The Brazilian Experience on International Cooperation in Cartel Investigation[1]

Mariana Tavares de Araujo[2]

Novembro / 2002

[1] The views expressed in this paper are personal and should not be attributed to the Brazilian Ministry of Finance.

[2] General-Coordinator for Anti-Cartel Enforcement at the *Secretariat for Economic Monitoring (SEAE).* LL.M. 2001, *Georgetown University Law Center*. The views expressed in this paper are personal and should not be attributed to *SEAE*. Email: mariana.araujo@fazenda.gov.br. Esplanada dos Ministérios, Bloco P, sala 220, Edifício Sede, 70048-900. Brasilia-DF. Tel: (61) 412.2293. Fax: (61) 412.1764.

RESUMO

A investigação sobre cartel está se tornando, de modo crescente, uma atividade internacional e, por essa razão, as efetivas cooperações entre as agências antitruste no mundo inteiro se tornam cada vez mais cruciais. Geralmente, as empresas envolvidas em formação de cartel tem subsidiárias em mais de um país e os efeitos de tal atividade, de acordo com as evidências, são frequentemente dissipados nos vários países.

O objetivo deste trabalho é relatar casos em que o Sistema Brasileiro da Defesa da Concorrência contou com significativa colaboração de autoridades antitruste internacionais, especificamente, norte-americanas e canadenses, em três importantes investigações nos últimos cinco anos. Os casos descritos ilustram diferentes formas de cooperação prestadas de acordo com as particularidades de cada situação e o nível de parceria já estabelecido entre o Brasil e o outro país disposto a ajudar.

ABSTRACT

Cartel investigation is increasingly becoming an international activity and, therefore, effective cooperation among antitrust agencies around the world become more crucial. Firms engaging in collusion are frequently established in more than one country and the effects of such activity, as well as the evidence related to it, are often dispersed among different countries of the world.

The purpose of the present study is to show how the Brazilian System for Competition Defense has received significant help from international (the North American and Canadian) antitrust agencies in three important investigations during the last five years. The cases described illustrate different forms of aid offered according to the particular circumstances of each case, as well as to the level of cooperation already institutionalized between Brazil and the country offering help.

1. DIFFICULTIES IN COOPERATION AMONG COMPETITION AGENCIES

Cartel investigation is increasingly becoming an international activity and, therefore, effective cooperation among antitrust agencies around the world become more crucial. Firms engaging in collusion are frequently established in more than one country and the effects of such activity, as well as the evidence related to it, are often dispersed among different countries of the world.

Studies within the OECD indicate that international cooperation among antitrust agencies around the world is becoming more frequent—though it still remains far from its optimal level. There are important issues that hinder this process such as the strict control national laws impose over the exchange of confidential information, as well as the fact that few jurisdictions combine a strong reputation for enforcing cartels with an effective leniency program. Such programs significantly increase the chances of a successful prosecution where it exists and participants take advantage of it. However, they hinder information exchange between countries where the firms involved choose not to cooperate, either because they are not aware that a similar program is available, or simply because the other jurisdiction prosecuting the cartel lacks the enforcement record that creates the incentive for the firms to come forward and cooperate.

Since information obtained through a leniency process in strictly confidential and it is unlikely that firms being investigated for cartel practice will waive their confidentiality rights and voluntarily submit themselves to different antitrust authorities simultaneously, most of the information exchange that has taken place so far has regarded non-commercially sensitive information. This category encompasses trial records, case theories and general information regarding witnesses and evidence analysis; although of limited scope, it has been a significant aid to Brazilian investigators in international cartel cases.

This alternative to formal cooperation (e.g. allowing competition officials to share their views and exchange data) has proved fruitful in many different ways such as allowing competition officials to help investigations in other jurisdictions. This informal exchange, however, presupposes an existing relationship between the agencies based on trust and a minimum knowledge of the other party's system. Therefore, this alternative cooperation strategy has predominated among countries where there are already bilateral agreements in place.

2. THE BRAZILIAN EXPERIENCE ON INTERNATIONAL COOPERATION

In the past five years, the Brazilian System for Competition Defense has received significant help from the North American and Canadian antitrust agencies in three important investigations. The cases described below illustrate different forms of aid offered according to the particular circumstances of each case, as well as to the level of cooperation already institutionalized between Brazil and the country offering help.

The United States is the only country with which Brazil has entered into a formal cooperation agreement[3], and is also where most of the assistance has been derived from in the past years. In three investigations with international ramifications, the Antitrust Division of the US Department of Justice has worked together with SEAE and SDE in different ways (e.g. from the most wide-ranging cooperation as in the Lysine investigation to the specific personnel training in the Toilet Paper case). Nonetheless, for the Vitamins Cartel investigation performed in Brazil, most of the information received from abroad was provided by Canada, regardless of the fact that the two countries do not have yet a cooperation agreement in place.

The Lysine Cartel Investigation

From 1992 until 1995 the major producers of lysine in the world formed a cartel to fix prices and quantities to be sold, as well as to stipulate each firm's market-shares in the different continents around the globe. Archer Daniels Midland Co. (ADM) in the United States; Ajinomoto Co. Inc. and Kyowa Hakko Kogyo Co. Ltd. in Japan; Miwon Food Co. Ltd, Sewon America Inc. and Cheil Jedang Ltd. in Korea; and Eurolysine S.A. in France, divided the world into four regions for their purposes: North America; Latin America; Europe and Africa; and Asia and Oceania .

The top executives of these firms gathered to exchange information on prices and to establish sale targets to be met by each of them. To justify the meetings, the participants elaborated imaginary agendas involving the creation of an "International Association of Aminoacids Producers," that would enable the firms to fulfill the objectives of the cartel (i.e. to stifle competition and increase profits).

In the United States, these firms were prosecuted and found guilty of price fixing and market allocation around the world. The trial resulted in the conviction of five companies, and the imposition of historically high fines: ADM was fined U$70 million (plus an additional U$30 million for participating on a separate conspiracy in the citric acid market); Ajinomoto and Kyowa were fined U$10 million each; Cheil Jedang U$1.25 million; and Sewon America U$328,000. In addition, in September 1998, a Chicago Jury sentenced the former Vice-Chairman of ADM and two other high executives of the company to lengthy prison terms and imposed fines on them personally for their roles in the conspiracy.

The investigation in Europe found ADM, Ajinomoto, Cheil Jedang, Kyowa and Sewon guilty of fixing prices of lysine in the world market and in Europe as well, and of establishing sales quotas and sharing information about these quotas at least between July of 1990 and June of 1995. Ajinomoto and Sewon collaborated with the investigation and therefore received a 30% reduction in the fine imposed. ADM's fine was also reduced by 10% since, despite not having collaborated with the investigation, it did not contest the allegations presented by the Commission for the decision of the case. The fines imposed ranged from 47,3 million Euros, for ADM to 8.9 million Euros, for Sewon.

In Brazil, the preliminary investigation was initiated only in 1999, after the Secretary and the Deputy-Secretary for Economic Monitoring returned from the International Cartels Workshop in Washington, DC (USA) where they became aware of the details of the

[3] *"Agreement Between the Government of the Federal Republic of Brazil and the Government of the United States of America Regarding the Cooperation Between Competition Authorities in the Enforcement of Competition Laws"*. The Brazilian and the U.S. government signed the agreement on October 26, 1999 and on June 27, 2002, it was declared in full force and effect, through the enactement of the Decree 154.

investigation being pursued by the US Department of Justice (USDOJ). Since in this case the parties had already gone to trial, all the information regarding the prosecution and resulting conviction was public. Nonetheless, the forum for discussion offered by the workshop provided a beneficial environment for the exchange of theories and leads in the case. Subsequently, the USDOJ furnished SEAE with the trial records and all the relevant data, based on which SEAE issued a technical note to SDE recommending that formal charges be brought against these firms. SDE then opened an Administrative Process to enable SEAE and SDE to proceed with the analysis.

The activities of the Lysine cartel in Brazil were carried out by the Brazilian subsidiaries of the parent companies (i.e. ADM Export and Import S.A. and Ajinomoto Interamerican Industry and Commerce; and through Sumitomo Corporation of Japan—which had a distribution contract with the Mexican firm Fermex, the subsidiary of Kyowa Hakko Kogyo in Mexico).

The Brazilian investigative agencies worked closely together with the USDOJ and most of the investigation centered around the documents and leads provided by the USDOJ. In addition to documents related to the conviction of the firms in the US, SEAE also analyzed the importation data of lysine in 1995, as well as information provided by the firms on the volume of their sales and the respective prices charged in Brazil. Based on this collective evidence, SEAE concluded that the agreements to fix prices and allocate the world market for lysine was harmful to the domestic market, mainly because the firms had already been convicted in the US and in Europe for engaging in the same collusive regime by which they exported their product into Brazil.

The Lysine investigation is at a final stage in Brazil. The final report is being prepared by SEAE to be sent to SDE, where the instruction of the case will be complemented and submitted to CADE for a decision.

The Vitamin Cartel Investigation

The vitamin cartel investigation involved a number of pharmaceutical firms that from 1990 until 1999 agreed to fix prices and quantities and to allocate market shares through the imposition of sales quotas for various vitamins around the world. The firms' executives met several times during this period to discuss and implement their collusive scheme and agreed upon mechanisms to monitor and guarantee the fulfillment of the agreements.

On May 20th, 1999, the USDOJ found the firms guilty of collusion in the markets for vitamins A, B2, B5, C, E, Beta Carotene and pre-mixture of vitamins and fined F. Hoffman-La Roche U$500 million and BASF U$225 million. Another firm that also participated in the agreement, Rhone-Poulenc, benefited from the Leniency Program of the USDOJ and escaped trial, due to its intense collaboration with the USDOJ. In addition to the fines imposed on the firms, the US jury also imposed prison sentences on the top executives of BASF and F. Hoffman-La Roche.

This decision prompted the European Commission to initiate an investigation of 13 pharmaceutical firms (both European and non-European) charged them with price fixing and allocating the markets for vitamins A, E, B1, B2, B5, B6, C, D3, H, M, Beta Carotene and Carotinoids. The charges were based on several agreements, with different numbers of

participants, over different periods of time. The only firm that actually participated in all the various markets agreements was F. Hoffman-La Roche.

The European Commission imposed fines that varied from 462 million Euros for Roche, to 5. 04 million Euros for Aventis, which were calculated according to the seriousness of the crime; its duration; and the cooperation offered by the company during the investigation. The firms that colluded in the markets for vitamins B1, B6, H and M, however, could not be punished. This was because the investigation was initiated by the Commission more than five years after the termination of the cartels in those markets and the statute of limitations had expired.

In May 2000, after approximately one year of preliminary investigations, SEAE and SDE brought formal charges against Roche, BASF, Aventis and eleven executives of the firms for their participation in the international vitamins cartel. During the Administrative Procedure, SEAE and SDE jointly interrogated the people in decision-making positions in the firms and performed raids on the Brazilian headquarters of BASF and Roche. The evidence gathered during this preliminary investigation indicated that the firms coordinated efforts to prevent prices of vitamins A, E and Beta Carotene from falling within Brazil. SEAE and SDE uncovered that the managerial team of the firms responsible for the fixing of the vitamin market in Latin America met in Sao Paulo two to four times a year to exchange information about prices and quantities sold of these products. These meetings had the purpose of monitoring the international cartel's activities within the Latin American and Brazilian markets, so that the sales and prices were kept in accordance with the international agreement among these firms.

In this particular investigation, the leniency programs that enabled the successful investigations in the US and in Europe prevented the SBDC from having access to most of the sensitive information gathered by the DOJ and the European Commission. This is a typical situation where the benefits of a strong leniency program in one country can get in the way of the prosecution of the same cartel in another jurisdiction. During the American and the European investigations, the firms struck deals with the agencies where all the information volunteered would remain confidential; thus, the information could not be shared with other enforcement agencies.

Nonetheless, Canada informally cooperated with Brazil in this case, offering leads on what exactly to investigate. This was an unusual exchange, based mostly on the professional relationships already developed between the staffs of the two agencies, since Canada and Brazil do not yet have a cooperation agreement on this subject.

After the Administrative Process was initiated, SEAE continued the evaluation of the effects of the cartel in the Brazilian market, compiling additional information such as the volume of vitamins A, E and Beta Carotene exported to Brazil during the years of the cartel. Currently SEAE is preparing a final report on its investigation, having already concluded that the agreement had an adverse effect on the Brazilian market due to substantive imports. The instruction of the case then should be complemented by SDE, from where it will then be sent to CADE for a decision.

The vitamin cartel investigation resulted in the collection of evidence on the activities of these firms not only within Brazil but throughout Latin America. The Brazilian investigative agencies are, therefore, ready to collaborate with the antitrust agencies of Mexico, Central and

South America, sharing all the information available on the meetings held in Sao Paulo and on the agreements regarding sales and prices agreed upon by the cartel for this region.

The Toilet Paper Cartel Investigation

In July 2001, SEAE and the Sao Paulo unit of the Brazilian Consumer Protection Agency (Procon-SP) initiated a joint investigation of the three major Brazilian toilet paper producers; Klabin, Santher and Melhoramentos, after they concomitantly reduced the size of the non-popular toilet paper. Within less than one month, between June and July of 2001, the three firms changed the measure of the rolls, from its traditional 40 m length to 30 m, without informing consumers or correspondingly reducing the price.

The firms presented similar reasons for the new length, including the better quality of the sheets; their need to cut energy spending by 25% due to the energy crisis; and due to the increase of production costs after the 1999 devaluation of the Real—which caused the price of cellulose to go up. However, despite these ostensibly legitimate justifications, SEAE uncovered during the preliminary investigation that the simultaneous reduction could not have happened without previous coordination among the firms.

In this investigation, SEAE analyzed the orders to the packaging firm as well as the invoices to their major clients (i.e. the largest supermarkets in Sao Paulo). The examination indicated that although the toilet paper producers had ordered the new packages and offered the new product to the supermarkets on different days, all three did it before the first firm had its 30m roll on supermarket shelves. This evidence showed that before the change in the size of the rolls was made public, or the first firm had had the opportunity to check whether the reduction was approved by consumers, the other two firms had already switched to the new length, regardless of the fact that the demand for the 40m length roll continued to exist.

The toilet paper industry in Brazil is relatively concentrated and the top three firms dominate a little over 50% of the market, therefore, any conflict of interest among them can be easily overcome. In addition, there are no significant imports to counteract any agreement to raise prices above the competitive level and non-popular toilet paper is also a relatively homogeneous product. Moreover, SEAE observed that this parallel movement occurred in a variable that is not as easy to coordinate as prices is (i.e. the reduction of quantity in a product where the specific packaging has to be ordered in advance and requires firms to plan ahead and prepare for the change).

Although this was a national case, the Brazilian investigative agencies also benefited from substantive help in preparing this investigation from the USDOJ and the FBI. In April 2002, the Chief Attorney for the Chicago Unit (Mr. Marvin Price) and the Supervisory Special Agent (Ms. Vida Bottom) came to Sao Paulo for a week to share their expertise on search and seizure proceedings and other evidence gathering tools. They cooperated with the staff of SEAE, SDE, the District Attorney's office, and some representatives of the Procon-SP in analyzing the facts and discussing the data collected at that point. Aside from the direct contribution to the toilet paper case specifically, their technical assistance also presented a valuable opportunity to debate broader aspects of anti-cartel enforcement, drawing parallels and discussing the Brazilian and the North-American systems of antitrust enforcement.

This preliminary investigation was closed at SEAE in June 2002 and a report was issued to the Secretary of Economic Law at SDE, which accepted the recommendation of SEAE and

determined that the opening of an Administrative Process against the three firms for cartel formation was appropriate. The instruction of the case is currently being complemented at SDE and the case should be soon sent to CADE for a decision. In tandem, SEAE submitted a technical note to the District Attorney of Sao Paulo recommending that the firms should also be prosecuted criminally

3. ENHANCING INTERNATIONAL COOPERATION

The Brazilian exchange with other jurisdictions has been carried out mostly on an informal basis. In all three of the cases reported above, this has been possible due to the relationship developed between the officials from the SBDC and their Canadian and American counterparts over the years and the resulting knowledge our countries have of each other's legal frameworks and institutions. With regard to the United States, this relationship has expanded after both countries signed a bilateral agreement in 1999 although, due to the limitations concerning confidentiality agreements mentioned above, in the course of many international antitrust investigations the data provided to Brazilian agencies has been limited in scope.

Nonetheless, the investigation of cartel cases where the Brazilian authorities could count on assistance from other jurisdictions, were productive experiences. Thus, in order to enhance international cooperation under the current model based on bilateral agreements, Brazil must increase its number of partners by entering into agreements with the enforcement agencies in other jurisdictions. Lastly, the SBDC should be prepared to receive information through formal channels as well, and in order to do this, it is imperative that Brazil build up a reputation as a strong enforcer against cartel activity and to advertise the existence of its leniency and amnesty programs.

4. REFERENCES

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Hard Core Cartels Suggested Topics for Further Discussion***. Note and Questionnaire by the Secretariat - DAFFE/COMP/WP3(2002)5.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Draft Outline of the Second Report by the Competition Committee on Implementation of the Council Recommendation on Hard Core Cartels.*** - DAFFE/COMP/WP3(2002)6.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Further Discussion of Selected Cartel Topics***. Note Prepared by Canada - DAFFE/COMP/WP3/WD(2002)2.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Further Discussion of Selected Cartel Topics***. Note Prepared by Germany - DAFFE/COMP/WP3/WD(2002)3.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Further Discussion of Selected Cartel Topics***. Note Prepared by Japan - DAFFE/COMP/WP3/WD(2002)7.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Further Discussion of Selected Cartel Topics***. Note Prepared by the United Kingdom - DAFFE/COMP/WP3/WD(2002)6.

Organization for Economic Co-operation and Development (2002); Competition Committee; Directorate for Financial, Fiscal and Enterprise Affairs; Working Party No. 3 on International Cooperation. ***Further Discussion of Selected Cartel Topics***. Note Prepared by the United States - DAFFE/COMP/WP3/WD(2002)5.

Weber, Spencer (2000), "Anticartel Cooperation", *in* **Evenett**, Simon; **Lehmann**, Alexander; and Steil, Benn (ed), ***Antitrust Goes Global – What Future for Transatlantic Cooperation?***, Royal Institute of International Affairs, London; Brookings Institution Press; Washington, D.C.