (though I know of no specific evidence of this) and to deprive Cade of invaluable experience (who would argue that Gesner Oliveira and Lucia Helena Salgado would no longer be exemplary members of Cade after four years?).

**11. *What is your opinion about CADE's performance compared to the world best practices of competition policy?***

Cade has for the last couple of years – the only period of my observation -- been extremely fortunate in the quality of its commissioners. There is no competition authority in the world in which the best of Cade's commissioners could not serve, and serve well. My one overall criticism of the decisions of which I have some knowledge is that there seems to be an excessive willingness to approve mergers with extensive behavioral conditions, rather than to make the difficult decision of either approving (perhaps with certain discrete structural conditions) or disapproving. This is not unusual for a relatively new agency, and it may reflect the political constraints that such an agency faces in confronting a major multinational merger, but it cannot be said to constitute "best practice". Even if Cade is able to overcome this problem, however, I think that it cannot expect to reach its full potential, no matter how well its commissioners are chosen, under its current administrative structure and severe resource limitations.

The opinions expressed here are those of the author and do not purport to represent the opinions or positions of the US government or the US Department of Justice.

