**Panel: Institutional Problems of Brazilian Economic Development**

# Building Competition Policy Reputation: The Relationship Between Competition Authorities and the Judiciary

> "*Competition policy in this new institutional economics perspective can be seen as a game between lawmakers, administrators, law courts and private actors.*" Kirchner (2005: 310)

## *1) Introduction*

The present paper addresses the issue of building competition policy reputation in young jurisdictions. Many developing countries have enacted competition laws in the last decade, and have struggled with building their competition policy reputation in order to avoid anticompetitive practices. Besides scarce financial and human resources, the main reason for this concern has been the slow judicial revisions of administrative decisions and the fact that, not rarely, this decisions are overturned due to procedural or substantive issues.

Institutions count for economic development. This insight made a Nobel Prize winner and nowadays it is in mainstream of economist's toolbox. However, issues like how precisely institutions count and what are their transmission mechanisms for economic performance, passing through individual decision making process, still challenge academics and policy-makers.

The recognition of the relation between economic development and institutions has arrived to developing countries' governments and to international organizations such as the Organization for Economic Co-operation and Development - OECD and the International

Competition Network - ICN. The Brazilian Government, for example, has explicitly recognized the importance of institutions for a sustainable development strategy, adopting an agenda of microeconomic reforms, which is strongly based on the construction and consolidation of institutions. On the other hand, the OECD Competition Committee and ICN have devoted strong efforts to the challenging issue of showing how market-like mechanisms in general and competition policy in particular may contribute to development, poverty alleviation and less social inequality.

Market is an institution itself, a set of rules on exchange. These rules are built on property rights. Competition policy, as others public policies, imposes a set of constraints on property rights, influencing market performance. Merger controls and the condemnation of some commercial practices as illegal impose constraints on the freedom of businessmen to adopt competition strategies, and at the same time protect the competition process from exclusionary practices adopted by dominant firms.

Market power is one of the sources of market failure, when it does not result from competition on the merits. However, the regulator often surpasses their mandate, creating regulation failures. The classical independency of powers among the executive, legislative and judiciary can be useful in order to impose constraints on regulators. The “due process of law” is an instrument to protect citizens and firms from the abuse of regulators and the judicial revision of the bureaucratic decisions has been guaranteed in most jurisdictions.

However, corroborating the issue of “who regulates the regulator”, the judiciary can also void correct decisions or validate incorrect ones. Or even worse the judicial revision, when slow and costly may introduce wrong incentives. When administrative decisions are systematically

overturned or delayed by the judicial revisions, businessmen may feel free to adopt anticompetitive strategies.

This paper is organized in three sections, besides this introduction. Part 2 introduces the discussion of the relation between development and competition policy and how its implementation depends on an efficient judiciary system. Part 3 presents the results of a recent survey on the relation between the competition authorities and the judiciary, among young jurisdictions, showing that this is not a peculiarity of the Brazilian institutional environment. Part 4 discusses some Brazilian cases that have been sent to judicial revisions and that have been raising difficulties to the enforcement of competition law and its effectiveness. The last part presents some conclusions.

***2) Economic Development, Competition Policy and the Judiciary***

There is an increasing consensus that an effective competition policy and competition laws are essential to reach goals of economic development, economic efficiency and welfare of citizens in the medium and long run. However, i*t is often difficult to provide empirical evidence of the effect of incremental changes in the intensity of competition for aggregate economic performance. This is partly because product market competition is only one among many factors influencing key aggregate performance indicators, such as productivity and employment (OECD Economic Outlook nº 72).*

In the developing countries, the competition goals, instruments and benefits are not always understood by society. On the contrary, people, including judges, are accustomed to government intervention and price control, not competition. Although this scene is something

real, there is an increasing attention to the microeconomics foundations of economic policy in Brazil, something that can bring some insights to the enforcement of competition policy in the next few years.

Many scholars have stressed the necessity of building a favorable business environment in order to stimulate the investment and make enterprises keen to develop their capacities and, consequently, promote the economic development (Souza, 2004; Castro, 2005). Moreover, microeconomic foundations of the economic growth have been recognized by the Brazilian government, as shown by the document of the Ministry of Finance entitled "Microeconomics Reforms and Growth in the Long Run" (2004: 8):

> "*we must take advantages of the macroeconomic stabilization and the recovering of the production level in order to adopt activate policies that foster productivity, as well as the spread of new technologies, the institutional development of credit market, the infrastructure investment and incentive entrepreneurial skills, so we can guarantee solid fundaments to our economy and so it can start a long cycle of economic growth.*"

This Ministry of Finance's document established the government's microeconomic agenda organized in five main areas: a) improvement of the credit market and the financial system, b) improvement of the quality of taxation, c) economic measures to promote social inclusion, d) reduction of costs on conflict's resolution and e) improvement of the business environment. Within this last area, the restructuring and strengthening of the Brazilian Competition Policy System (BCPS) is one of the main pillars, along with the bureaucracy simplification and the incentive to innovation and diffusion of new technologies.

In this regard, BCPS has recently sent to Congress a Bill with amendments to the Competition Law by which BCPS´s structure is changed in order to enhance its independence, efficiency and efficacy[1]. Among other innovations, the Bill establishes the pre-merger notification instead of the current pos-merger notification. After the merger consummation, it becomes more and more difficult for the competition authority to impose any structural restriction or to block a merger that has a high probability to negatively impact competition. Therefore, the firms have strong incentives to postpone any relevant information needed for the sound analysis of the merger impact on market performance. Moreover, the firms have strong incentives to appeal to the judiciary against the competition authority decision, especially if it is slow. The pre-merger notification fundamentally alters these incentives, as the merger cannot be concluded before the decision of the competition authorities.

Nonetheless, good laws are not enough. As Kirchner (2005: 310) states:

> "*One characteristic feature of competition policy in practice is its focus on lawmaking and law enforcement. Enforcement of legal rules of competition law takes place in an interplay between the competition authority and law courts when the latter have to find whether a decision of the competition authority on how to apply competition law in a concrete case is correct in the legal sense.*

[1] According the Bill, the Secretariat of Economic Law of the Ministry of Justice (SDE) would become an investigative department of CADE, which would be kept as an independent tribunal. A General Director who would be appointed by the President and confirmed by the Senate would replace the current Secretariat of Economic Law. In order to avoid congressmen interference in the decisions, the mandate of the commissioners would be four years long, no reappointment allowed. The economic analysis would be a responsibility of the Department of Economic Studies, which would be led by a Chief Economist, somehow replacing the role played by the Secretariat for Economic Monitoring of Ministry of Finance (Seae). Once more, the analysis would gain independence, as the Chief Economist would have also a mandate.

The Brazilian Constitution, in its article 5, establishes that no injury or threat to rights can be excluded from the review of the Judiciary Branch. Thus, every single decision taken by CADE, or by any other administrative or governmental board, is subject to judicial revision.

The Brazilian Antitrust Law establishes that CADE is the only administrative body for judging prevention and repression of infractions against the economic order. Therefore, after a CADE's decision, no appeal on the merit is possible to the parties on administrative level and so the judiciary must carry out any further discussion related to the decision, according to the constitutional precept mentioned above. By June 2006, there were more than 700 lawsuits in the Judiciary in which CADE appeared as a party[2].

Independent and effective review of competition agencies' decisions by courts is a necessary, critical and common aspect of many competition regimes. The judiciary may change a competition authority's decision in two different ways: the first is related to the review by the judiciary power of the procedures during the antitrust analysis, and the second is related to the merits of the decision. Reviewing the merits, judge may limit his decision to nullify or confirm a CADE's decision, or he can change the decision, and determine – or discharge – obligations to the defendants not imposed by CADE (FARINA, 2006: 5-6).

Studying the regulatory governance in infrastructure industries in Brazil, CORREA et al (2006: 6) states that:

> "*Institutional design should include mechanisms for appeal of decisions that are neither excessively disruptive of the regulatory process (that is, when there are too many*

[2] If we consider that from 2000 to 2006, less than 150 decisions involved restrictions on mergers or some kind of condemnation, the number appears quite high. Also, from 2002 till 2004, CADE had collected no more than 3.7% of the fines imposed.

> *opportunities for appeal by non-specialized agents) nor weak and ineffective. An appeal through the executive branch – presidents, line ministries governors – represents interference in the regulator's autonomy and should be prohibited. Appeals should normally be made on grounds of procedure (not statutory or evidentiary grounds) and should involve only the agency and the relevant judicial institutions. The latter should have developed expertise in regulation and should use designated courts for dealing with regulatory matters.*"

The same thing happens regarding competition policy matters and although the above author suggests that the revision should be made on grounds of procedure, instead of evidentiary grounds, and that courts should be specialized in regulatory matters, this is only a wishful thinking, as no court will accept this kind of limitation.

The biggest problem is when the judiciary overturns the merit of the competition authorities' decision. When the Judiciary determines different obligations, or discharges obligations imposed, it plays the role of another competition authority, hurting the reputation of the Competition authority, and creating insecurity for firms! This problem raises more concerns due to the unfamiliarity of Brazilian judges with competition issues. There are not specialized chambers and judges, and the rule of reason is strange to the Brazilian civil law tradition.

Even when limited to the analysis of legal procedural issues, the judiciary has been used by parties to delay either the decision itself, either the fulfillment of the obligations imposed by the competition authority. Though the importance of the due process of law must be recognized, such delays have negatively affected the reputation and the enforcement effectiveness of the competition authority.

Two problems may emerge from the analysis of the relation between the Judiciary and competition authorities: one concerns what judges have to learn about competition issues and the economic analysis of the law and the other concerns what competition agencies have to learn from judges.

The first is directly related to advocacy and involves the development of some kind of discussion-platform with judges in order to make competition defense concepts and instruments, as well as competition policy goals, more familiar to them. The second type of problem is related to what competition agencies can learn from judges to develop their mechanisms in a way that evidences and analysis used in the administrative competition process can be equally used as proof of anticompetitive damages by the Judiciary (i.e. individualization of the condemnation, measurement of evidence, witness testimony procedures, types of evidences to be collected on dawn raids procedures, penalties assessment, and so on).

Most certainly, after CADE's decision of restricting or blocking a merger or acquisition, the parties appeal to the Judiciary. Due to the number of appeal possibilities allowed in the Brazilian legal system, the lawsuits can take years before they are ended[3]. Therefore, the decision is not enforced and the Competition Law turns out to be ineffective.

On the other hand, it is worth emphasizing that the Judiciary action on CADE's lawsuits has contributed to improve the fulfillment of the due legal process. The Brazilian Public Administration is ruled, in a large extent, by informality and celerity principles, which sometimes lead authorities to be less strict with procedural aspects.

[3] It is worth mentioning the important judiciary reform occurred in late 2004. Among other measures that accelerate the processes is the reduction in the number of possible appeals. Some other measures have been taken by the Supreme and the Superior Courts (Constitutional and non-constitutional matters, respectively) to reduce the hypothesis in which the appeals are possible.

There is also a need for the BCPS to be closer to the Judiciary. Dawn-raids and wire-tapping[4], in addition to other investigative instruments, are only possible with the Judiciary authorization. The Flintstone Cartel, condemned in August 2005, brought a recent example of this integrated action. The most important proof of the cartel was obtained through a dawn-raid in the Flintstone Union headquarter. The Federal Police and Public Prosecutors also participated on the investigative process[5].

The Public Prosecutors have also been important players regarding the enforcement of the BCPS decisions, as they are responsible for criminal denounces.

The depicted scene is not a peculiarity of the Brazilian Competition Policy environment. Many other jurisdictions have faced the same difficulty to confirm their decisions in the judiciary and to build a reputation of effectiveness, as discussed below.

### *3) The Relationship between Competition Authorities and the Judiciary in Other Jurisdictions*

A recent exploratory survey conducted by the International Competition Network (ICN), within the Competition Policy Implementation work group (CPI's Sub-Group 3), focused on the relationship between the Competition Authorities and the Judiciary[6]. The main hypothesis that oriented the elaboration of questions was that: 1) most decisions taken by the competition

[4] As per the Brazilian legal system, wiretapping is allowed only in criminal investigations. According to Law 8137/90, a cartel is also considered a criminal offense, which, therefore, allows competition authorities to be benefited from the evidences collected by such procedure.

[5] This and other cases are discussed in more detail on part 4.

[6] The survey was leaded by CADE, receiving a strong support from the Chilean Competition Tribunal (*Tribunal de Defensa de la Libre Competencia*) as the co-chair of the sub-group.

authority are overturned by the judiciary[7]; 2) the revisions are mostly concentrated on procedural issues; 3) judges are not familiar with competition issues and the rule of reason, therefore younger and civil law jurisdictions are the most affected;

The survey used a questionnaire designed for respondents from developing and transition countries, though some developed countries answered it as well. The questionnaire was divided into four sets of questions: 1) the first section was designed to understand the structure of the competition authority's decision in each country in the sample; 2) the second analyzed possible interventions by the judiciary before the authority's final decision; 3) the third was focused on the role of the judiciary after the competition authority has taken its final decision and 4) the last section surveys the measures adopted by the competition authority in order to resolve the difficulties they have faced in respect to the judiciary.

It is important to mention that this survey "*did not seek to address the merits or correctness of judicial decisions. Rather, the objective was to examine competition authorities' perceptions about instances where courts and competition authorities come to different conclusions*" (ICN, 2006: 3) and the answers therefore are subjective. Also, it is important to emphasize that some countries have limited experience with judicial revision due to the fact that only a few of mentioned revisions had come to an end.

The questionnaire was answered by 18 agencies from 17 countries[8], representing almost 20% of ICN members[9].

[7] The European Union has recently decided to go through a deep reform of the procedures and analysis on mergers and illegal conduct due to the high number of decisions overturned by the judiciary, based on the reason of insufficient proof or poor economic reasoning.

In terms of structure of decisions in competition matters, this sample reflects the main different institutional models that exist around the world, which are 1) administrative decisions with the investigation body separated from the decision body; 2) administrative decisions with the investigation body within the decision body; and 3) decisions already taken by the judiciary. "*Among the respondents, 11% were specialized tribunals within the judiciary, 11% were administrative decision-making bodies, 22% were administrative investigation bodies and 56% were agencies that unify investigation and decision-making under one single body. All but one of the respondents had jurisdiction over mergers as well as anticompetitive conduct.*" (ICN, 2006: 3)

Results on section 1 of the questionnaire show that for 47% of the respondents the competition authority's decision is suspended pending of an appeal to the judiciary, what suggests that appealing to the judiciary do not stop the enforcement of competition authority's decision for an important percentage of the jurisdictions in the sample.

This section also explored the possibility that the judiciary can substitute the competition authority's decision for its own decision when reviewing a case. The answers to this question demonstrate that in 76,5% of the jurisdictions this is a real possibility, meaning that the judiciary can take another decision without referring it back to the agency.

This result strengthens the necessity to have a judiciary that fully understands the whole idea behind the instruments and techniques supporting an analysis of a competition case. In the more important cases, which are the ones that parties appeal more frequently, this analysis

[8] From Chile, we have received answers from the investigative body (*Fiscalia*) and from the judicial tribunal (*Tribunal de Defensa de la Competencia*).
[9] What also means almos 20% of countries that have antitrust laws.

involves a lot of complex questions that sometimes take years to be answered. Thus, if the judiciary is able to substitute a competition authority's decision, then it will better if judges are aware of what is at stake and what are the techniques and trade offs that must be faced in order to give a better answer.

Regarding the perception about the increasing of the judiciary's role on competition matters in each country, 53% of the respondents answered that appeals to the judiciary have been increasing. Among these, 78% were from developing countries. This numbers were seen as a "*sign of institutional development in these countries, showing that increased enforcement efforts are leading to more appeals to the judiciary. However any such conclusion may need further testing.*" (ICN, 2006: 5)

Section 2 of the questionnaire was focused on issues related to judicial measures taken during the investigation and/or the authority's decision process. Interesting to note that this kind of judicial intervention does not apply to 55.6% of the respondents.

The most important results of this section were: 1) the judiciary rarely intervenes during the investigation process carried out by the competition authority (for 66.5% of the respondents) and, when it does, the intervention is related to procedural issues and regards conduct cases; 2) for the ones who quoted some reasons for the intervention, the respondent's feeling seems to be that it happens because there is an imbalance between the competition authority and the appealing parties before the judiciary (this can be seen on Table 1 below); and 3) the main concern regarding such interventions is the delay in competition proceedings and the automatic suspension of the process.

**Table 1**
**Reasons Why Injunctions are Granted**

| | |
|---|---|
| **Judges are not sufficently familiar with the economic concepts need to assess competition cases** | **2** |
| **There are difficulties that hindering competition agencies to explain their views to the judiciary** | **2** |
| **The judiciary considers that the competition authority abuses its investigative powers** | **1** |
| **Competition authorities have less resources at their disposal to defend their case** | **3** |
| **Other reasons, such as:**<br>**Judges required to make hasty decisions on complex facts** | **2** |

Source: ICN Report

Regarding the alleged imbalance between competition authority and the appealing parties, ICN report states that:

> "*Although the study did not specifically qualify this issue, lack of resources was noted to be a problem for the authorities. This imbalance could be concluded from the 50% of the answers indicating that "there are difficulties that hinder competition agencies to explain their views to the judiciary" and that "Competition authorities have fewer resources at their disposal to defend their case." This majority of responses cited reasons that are perceived shortcomings by the competition authorities, and not of the judiciary.*" (ICN, 2006: 6)

According to the survey, the main concern regarding judiciary is related to interventions by the judiciary after the competition authority has taken a decision, which is the issue focused on Section 3 of the questionnaire. Overturned decisions are mostly granted in infraction/conduct cases and in the discussion of the amount of fines, as opposed to merger cases. This result

appears to be independent of the legal systems adopted in each country (civil or common law systems).

According to Table 2 below, extracted from the ICN Report, "*T[t]he most quoted answer in the survey is that there are divergences in the way competition authorities and the judiciary interpret competition rules. Nine of 18 interviewees (50%) responded this way. Of this group, 56% out of the nine are from developing countries.*" (ICN, 2006: 8)

**Table 2**
**Main Reasons Why Your Decisions Have Been Overturned**

| | |
|---|---|
| **Judges are not sufficently familiar with the economic concepts need to asess competition cases** | **8** |
| **There are difficulties that hindering competition agencies to explain their views to the judiciary** | **3** |
| **The standard of proof adopted on competition cases is considered not appropriate** | **6** |
| **There are problems related to the calculation of fines** | **6** |
| **There are divergences in the way competition authority and the judiciary interpret the competition rules** | **9** |
| **The judiciary considers that the competition authority abuses its investigative powers** | **1** |
| **The judiciary considers that competition authority is not competent to assess a particular conduct or merger case** | **0** |
| **The standard of review applied by the judges is very compreensive** | **4** |
| **There are problems on procedural issues (*)** | **5** |
| **Other (**)** | **2** |
| **NA (Never happened)** | **3** |

**(*)** Definition of interested party; Merger - (i) deadline expiration, condition of interested parties and (iii) legal value of the proceedings before the competion agency; Conduct - (i) concerning deadlines; interruption of deadlines and (iii) confidential

(**) Different interpretation of the law; appeal courts are very conservative; annullment because Board Members involvement in the investigation.

Source: ICN Report

The second most quoted answer was a perceived lack of familiarity of judges with the concepts of competition law. Also, there is a couple of other relevant issues mentioned by respondents, including procedural shortcomings, or issues regarding the standard of proof applied to competition cases.

Section 3 of the questionnaire was split into three sub-sections, each one dedicated to a different kind of competition issue, which are: a) merger cases; b) conduct/infraction cases; and c) monetary sanctions.

In merger cases, the results show that the decision taken by competition authority is implemented always or almost always, by 77.8% of the respondents. The results also indicate that this kind of cases are appealed more often on grounds of the merit of the decision and that the judiciary generally seems to be in accordance with the competition authority's decision[10].

Regarding conduct/infraction cases, the percentage of decision's enforcement is lower. For only 56.6% of the interviewees the competition authority's decision is implemented always or almost always. The results also indicate that this kind of cases is filed more often on grounds of the merit of the decision and that the judiciary upholds the competition authority's decision less frequently. The overturning of competition authority's decision is based on both procedural and substantive (merit) issues.

[10] Regarding this question, however, it is important to mention that only 8 respondents answered it. Nine respondents said it was not applicable and 1 of them did not answer it. Reasons for quote not applicable were: "*(i) the respondent does not have merger control; (ii) responses are from tribunals which are already part of the judiciary, (iii) the competition authority has never had an appeal on a merger case; and (iv) the interviewee is from an investigation body that does not take decisions.*" (ICN, 2006: 10)

At last, regarding the enforcement of monetary sanctions, for 57.1% of the respondents fines are collected always or almost always and when they are not collected it is due to a judicial appealing in most of the cases (78.6% of the respondents).

After judiciary review the fines are upheld always for 14% of the interviewees, almost always for 37% of the interviewees, and half of the time for 14% of the interviewees.

Section 4 of the questionnaire was an open room for respondents to mention what they have been doing to improve its relationship with the judiciary. The first question asked agencies to mention if they have contacted the judiciary for matters other than on specific cases and the second question was interested on identification of concrete measures taken by the authorities. Table 3 and Table 4 below depict the results of this Section.

**Table 3**
**Shortcomings on the Relationship with the Judiciary**

| | |
|---|---|
| **Lack of specialized knowledge on competition issues by Judiciary** | **11** |
| **Investigation body needs more specialized staff and/or resources** | **3** |
| **Lack of faculties to investigation body (leniency programms, for example)** | **1** |
| **The long average duration of reviews** | **3** |
| **Lack of authority to impose fines** | **1** |
| **Lack of oportunity to talk to judges on general matters and not only on a case basis** | **3** |
| **Different views on law interpretation** | **2** |
| **Need for amendments to the law** | **3** |
| **Not answered** | **1** |

Source: ICN Report

**Table 4**
**Measures Taken by Competition Authorities**

| | |
|---|---|
| **Joint Seminars and Workshops** | **9** |
| **Sending Materials to Judges** | **1** |
| **Formal meetings to discuss the case challenged** | **1** |
| **The judicial tribunal has economist** | **1** |
| **Improve staff/resources the investigation level** | **1** |
| **Amendments to the law (*)** | **1** |

(*) Amendments proposed in order to (i) facilitate review of cases at the Supreme Court;
(ii) facilitate and clarify the standard of proof to be used.
Source: ICN Report

As expected, the main shortcoming quoted by the respondents was the lack of specialized knowledge on competition issues by the judiciary. The main measure taken by competition authorities to deal with it is the organization of joint seminaries and workshops in order to come closer to the judges.

Kirchner (2005: 307) proposes that competition policy must be understood as "*the application and enforcement of competition law by competition authorities and law courts.*"

The ICN report has found the same conclusion and states that:

> "*Since the judiciary plays a role in competition matters in all jurisdictions, having a judiciary that understands competition policy's concepts, goals and instruments is of great importance. What is identified by the results of the report is the urgency to bring judges closer to the technical analysis made by competition authorities, especially in developing countries.*" (2006: 16)

In other words, the survey stressed the importance of the judiciary's role to the results that competition policy can reach, concluding that at the end of the day the judiciary shapes competition policy results irrespective of the legal tradition and development level.

Another interesting conclusion of the ICN report was

> "*… that decisions challenged in court increase in proportion to the level of maturity of a competition authority. For that reason, a natural conclusion is that it is important that competition authorities and courts in developing countries understand each other better to improve the effectiveness of competition policy as a whole.*" (ICN, 2006:16)

Also, on the Fifth Annual ICN Conference at Cape Town, South Africa, there was a breakout session discussing the Report's results. In this occasion some members raised other issues regarding more structural measures that can be taken to improve the whole system of competition. Some of the ideas concern the discussion between specialized tribunals vs. generalist tribunals and the adoption of "specialized teams" inside the generalist tribunals.

### *4) Exemplifying Competition Issues Regarding the Judiciary – Some Brazilian Cases*

Graph 1 and Table 5 below, offer a good picture of the recent evolution of the Brazilian Competition System activities. The number of decisions has grown fast, but most of them are related to merger reviews. Since 2004, mergers reviewed were approved with some restrictions in about 10% to 15% of cases, but only one was blocked since 1994. The condemnation of conducts is about 50% of the cases. The growth in judiciary revisions is much higher (7 times in 7 years) requiring an increasing effort of CADE to maintain the decisions.

**Graph 1**

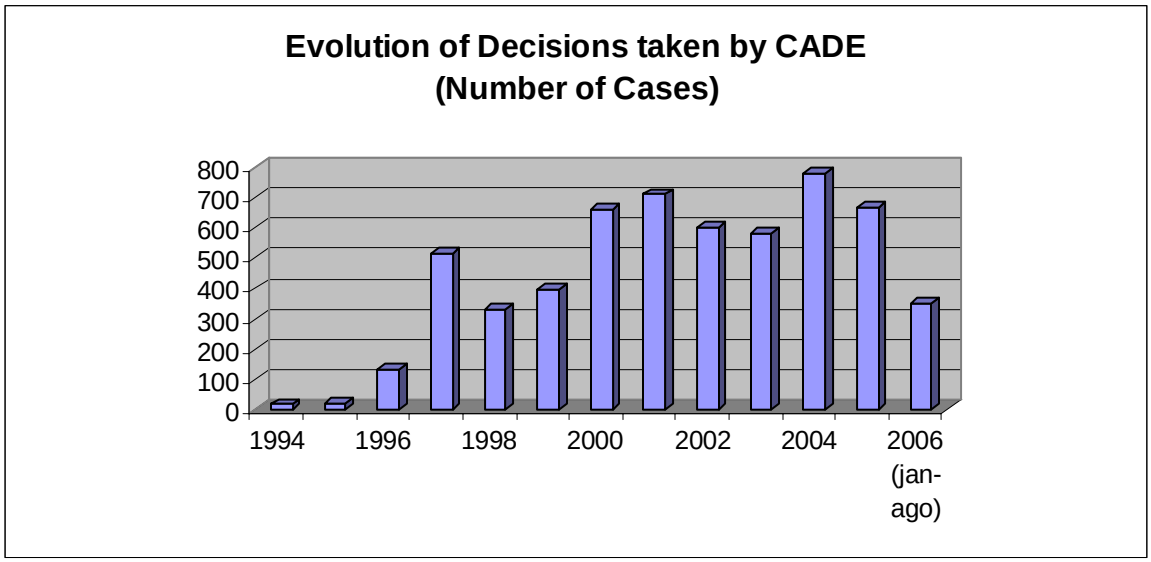
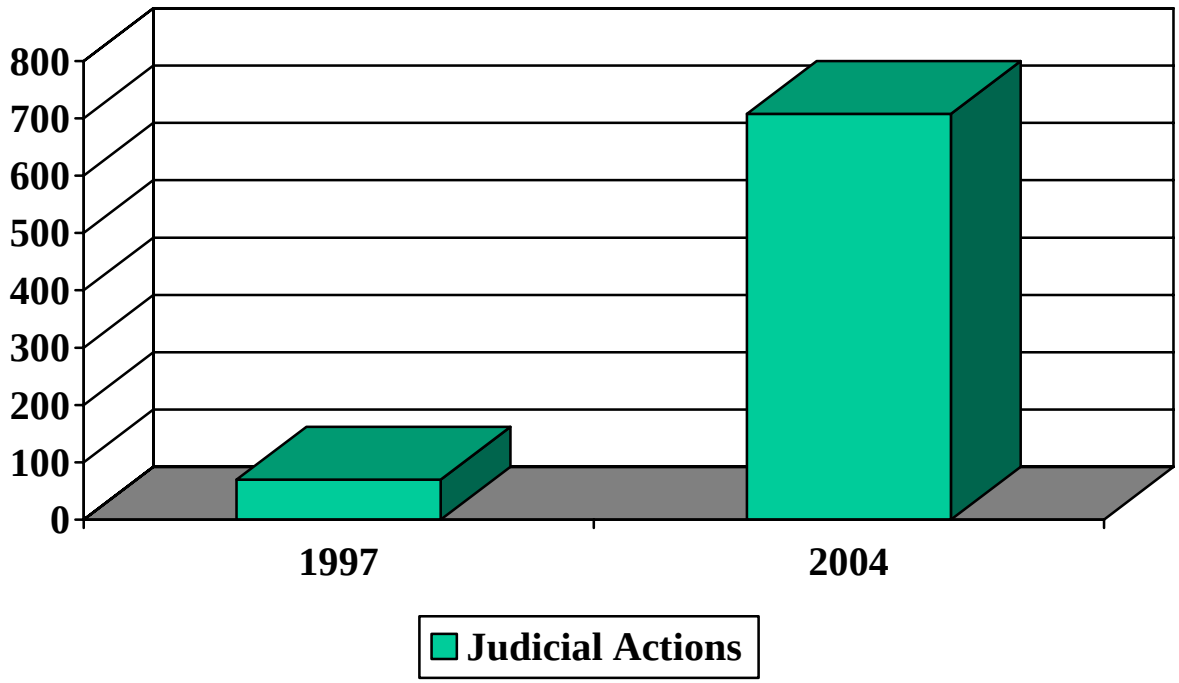



**Table 5**
**Conduct Cases Condemned and Mergers Cases Approved with Restrictions**

| Year | Mergers | Mergers with Restrictions | Conducts | Condemned | Total |
|---|---|---|---|---|---|
| 2000 | 523 | 17 | 34 | 13 | 574 |
| 2001 | 584 | 12 | 33 | 17 | 629 |
| 2002 | 518 | 11 | 32 | 12 | 561 |
| 2003 | 526 | 7 | 23 | 11 | 556 |
| 2004 | 651 | 43 | 43 | 21 | 737 |
| 2005 | 497 | 37 | 63 | 25 | 597 |
| 2006 (jan-jul) | 276 | 13 | 20 | 4 | 309 |

Source: CADE

**Graph 4**
**From CADE to the Judicial Tribunals**




One of the major issues regarding the judiciary's review is related to condemnation of conduct cases and consequently the payment of fines, depicted in Table 6 below. This is also an issue that the ICN report has state as the most common problem around the analyzed jurisdictions, reflecting that the institutional design of competition policy and the reputation building of competition authorities remains an issue no matter what jurisdiction we are focusing on.

**Table 6**
**Collecting of Fines in Conduct Cases (US$)**

US$

| Year | Fines Imposed | Fines Collected | % |
|---|---|---|---|
| 2002 | 955.326,22 | 4.356,97 | 0,46% |
| 2003 | 2.702.239,86 | 201.854,06 | 7,47% |
| 2004 | 1.914.054,18 | - | 0,00% |

Source: CADE

Till very recently, the judiciary did not asked parties to deposit a collateral security to grant an injunction. Therefore, parties were given incentives to go on with the discussion in the judiciary for a long time and postpone the fine's payment. But much more serious and deleterious to the effectiveness of CADE's decision is that most of the important decisions are pending in the judiciary, for years. For instance:

1) Vale do Rio Doce – the currently largest iron company in the world, had 7 mergers in iron and logistic activities approved with restrictions in 2005, but is still pending in the judiciary.
2) Nestlè – submitted an acquisition in chocolate market that was blocked by CADE in 2004, but is still pending in the judiciary. Meanwhile Nestlè go on running the acquired company.
3) Santos Port Terminal Operators – port terminals operators were condemned for raising rivals costs in order to discipline competition pressure, in the beginning of 2005, but the case is still pending in the judiciary
4) Flinstone hard core cartel case – condemned in 2005, only one company paid the fine (the largest ever collected by the BCPS - US$ 1,2 million, after an administrative revision of the amount imposed).
5) The flat-rolled steel cartel, was condemned in 1999 and it is still pending in the Judiciary until this moment. This case had 24 incidents in the Judiciary and the condemned companies have not paid a penny so far.
6) The cartel of the iron-bars producers took 6 years pending in the judiciary before could be decided at CADE. The decision is still pending in the judiciary

***5) Conclusions***

Reputation is the result of a repeated game. Then, in the case of competition authority's reputation, the recognition of a correct decision depends on two things: (i) the quality of past decisions taken by the administrative authority and (ii) the judiciary's capacity to evaluate the decisions taken by this authority.

In this sense, the dialogue between the administrative authority and the judiciary is crucial to have well-known criterions in each instance of the competition policy's system.

Brazil has a very young competition system effectively in operation. The first competition cases have just been taken to the judiciary and it remains to be seen what will happen. A strong effort must be made (and is being made) to properly present the cases to judges in order to maintain CADE's decisions. A strong competition advocacy is needed and BCPS (CADE, SDE and Seae) has invested efforts on this matter.

Historically, in Brazil, experience demonstrates that the judiciary looks suspiciously towards CADE's decisions, which gives more incentive to the parties appeal to the judiciary alleging any kind of issue. However, recently we have noticed a trend of reversal in this scene. CADE's decision have been maintained and judges started to require the payment of collateral security to grant the case's discussion, what is a demonstration of judges' good will regarding CADE's decision.

Something that can bring some improvement to the system as a whole is the development of a self-evaluation process in order to make, not only CADE, but also the judiciary, able to correct any kind of problems identified.

Another issue that must have some attention paid by the system is the almost unlimited possibility of appeals to the judiciary, something that have brought some kind of non-effectiveness to the most important decisions taken by CADE.

Most of all, this is not a peculiarity of the Brazilian institutional environment, but is a common problem shared by young and not so young competition agencies (such as the EU), and also is not a problem limited to civil law countries tradition. Therefore, there is much to be learned and to be achieved regarding effectiveness of competition authority decision and better results in market performance.

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