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The purpose of this paper is to discuss Ginsburg's & Wright's proposal to enhance deterrence of hard-core cartels by shifting sanctions away from corporations towards perpetrators and other responsible individuals; and by specifically including the possibility of debarment as an option of sanction against corporate officers and directors. It is organized as follows. Section II presents data that supports policy decisions by antitrust authorities of prioritizing cartel enforcement. Section III analyzes why enhancing detection methods and adopting severe sanctions against offenders are crucial elements to deter hard-core cartels; I also describe Ginsburg & Wright's proposal and other views on this issue. Section IV examines Brazil's policy on hard-core cartel enforcement *vis a vis* Ginsburg's & Wright's proposal. Section V concludes.

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I. Introduction

The purpose of this paper is to discuss Ginsburg's & Wright's proposal to enhance deterrence of hard-core cartels by shifting sanctions away from corporations towards perpetrators and other responsible individuals; and by specifically including the possibility of debarment as an option of sanction against corporate officers and directors. It is organized as follows. Section II presents data that supports policy decisions by antitrust authorities of prioritizing cartel enforcement. Section III analyzes why enhancing detection methods and adopting severe sanctions against offenders are crucial elements to deter hard-core cartels; I also describe Ginsburg & Wright's proposal and other views on this issue. Section IV examines Brazil's policy on hard-core cartel enforcement *vis a vis* Ginsburg's & Wright's proposal. Section V concludes.

II. The Harmful Effects of Hard-Core Cartels

The Organization for Economic Co-operation and Development has stated that hard-core cartels are “the most egregious violations of competition law as they seriously harm consumers by raising prices and restricting output, without any efficiency justifications. Such agreements among competitors result in inefficient markets, where goods and services are unavailable for some consumers, and others are forced to pay higher prices but for the cartel. In addition, by artificially insulating themselves from the pressures that derive from competitive marketplaces, cartel members have limited incentives to control costs and to innovate.

The harmful effects caused by cartels are difficult to quantify, since it would be necessary to compare what happened in the market while the cartel operated to a hypothetical situation where the firms in the market competed honestly. There are practical obstacles to performing this comparison and usually competition authorities are not required by law to undergo this exercise before sanctions are imposed. Cartel fines generally are not determined based on actual harm, but instead authorities look at the volume of commerce, a firm's turnover, or affected sales of the cartelized product or service and use a proxy estimate (i.e., a set percentage) for the actual harm. Thus, there is not a significant amount of data regarding the quantification of harm in hard-core cartel cases.

The Competition Committee of the OECD conducted one of the available studies on the harm from hard-core cartels, based on a survey of cases conducted by its members, and concluded that 16 cartel cases investigated between 1996 and 2000 had cost consumers around the world over U.S. \$55 billion.¹ The mark-

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ups differed considerably but, on average, prices in a market where a cartel operated were 10 to 20 percent higher than they would have been in absence of an agreement. Still, in some cases, the mark-up reached as much as 50 percent over what would have been charged had there not been a cartel. Another study conducted by Levenstein & Suslow concluded that, from 1995 to 2005, overcharges by international cartels reached as much as U.S. \$500 billion.² It follows from both studies that cartels around the world annually harm consumers in a number of billion U.S. dollars.

Strong enforcement against hard-core cartels is thus a common goal shared by a great number of competition authorities around the world; these have, in the last two decades, adopted leniency programs, criminalized cartel conduct, imposed higher sanctions against participants, and increasingly cooperated with each other on the path towards enhanced deterrence.³

III. The Two Elements of Deterrence: Effective Detection and Optimal Sanctions

Jurisdictions that actively pursue anti-cartel enforcement face a common challenge that is, in fact, twofold: first, to heighten the fear of detection through the

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use of an arsenal of different investigation methods; and, second and equally important, to institute the threat of severe and well-targeted sanctions that will enhance deterrence.

Parties to hard-core cartels go to great lengths to hide their behavior and indeed, in response to recent enhanced enforcement in several countries, are using increasingly elaborate strategies to remain secretive.⁴ Competition authorities have thus strived to enhance their ability to detect cartel behavior. A number of agencies resort to sophisticated investigative techniques such as dawn raids and wire-tapping, very often in cooperation with the police and prosecutors of these countries and also with each other.⁵

In the last two decades, a great number of jurisdictions have adopted leniency or amnesty programs for cartel conduct. These programs allow competition authorities to grant immunity of applicable sanctions to one (or more) of the co-conspirators, in exchange for cooperation that will lead to the prosecution and sanctioning of the other parties to the cartel. Leniency applicants provide authorities access to direct evidence from inside the cartel at a much lower cost than if other investigative techniques were used, and also act as a deterrence to

parties considering joining or forming a conspiracy.⁶ When coupled with the risk of detection and threat of severe sanctions, leniency programs introduce an ingredient that will contribute to the instability of the cartel by providing a powerful incentive to break ranks from the cartel and report the wrongdoing.⁷

Leniency programs become an attractive option as long as conspirators realize that the chances of being detected are high. If that happens, severe sanctions will be imposed. However, without strong enforcement actions that signal to cartel members that their behavior will not go undetected, it is unlikely that any conspirator will spontaneously come forward to confess and cooperate. Similarly the incentives to leave the cartel are diminished if the gains accrued through the agreement are superior to the sanctions to which the cartel member will be exposed if caught. And finally, leniency applications suppose a high degree of trust between the authorities and the candidate to the program, as well as their counsel. Therefore, as in any trust-based relationship, transparency and predictability of the program rules are paramount to encourage parties to confess and to turn against the other co-conspirators.⁸

Currently, over 50 jurisdictions have leniency programs in place. In the United States, companies have been fined over U.S. \$5 billion dollars for antitrust crimes since 1996, with over 90 percent related to investigations assisted by leniency applicants.⁹ Enforcement experience confirms that having an effective leniency program in place is an important step for competition agencies to encourage deterrence. Nonetheless, despite the proliferation of leniency programs and the enhanced cartel enforcement around the globe, authors have argued that cartels are still, overall, under-deterred.¹⁰

By agreeing not to compete, cartel members are able to set prices and accrue profits substantially above the competitive level. To discourage what is clearly a very appealing business practice, the penalty has to be equally unappealing. An additional aspect to be considered is that, despite the recent increase in enforcement around the world, evidence suggests that recidivism among cartelists is not infrequent. Stock price movements following indictment for price-fixing also indicate under-deterrence; usually share prices fall significantly when charges are pressed, but the overwhelming majority returns to pre-indictment levels within one year.¹¹ Moreover, taking into account the secretive nature of collusion and the lengths cartelists go to in order to conceal their conduct, the detection of cartel conduct will always remain a challenge for authorities, and conspirators are well aware of that. Therefore, achieving deterrence requires strong enforcement coupled with severe sanctions that outweigh the potential rewards of participating in a cartel; not just merely as routine business costs.

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Sanctions form a relevant piece of any regulatory system. In addition to providing a deterrent, they act as catalysts to ensure that laws and regulations are complied with and also signal that non-compliance will not be tolerated. A number of different theories have been developed on what is the optimal sanction or, better said, which is the optimal combination of sanctions that will effectively discourage collusive behavior. Some jurisdictions have opted for making enterprises the exclusive targets of enforcement and seek optimal deterrence of cartel activity through adequate administrative sanctions alone.¹² In a recent article, Professors Lande & Davis¹³ reviewed data regarding criminal enforcement *vis a vis* private litigation in the United States and concluded that the latter, by exposing corporations to very high damage payments, has played a crucial role in deterrence.

Other authors have argued that an optimal sanction or mix of sanctions depends on ensuring that the individuals who fix prices on the corporations' behalf shoulder a substantial part of the total sanction.¹⁴ However, a relevant point has been raised that if the individuals are exclusively sanctioned through administrative or criminal fines, it is a challenge to prevent companies from indemnifying them, either directly or indirectly, against pecuniary damages.¹⁵ Since this would completely undermine the purpose of the penalty, the most effective sanction against individuals might be imprisonment.¹⁶ Moreover, there is also the risk that these fines are passed on to consumers, as corporations may choose to recoup those financial losses through price increases.

Ginsburg & Wright indicate that, in addition to the two potential targets of antitrust sanctions—the individuals and the corporations—it is also relevant to consider that there are two sources of these sanctions: law enforcement agencies and the market. Law enforcement agencies impose the available sanctions in the different jurisdictions against both targets; the market also imposes reputational penalties. Ginsburg & Wright argue that two fundamental principles should guide optimal sanctions for cartel activities: the first is aimed at calibrating sanctions to achieve deterrence; and the second focuses on the adequate mix of sanctions allocated between the enterprise and the individual(s) involved in the cartel. The first principle establishes that “(...) the total sanction must be great enough, and no greater than necessary, to take the profit out of price-fixing.”¹⁷ And, according to the second principle, “the individuals responsible for the cartel activity, whether they are engaged in, complicit with, or negligent in preventing the price-fixing scheme, should be given a sufficient disincentive to discourage them from engaging in that activity.”¹⁸

The authors also point out that, taking into consideration the data available, there is no indication that increasing fines against firms will enhance deterrence. Therefore, they propose to reform antitrust sanctions by both shifting the emphasis on sanctions against corporations to those directed at individuals and, including as an alternative sanction, debarment of individuals from those positions that enable them to violate competition laws or allow subordinates to do

so. The two main aspects of their proposal are the overall level of deterrence and the combination, instead of the level, of sanctions.

Holding perpetrators accountable and tailoring the optimal mix of sanctions through a combination of administrative and criminal penalties are two core elements of Brazil's anti-cartel enforcement.

IV. Brazil's Anti-Cartel Enforcement: Our Path Towards Deterrence

Brazil's Competition Policy System ("BCPS") is composed of three agencies: the Council for Economic Defense ("CADE"), an administrative tribunal that adjudicates both merger and conduct cases; and two investigative and advisory agencies. These are, respectively, the Secretary for Economic Monitoring of the Ministry of Finance ("SEAE"), in charge of merger review, and the Secretary of Economic Law of the Ministry of Justice ("SDE"), responsible for anticompetitive conduct investigation, including cartels. Both secretaries have legal mandates to perform both merger analysis and conduct investigations and may, at their discretion, issue complementary reports to ones issued by the other Secretary. However, in the past five years, the Secretaries' policy has been to forego this prerogative. Both Secretaries' reports to CADE are non-binding.

Brazil has a dual enforcement system—cartels are both an administrative infringement and a crime. State and federal prosecutors are in charge of criminal prosecution and, together with the criminal courts, enforce Law 8.137/1990, the statute that establishes cartel activities as a crime. At the administrative level, the applicable statute is Law 8.884/1994 and the prosecutorial role is performed by the SDE.

Since 2003, Brazilian antitrust authorities have promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as their top priority and, as with other antitrust authorities across the world, have had to focus on developing better detection methods and increasing the sanctions that had previously been imposed against offenders. Their choice was to create an integrated system where the administrative authorities in the federal government and the criminal authorities at the federal and state levels work as a team, so as to utilize the best of both systems and improve deterrence.

Brazil's integrated system has three main and equally important purposes. The first is to enhance the detection abilities of the antitrust authority, taking advantage of the complementary expertise in the administrative and criminal spheres, as well as of the resources of police and prosecutors around the Brazilian territories. The second is to secure convictions and jail sentences for executives who do

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not apply to Brazil's leniency program, in addition to collecting the administrative fines applicable to corporations and individuals under Law 8.884/1994. And the third purpose is to increase legal certainty regarding the leniency program.¹⁹

During the first years after Brazil's anti-cartel enforcement was launched, criminal authorities played an accessory role that mostly consisted in providing technical assistance during dawn raids and executing leniency agreements with the SDE. When criminal prosecution followed, until 2007 at least, in the vast majority of the cases it happened as a consequence of enforcement at the administrative level. These first steps of integration boosted SDE's and CADE's reputations as tough enforcers and made available a variety of investigative tools that had not been used before, thereby strengthening the cases prosecuted at the administrative level. This, in turn, had three important inter-related consequences: first, CADE began imposing higher sanctions due to the existence of direct evidence of collusion; second, it increased litigation during and after the adminis-

THE LANDMARK CASE THAT OCCURRED DURING THIS FIRST PHASE OF BRAZIL'S ANTI-CARTEL ENFORCEMENT WAS THE CRUSHED-ROCK CARTEL INVESTIGATION.

trative prosecution along with the instances when CADE's decisions and the SDE's administrative acts were upheld by the courts; and third, it attracted a greater number of leniency applicants.

The landmark case that occurred during this first phase of Brazil's anti-cartel enforcement was the crushed-rock cartel investigation. It was the first time that administrative authorities, in close cooperation with criminal authorities, executed an antitrust dawn raid.²⁰ There was intense cooperation between SDE and the Public Prosecutor's Office of the State of Sao Paulo throughout the case and, as a result, criminal proceedings were also filed before the Judiciary. The proceedings led to joint interviews of witnesses by SDE and the police as well as criminal indictments of several individuals. Ultimately, however, all the criminal proceedings were settled with the payment of fines.

This case was an important step as it was the first time that the Public Prosecutors from Sao Paulo argued a cartel case before the criminal court, but the fact is that the parties did not face severe criminal consequences for having taken part in the cartel. On the other hand, at the administrative level, using the SDE's report as a basis, CADE fined the defendant companies along with the trade association in amounts ranging from 15 to 20 percent of their 2001 gross revenues, depending on the degree of their involvement. Some of the parties challenged CADE's final ruling before the Judiciary; so far all the judicial decisions have unanimously upheld the fines imposed by CADE. In addition, at the request of CADE's legal service, the judges demanded a judicial deposit from the parties in the amount of the administrative fine, before appealing to the courts.

The dynamics of the cooperation between administrative and criminal authorities and of the roles performed by each during the first years of Brazil's anti-car-

tel enforcement are well illustrated by the crushed-rock cartel investigation and, although coordination has been at the crux of Brazil's anti-cartel enforcement from the outset, in this case it served a different purpose. The numerous dawn raids that have been run since 2003; the growing number of leniency applicants; and the hefty fines imposed by CADE have been decisive in attracting attention from criminal authorities from the different states of the country and encouraging anti-cartel enforcement to be treated as a relevant matter for criminal enforcement. This approach has evolved significantly in the recent years, and the integration between criminal and administrative authorities has resulted in the detection of numerous domestic and international cartels, through investigations initiated either by the SDE, or by police or prosecutors' offices around the country.²¹

In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the SDE in joint criminal and administrative investigations. This arrangement became a template for co-operation between SDE and other state prosecutors; currently there are agreements between SDE and state prosecutors in 23 states, in addition to a separate agreement with the federal prosecutors.²² These protocols culminated in the National Anti-Cartel Strategy ("ENACC"), a formal network to coordinate a plan of activities between criminal and administrative authorities, with the purpose of ensuring synergy and organization in anti-cartel enforcement around the country.²³ Deeper integration became indispensable as enforcement changed the scale of activity, and also as criminal authorities began performing a leading role instead of an accessory one.

There are numerous synergies that can be explored within a dual enforcement system, but there are also significant challenges that derive from the fact that administrative and criminal authorities have different backgrounds and, on occasion, may have different priorities. It is quite natural for an antitrust authority to set anti-cartel enforcement as a top priority, but not as natural for criminal authorities that usually are involved with the investigation of other serious crimes to do the same. And even when that happens, and specialized units are created, it does not necessarily follow that they will master the subject as well as antitrust authorities. This has several consequences as, for example, which penalties will be sought or what will be required to settle a case. Brazil's anti-cartel enforcement is moving towards a new phase, where criminal authorities will take the lead and administrative authorities will increasingly play a coordination role. This is a work in progress and, during this transition, there will be some discomfort, which is natural and part of the growth process. The results ahead seem promising, but success depends on increased integration and coordination.

THERE ARE NUMEROUS SYNERGIES THAT CAN BE EXPLORED WITHIN A DUAL ENFORCEMENT SYSTEM, BUT THERE ARE ALSO SIGNIFICANT CHALLENGES THAT DERIVE FROM THE FACT THAT ADMINISTRATIVE AND CRIMINAL AUTHORITIES HAVE DIFFERENT BACKGROUNDS AND, ON OCCASION, MAY HAVE DIFFERENT PRIORITIES.

CADE has also demonstrated its firm commitment to severely punishing cartels. In the recent past, fines imposed against firms sanctioned for hard-core cartels have frequently been in excess of 20 percent of their turnover in the year prior to the beginning of the investigation.²⁴ CADE has also coupled administrative fines with other available sanctions in the antitrust statute, such as prohibiting corporations that were found guilty of bid-rigging from bidding on government contracts for certain periods of time, as well as publishing ads in major Brazilian newspapers informing the public of the sanctions imposed by CADE for participating in a cartel.²⁵ But beyond that, and although CADE has severely sanctioned individuals as well, Brazil's policy on cartel enforcement operates under the premise that enhanced deterrence is possible if the rigorous criminal penalties provided by law (from 2–5 years jail terms²⁶) are sought. Criminal and administrative authorities reaffirmed this understanding in a document named *Brasilia Declaration*, which instituted the ENACC.²⁷

Many of the criminal authorities who take part in the ENACC are also in charge of prosecuting other white-collar crimes. This allows those developing strategy for cartel enforcement to learn from positive experiences in different areas such as money laundering and insider trading. Following existing examples in other areas, the ENACC issued two recommendations directed to Brazil's Security and Exchange Commission (CVM), with the purpose of preventing wrongful conduct and improving transparency to stockholders.²⁸ The first recommendation requires that all listed companies adopt antitrust compliance programs; and the second requires that companies give notice to stockholders when enforcement action is initiated for price-fixing and other types of collusive behavior.

Brazil's administrative and criminal authorities in charge of cartel enforcement share the view that stricter penalties than those that have been imposed so far are necessary to improve deterrence; but also recognize the importance of shifting sanctions away from corporations towards individuals. Still, although there have been recent decisions from criminal courts sentencing executives found guilty of price-fixing to jail terms, and there are firm commitments from the parties to the ENACC to enforce the criminal statute more severely, there are certainly costs for society to take into account when considering these sanctions as an option in every case.

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As in other white-collar crimes, jail sentences tarnish the reputation of individuals who are found guilty of participating in cartels, which is an important aspect of such penalties. Adding the possibility of debarring individuals responsible for price-fixing in publicly traded companies to the existing sanction mix has two important features. First, as it has a strong reputational ingredient, it will enhance deterrence. Second, as it will ban individuals from occupy-

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ing positions from which they could again violate or negligently enable their subordinates to violate the antitrust laws, it will prevent recidivism as well.

Pursuant to article 11 of Law 6.385/76,²⁹ Brazil's Securities and Exchange Commission ("CVM") has statutory authority to debar individuals found guilty of serious infringements. Internal resolutions set out the practices that are considered serious infringements by the regulator and that may be punished by debarment. This is an important precedent under Brazil's legal system, i.e. debarring directors and executives found culpable of white-collar crimes, in combination with or as an alternative to jail sentences. The possibility of including debarment of individuals found guilty of price-fixing from occupying certain positions in publicly traded companies in Brazil still depends on amending Law 8.884/94,³⁰ as the CVM's statutory authority is circumscribed to the infringements of its regulations, of Law 6.385/76, of Law 6.404/76,³¹ and of other legal provisions regarding practices over which it has jurisdiction. As price-fixing, market division, bid-rigging, and other types of collusive behavior fall outside this category, it will therefore be necessary that debarment be included as a possible sanction under Law 8.884/94, to be imposed by CADE when adjudicating a cartel case.³²

V. Conclusions

Administrative enforcement has been the key driver of Brazil's anti-cartel enforcement until very recently, and sanctions in the past were mostly directed towards corporations. Since 2003 though, the landscape has changed; culpable individuals are increasingly being held accountable, and a continuous effort has been made to enlarge the scope of available sanctions against offenders.

Effective cartel enforcement in Brazil is less than a decade old and it would be premature to reach definitive conclusions regarding deterrence. Nonetheless, empirical evidence on the number of search and seizure warrants served, on individuals sentenced to prison terms, as well as on the increasing number of leniency applications and settlements³³ allows the conclusion that both requirements for deterrence of cartel activity—heightened fear of detection and threat of severe sanctions—were positively affected through the integration of criminal and administrative authorities. Making available new sanctions that give sufficient disincentive to executives and other officers from engaging in collusion; as well as coordinating the various corporate and individual sanctions to achieve the optimal total sanction, will set Brazil on a strong path towards deterrence. ▼

CULPABLE INDIVIDUALS ARE INCREASINGLY BEING HELD ACCOUNTABLE, AND A CONTINUOUS EFFORT HAS BEEN MADE TO ENLARGE THE SCOPE OF AVAILABLE SANCTIONS AGAINST OFFENDERS.

- 1 Organization for Economic Co-operation and Development (OECD), *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs (2002)*, available at <http://www.oecd.org/dataoecd/41/44/1841891.pdf>.
- 2 See, e.g., Michal S. Gal, *The Globalization of Antitrust*; Margaret Levenstein & Valerie Y. Suslow, *Contemporary international cartels and developing countries: Economic Effects and Implications for Competition Policy* 71 ANTITRUST L. J. 801 (2004).
- 3 Countries such as Chile, Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Australia, Russia, and South Africa have recently criminalized cartel conduct or are considering it.
- 4 The OECD report (*supra* note 1) provided a number of examples of these strategies: Conspirators in one case, faced with a document demand from the competition authority, loaded two automobiles with bid files and took them to the country, where it took a full day to burn them in “four huge bonfires. . . .” In another case, the conspirators carefully controlled the creation and retention of incriminating documents by, among other things, conducting internal audits to verify that such documents no longer existed. When it was felt necessary to keep certain spreadsheets showing allocations of business among the conspirators, the files were copied onto computer disks and hidden in the eaves of one employee’s grandmother’s house. In another case, internal documents from one of the defendants revealed an unofficial motto of the company: “Our competitors are our friends, our customers are the enemy.”
- 5 In response to a questionnaire circulated by Sub-Group 1 of the Cartel Working Group of the International Competition Network (“ICN”), 43 out of the 50 responding jurisdictions declared have adopted increased penalties for cartels; 35 have implemented amnesty or leniency provisions; and 35 have gained new investigative powers. See, Scott Hammond, Deputy Assistant Att’y General for Crim. Enforcement, Antitrust Div., Depart. of Justice, Presentation at The 9th Annual Conference of the International Competition Network (ICN), Trends and Developments in Cartel Enforcement (April, 27-29, 2010) available at <http://www.internacionalcompetitionnetwork.org/library.aspx?search=&group=2&type=0&workshop=0&page=2>.
- 6 See International Competition Network (ICN), *Anti-cartel Enforcement Manual, How to Implement an Effective Leniency Program* (April 2009).
- 7 See Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, EUR. COMPETITION J. (March 2009); and Scott Hammond, Deputy Assistant Att’y General for Crim. Enforcement, Antitrust Div., Depart. of Justice, Presentation at The 24th Annual National Institute on White Collar Crime, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>:

Consider the “empty seat at the table” scenario. Five members of a cartel are scheduled to hold an emergency meeting, but when the meeting starts there is an empty seat at the table. One of the conspirators has unexpectedly not arrived at the meeting and is not returning phone calls. The cartel members at the meeting start to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he already reported the others to the government? Or did he just miss his plane? In this environment, with the risk of detection and resulting sanctions so high, can the conspirators afford to trust one another? Each member of a cartel knows that any one of its co-conspirators can report the others in exchange for total immunity—a decision that will seal their fate. Imagine the vulnerability of cartel members in that position asking, “Can I really trust my competitors to look out for my best interests?” The answer to this question leads them directly to the prosecutor’s door.

- 8 See ICN, *supra* note 6.
- 9 Hammond, *supra* note 7.

- 10 See, e.g., Robert H. Lande, & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws* (March 2010); John M. Connor, & Yuliya Bolotova, *Cartel Sanctions: An Empirical Analysis* (April 2008); Michael S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance* (October 2008); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions* (June 2010); Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime* (March 2009).
- 11 See Ginsburg & Wright, *id.*, page 21.
- 12 The European Union is one of the jurisdictions that have severely sanctioned hard-core cartels exclusively through administrative sanctions. Between the years 2005 and 2009 the sanctions against hard-core cartels, adjusted for court judgments, have been in excess of EUR 9.75 billion. See <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last visited September 5th, 2010).
- 13 Lande & Davis, *supra* note 10.
- 14 See Werden, *supra* note 7 and Ginsburg & Wright, *supra* note 10.
- 15 See contributions from Australia, the United States, and the United Kingdom to the OECD roundtable on *Cartel Sanctions Against Individuals*, October, 2003. Available at www.oecd.org/dataoecd/61/46/34306028.pdf. Last visited August, 25th, 2010.
- 16 On the other hand, criminal law authors like Luigi Ferrajoli, Winfried Hassemer, Eugenio Raul Zaffaroni, and Alessandro Baratta have argued that the states' intervention through criminal penalties should be limited in scope—and therefore the institution of new categories of crimes should be avoided, as well as increasing intensity, so that prison terms in particular should only be imposed as punishment for the most harmful crimes.
- 17 See Ginsburg & Wright, *supra* note 10, at 3.
- 18 *Id.*, at 4.
- 19 Brazil's leniency program shelters both administrative and criminal sanctions from the directors and managers of the cooperating firm if the individuals sign the agreement and fulfill the requirements provided in the law. The SDE is the antitrust agency with power to negotiate a leniency agreement. In the beginning, Brazil's Leniency Program received some criticism as some claimed that the SDE, as an administrative agency, could not ensure criminal immunity. The fact is that the law creates a legal fiction and provides for the automatic extinction of criminal and administrative liability at the time CADE verifies that the leniency applicant fulfilled all his obligations. However, to avoid any questioning and, although it is not a legal requirement, the SDE may involve the Prosecutors Office (state and federal, depending on the case) in the execution of the leniency letter.
- 20 In 2002, SDE received an anonymous tip of an alleged cartel involving crushed rock companies in São Paulo. The companies took part in a cartel to fix prices, allocate customers, restrict production, and rig public auctions in the market for crushed rock, an essential raw material in the civil construction industry. The companies also used sophisticated software in order to steer sales and check compliance with the agreement. In July 2003, an administrative proceeding was initiated against 21 companies and one trade association in order to investigate the alleged cartel violations. The anonymous tip provided the authorities with plenty of information which enabled SDE and the Public Prosecutors to run the first antitrust dawn raid in Brazil's history. The procedure was conducted at the offices of the industry association Sindipedras. Seized evidence showed that there was, in fact, an illegal and sophisticated cartel in place.
- 21 Due to enhanced cooperation, the number of search warrants served—and consequently the quality of the evidence presented in cartel cases—has significantly increased: From 2003 to 2006, 30 warrants were served, while from 2007 to June 2010, more than 230 warrants were served. To date, more

than 250 executives are facing criminal proceedings, over 40 executives have been sentenced to serve jail time, and another 19 executives have been sentenced to pay criminal fines for their participation in cartel conduct. One important investigation that resulted from a more active role played by the criminal authorities was in the fuel retail sector, in the Northern region of Brazil. In May 2007, SDE, together with SEAE, the Federal Police, and the State Prosecutors of the State of Paraíba launched a dawn raid in Joao Pessoa and Recife to obtain evidence of a cartel in this sector. The operation involved 190 agents who searched 26 different places and served 16 prison warrants. The dawn raid exercises were called "Pact 274," named after the price allegedly agreed for the liter of gasoline (BRL 2,74). The positive impact to the economy in this case was felt immediately after raids, as the average price of the type C gasoline in Joao Pessoa went from BRL 2,74/litre in April 2007 to BRL 2,37/litre in December the same year. Considering the price reduction and the increase in demand, consumer savings can be estimated up to BRL 32 million during the eight months after the raid. Stronger integration has also been crucial to detect international cartels that allegedly affected the Brazilian market, as in the compressors cartel investigation that was initiated as the result of a leniency agreement with SDE. Simultaneous dawn raids were conducted in Brazil, the United States, and Europe of suspected cartel participants. More than 60 officers from SDE, the federal police, and state prosecutors from Sao Paulo conducted the operation in Brazil. Three Brazilian subsidiaries of the U.S. appliance maker Whirlpool reached a settlement agreement with CADE under which the company would pay a fine of BRL 100 million (about U.S. \$58.7 million) and six executives would pay fines totaling BRL 3 million (U.S. \$1.8 million). These were the largest fines assessed and paid to date in a cartel case. While the respondents admitted guilt as a result of the agreement, the case against other respondents continues.

- 22 The SDE has also entered into cooperation agreements with the Federal Police and with the Secretary of Security of the State of Parana.
- 23 In October 2009, two hundred prosecutors and police officers from different Brazilian states met to discuss cartel enforcement issues and, at the end of the meeting, the formal network was instituted.
- 24 In September 2010, CADE issued its highest ever fine of 2.9 billion reais (EUR 1.3 billion) to five industrial gas manufacturers for alleged long-term cartel activity. The companies' products are used in several industries, particularly health care. The fines to the gas manufacturers are based on 25 percent of the companies' gross revenues in 2003—when the investigation started—except for White Martins, that was fined on 50 percent of its gross revenues, because it was also penalized for recidivism, as it had been previously fined in 1997 for cartel activity. In addition to the firms, seven company executives have also been fined.
- 25 See article 24, Law 8.884/94, available at http://www.planalto.gov.br/ccivil_03/Leis/L6385.htm.
- 26 See article 4, Law 8.137/90, available at <http://www.planalto.gov.br/ccivil/leis/L8137.htm>.
- 27 Available at <http://portal.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>.
- 28 In June 2008, CADE and CVM entered into a cooperation agreement that covers technical assistance and exchange of information, available at <http://www.cade.gov.br/upload/Cade%20e%20CVM.pdf>.
- 29 Available at www.planalto.gov.br/ccivil_03/Leis/L6385.htm.
- 30 There is currently a bill pending approval in Congress that will amend Law 8.884 to consolidate the BCPS into one agency, impose pre-merger notification and provide the agency with a significant number of new, permanent positions. PL 09/2009 had been approved by the House of Representatives and is under consideration in the Senate.
- 31 Available at http://www.planalto.gov.br/ccivil_03/Leis/L6404consol.htm.

- 32 Articles 23 and 24 of Law 8.884/94 list the sanctions that CADE may impose on parties found guilty of cartel conduct and of other anticompetitive conducts.
- 33 The Brazilian Cartel Settlement was introduced in May 2007 through an amendment to the Brazilian Competition Law. CADE, through its Resolutions 46/2007 and 51/2009, has detailed the negotiation rules and procedures. It covers administrative liability and is available for all firms and individuals that are parties to an administrative investigation of cartel involvement. CADE is the antitrust agency with power to enter into settlements. SDE may issue a non-binding opinion directed to CADE on whether or not to settle; it has done this for all cases. Federal and state prosecutors are in charge of enforcing the criminal statute and apart from the case of leniency agreements, where officers and managers that come forward are completely sheltered from criminal liability, a settlement with CADE does not mean that the case will be criminally settled. The criminal settlement has to be negotiated on a case-by-case basis with the state level and federal criminal prosecutors, but due to the close working relationship between criminal and administrative authorities, settlement with CADE increases the probability of settlement with the criminal authorities as well.