The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy[1]

Claudio Monteiro Considera[2]
Paulo Corrêa[3]

Janeiro/ 2002

[1] **Paper prepared for Fordham Conference on Competition Policy, NY, October, 2001. This paper does not represent the government position in any of the subjects here mentioned.**

[2] **Professor of economics at the Fluminense Federal University and Brazilian Institute of Financial Markets - IBMEC and Secretary for Economic Monitoring of the Ministry of Finance – Brazil. E-mail: consider@fazenda.gov.br. Esplanada dos Ministérios, Bloco P, sala 307, Edifício Sede, 70048-900. Brasilia-DF. Tel: (61) 412.2362. Fax: (61) 225.0971.**

[3] **Professor of economics at IBMEC and at Universidade Cândido Mendes, and Deputy-Secretary for Economic Monitoring of the Ministry of Finance – Brazil. E-mail: correap@fazenda.gov.br. Esplanada dos Ministérios, Bloco P, sala 307, Edifício Sede, 70048-900. Brasilia-DF. Tel: (61) 412.2362. Fax: (61) 225.0971.**

Abstract

The Brazilian political and economic history is embodied with the following elements that affect the definition and the enforcement of antitrust law and policy: a) the ideological climate; b) the expected net effects (costs and benefits) of the lobbying activity by large local groups; c) economic inefficiencies derived from the import substitution (IS) regime; and d) equity demands inherited from the IS regime.

During the recent Brazilian history, the ideological climate (social preferences toward the best state of the world) does not seem to have favored competition as the rule of the economic game. The private sector did not take it as the core of the economic activity nor as an outward orientation as a constitutive part of business strategies. On the contrary, the ideological climate seems to have favored "negotiation" among firms, state interventionism and an inward orientation (import substitution). "Industrialization" in a context such as this, was therefore a major national (public) goal and economic policy consistently favored producers (especially the industrial producer) welfare to the detriment of other social groups (specially consumers).

This paper discusses these aspects in three parts: firstly, it traces the historical background of building a competition law in Brazil linking it with economics and politics. Secondly, it describes the present situation of the competition law enforcement, its institutions and looks to the future. Thirdly, it discusses some political economy aspects of competition law enforcement.

Resumo

A história política e econômica do Brasil inclui elementos que afetam a definição e a aplicação da legislação e da política antitruste no Brasil. Esses elementos são: a) o clima ideológico; b) o efeito líquido esperado (custos e benefícios), por grandes grupos locais, da atividade de *lobby*; c) ineficiências econômicas derivadas do regime de substituição de importações (SI) e d) demandas por eqüidade derivadas do regime de substituição de importações.

Durante a recente história brasileira, o clima ideológico (preferências sociais em relação ao melhor estado de mundo) não parece ter favorecido a concorrência como regra no jogo econômico. O setor privado não a assimilou nem como princípio intrínseco à atividade econômica e nem como uma orientação extrínseca como parte constitutiva das estratégias de negócio. Ao contrário, o clima ideológico parece ter favorecido a "negociação" entre as firmas, o intervencionismo do Estado e uma orientação "para dentro" (substituição de importações). "Industrialização" num contexto como esse foi, por conseguinte, um grande objetivo (público) e a política econômica, conseqüentemente, favoreceu o bem-estar dos produtores (especialmente os produtores industriais) em detrimento de outros grupos sociais (especialmente os consumidores).

Esse texto discute esses aspectos em três partes: primeiramente, traz o pano de fundo histórico subjacente à construção da legislação antitruste Brasil, analisando aspectos econômicos e políticos envolvidos. Em segundo lugar, descreve a situação atual da aplicação da legislação antitruste. Em terceiro lugar, discute alguns aspectos de economia política da aplicação da legislação antitruste.

1. The Historical Background[4]

1.1. The Post-World War II Industrialisation Period – 1945-1964

2.1.1. Politics and Economics

Although there have been economic policies toward industrialisation in the past, the first approach to a deliberate development policy came with the emergence of the populist government of Getúlio Vargas, elected president in 1950 with the support of the urban working class. His political campaign was mostly based on a review of his previous effort to implant industrialisation during his 1930-45 period in power.[5]

As a consequence of his heterogeneous political support, his economic policy was ambivalent, although very close to the one formulated by the economists from the United Nations Economic Commission for Latin Americas (UN/ECLAC), known as the nationalism pro-development ("nacionalismo desenvolvimentista") economic policy. Both policies advocated a mixed economy where the State's incentives substituted the price mechanism as signals to resource allocation, and where the State again, through its own enterprises, had to provide the infrastructure of basic services (mainly energy, telecommunications and roads). Foreign capital, although welcomed, had to be carefully controlled and directed by the government.

The result of this declared industrialisation policy was very successful: manufacturing industry grew at a rate of 10.7% per year during 1949-55; at the end of the period, imports became only 15% of the supply of industrial goods compared with the 65% of 1949.[6]

In 1956, Juscelino Kubitscheck took office as the new president. He was nominated candidate by the alliance of the Social Democratic and Labour parties and his campaign was based on the appeal to accelerate industrialisation, promising "fifty years of progress in five years of government". He formulated a wide range of sectored economic objectives known as the Target Plan ("Plano de Metas"), which represented the most substantial decision deliberately taken on behalf of industrialisation in the economic history of the country.

His *nationalism pro-development* strategy focused in the industrial structure establishing the producer goods industry, managed either to receive support from every

[4] Unless quoted, most of the political and economic facts and interpretation comes: (1) up to 1980, from Claudio M. Considera, "Pricing and Functional Income Distribution in Brazilian Manufacturing Industry", 1959-80 (Oxford University, D.Phil. dissertation, 1982); (2) after 1980, from Claudio M. Considera, "The Brazilian Economy – 1980/97: from hyper inflation to stabilisation" (Economic Research Institute of the Economic Planning Agency from the Government of Japan, Tokyo, Working Papers Series, March 1998).

[5] The politics of this section is mostly based on Thomas E. Skidmore, Brasil: de Getúlio Vargas a Castelo Branco –1930-1964 (Rio de Janeiro, SAGA, 1969).

[6] Data from Joel Bergsman, Brazil – Industrialisation and Trade Policies (Oxford, Oxford University Press, 1970), p. 92.

socially important group or, at least, not to receive antagonism. The industrialists were not inclined to accept any program that could sacrifice industrialisation; so the proposition of a rapid industrialisation with a growing domestic market, easy credit and the continuance of protection against imports contained in the Target Plan, received prompt support from them.

Unlike Vargas, Kubitscheck did not threaten the foreign investors; on the contrary, he made a public appeal to foreign businessmen, inciting them to participate in and to help the Brazilian effort towards development. For that, Kubitscheck made some institutional changes to stimulate the inflow of foreign capital. The net inflow (US$1,194 millions) was more than the double of the previous presidential period. It was invested mainly in transport equipment and energy (37%) and in basic industries (48%) of iron and steel (state industries) and motor vehicles (foreign controlled motor car assembly factories).[7]

During the following five years, most of the targets were reached and even surpassed. To sum up, by 1961 the industry had changed into a very well vertically integrated structure. The manufacturing industry grew at an annual average rate of 11.5%; the capital good industry performed an outstanding rate of 27% annually. The domestic production was now responsible for around 92% of the total supply of industrial goods.[8]

The end of Kubitscheck government, and with it the end of the Target Plan, was not matched by any sort of new strategy towards growth. The political and economic crisis leaded to the removal, after seven months in power, of the new president Jânio Quadros, a representative of a conservative party. The vice-president João Goulart, a labour party representative, was not allowed to take the presidency. After a compromise solution period of fourteen months of a modified parliamentary system, he regained full presidential power through a plebiscite ballot. In April 1964 however, João Goulart was overthrown and a military junta appointed General Castelo Branco as the new president to complete the mandatory period.

2.1.2. Competition and Antitrust

All along this period, there was not much concern for competition and antitrust in Brazil. Actually, the government became a monopolist in infrastructure services and in strategic industries, either by creating new state firms or by nationalising the existing ones in

[7] UN/ECLAC, External Financing in Latin America (New York, UN, 1965)
[8] Carlos Lessa, "Fifteen Years of Economic Policy in Brazil", in UN/ECLA Economic Bulletin for Latin America, XI (Dec.1964).

the area of mining in general and oil refining (state monopolies by law), steel, energy and telecommunication.

At that time, a triple alliance that would be solidified during the military government was being formed: The government stood for the long run mature investments in infrastructure in the monopolies above mentioned; the foreign enterprises stood for the highly capital and technology intensive sectors, which mainly produced durable consumer goods. And, the domestic private capital stood for de derived demand in the non-durable consumer goods.[9]

The foreign capital enterprises established in Brazil brought a technological standard based on scale economy appropriate for the mass market of the developed countries. This standard would only fit in the Brazilian market, which at that time was significantly smaller, in a very concentrated way. This was valid not only for the final goods but also for the intermediate goods produced by those industries. Moreover those industries were protected from imports with high tariffs based on the theory of infant industries.

Therefore, the most dynamic industries were installed in Brazil as oligopoly structures, well protected from import challenge. No concerns regarding competition could politically or economically be raised. Nevertheless, the domestic industries of non-durable consumer goods had a domestic competitive structure, despite being technologically well behind the foreign industries due to its low productivity.

Although competition and antitrust was not a concern there have been some questions about price abuses. Actually since 1934 the Government, through the Decree nº. 24.150 and 'the Water Code', start intervening in price formation of the economy by determining the readjustment index of house rents and electric power tariffs (a private business at the time). This action were amplified during the fifties by the promulgation of Law nº. 1521 and 1522, regulating the intervening of the State in the economic dominion and defining as crime against the people economy the transgression of official tables of prices for essential goods and services. It also created the Federal Commission of Provision and Prices (COFAP) to inspect the application of the price control.[10]

[9] Cf. Maria da Conceição Tavares & José Serra, "Além da Estagnação", in M. C. Tavares, Da Substituição de Importações ao Capitalismo Financeiro (Rio de Janeiro, Zahar, 1972), pp. 153-208. This division of labour is well documented in Fernando Fajnzylber, Sistema Industrial e Exportação de Manufaturados (Rio de Janeiro, IPEA/INPES, 1972).

[10] Most of the information on price control measures is based on Milton da Mata, "Controles de preços na economia brasileira: aspectos institucionais e resultados," in Pesquisa e Planejamento Econômico vol. 10 no. 3 Dez 1980, pp.911-54.

Although competition and antitrust were not a concern, there were some issues related to price abuses. Actually, since 1934 the Government started intervening in price formation of the economy, by determining the readjustment index of house rents and electric power tariffs (a private business at the time), through the Decree nº. 24.150 and 'the Water Code. This action was amplified during the fifties by the promulgation of the Laws nº. 1521 and 1522, which regulated the intervening of the State in the economic dominion, and defined as a crime against the economy the transgression of official tables of prices for essential goods and services. It also created the Federal Commission of Provision and Prices (COFAP) to inspect the application of the price control.

Despite having an enormous power, COFAP was unsuccessful in accomplishing its tasks and was extinguished. It was simultaneously substituted by the National Superintendence of Provision (SUNAB), created according to Delegated Law nº. 5 and its attributions established by Delegated Law nº. 4, both in 26th of September of 1962.

The first signal of some concerns about competition and antitrust was the creation of the Administrative Council of Economic Law (CADE) through the Law nº. 4.137 of 10th of September of 1962. This law regulated the abuses of economic power, such as disloyal competition, abusive speculation, collusion, and agreements with competitors, abusive price increases, etc.

2.2. The Military Governments – 1964-1984

2.2.1. Politics and Economics during the 'Miracle'- 1964-74

Inflation was a common fact throughout the Brazilian industrialisation. During the first period (1939-50), the cost of living rose on average, around 10% a year. During the second period (1950-61), it rose even more at an average rate of 20% a year. Following the economic deceleration and political crisis of 1961, inflation started an explosive path and prices rose at an average rate of 52% yearly, reaching the rate of 87% a year n 1964.

At the time the debate concerning the economic and political crisis was far from purely academic. For inflation, different diagnosis led to completely opposite policies. It was not by accident that the explanation based on the weakness and mistakes of Goulart government made headway among the military. In April 1964, a coup d'etat brought the monetarist school into power.

Accordingly, the diagnosis of excess demand, a very orthodox monetary policy of restraining credit, public expenditure and wages was carried out. As a result inflation

decreased to a rate of 24% in 1967. The cost however, was low rates of growth, fall in real wages and employment, culminating with a big recession in 1967.[11]

Contrary to the ideas of the new economic team, but probably due to the military dictatorship, a massive state intervention in all areas of the economy was carried out. Many state owned firms were created in the industrial sector to complete the industrial structures. The same happened in the financial sector in order to finance the housing building system, the agriculture sector for export and the durable consumer goods.[12]

The second military government assumed in 1967 and brought into power a less orthodox policy-maker team led by Delfim Netto. He diagnosed inflation as being demand constrained and identified production costs as the main cause of inflation. Consequently, an effort was made to get costs down, by controlling prices, cutting the interest-rate and reducing some public services tariffs. Also, credit expansion was promoted attending firms, consumers and government.

The economy recovered vigorously and grew at an average of 10% yearly from 1967 to 1974. Inflation was controlled and maintained at a rate of 25% a year.[13] The economic picture that emerged in 1974, after seven years of continuously high rate of growth, based on durable consumer goods, was quite similar to the most advanced economies in terms of consumption and production patterns. Nevertheless, many distortions were created or increased: sector and regional unbalances; inequality of income distribution; and the fact that the economy became too dependent on imports of capital and intermediate goods for the new modern industry of durable consumer goods.

The most important fact coming from this policy, with respect to the subject of this paper, was the increased use of price control mechanisms in Brazil, which would last up to 1994 when it finally ceased being adopted.

[11] For an analysis of the stabilisation policy during the 1964-71 period see A. Fishlow, "Some Reflections of Post-1964 Brazilian Economic Policy", in ª Stepan, Ed., Authoritarian Brazil (New Haven, Yale University Press, 1973), pp. 69-118. V. also A. C. Sochaczewski, "Financial and Economics Development of Brazil, 1952-1968" (The London School of Economics and Political Science, Ph.D. dissertation, 1980).

[12] In 1991, when the privatisation started, the government owned more then 800 firms in all sectors of the economy; the large majority of them created or incorporated during the military government.

[13] At that time there were many disagreements concerning the rate of inflation: the official figures were lower than this and the labour unions calculate a much higher figure; we choose to adopt the rate employed by Roberto Campos, the former Ministry of Planning, in an article published in a newspaper.

2.2.2. Competition and Antitrust during the 'miracle'- 1964-74

2.2.2.1. Price Control as a Cartel Organiser

An industrialisation policy based on the transfer of modern technology, highly dependant in capital – which was a scarce resource - in a small market such as the Brazilian one at that time, could not have had any concern about competition. In fact there were numerous incentives for concentration of the financial system, for the take over of small Brazilian firms, and for the installation of big foreign firms. Foreign firms became the dynamic poles of the industrialisation. The consequence was a very concentrated industrial structure, since even those foreign firms' smallest plant size had been designed for the big markets of the developed countries. In such an environment of highly concentrated structure, where tariff protection was maintained and overall price control installed, there was no incentive for market competition to function. [14]

In order to fight inflation, in addition to all the monetary and fiscal policy implemented after the coup d'Etat of the 1st of April of 1964, the government decided to adopt, on the 23rd of February of 1965 (Inter Ministerial Directive, GB 71), a spontaneous price control system. As a compensation it offered fiscal and credit advantages to firms adopting moderate price increases. A National Commission for Price Stabilisation Stimulus (CONEP) was responsible for the implementation of that policy.

This policy had some obvious advantages: its adoption by the firm was spontaneous, representing an exchange of favours with government, and the process of examining the application was very simple. A significant amount of firms adhered to this policy: about 70% of sales value to the domestic market in 1965 were attached to this spontaneous scheme. [15]

Nevertheless, the government soon concluded that it would be more efficient to fight inflation through the creation of more rigorous price controls, making its adoption compulsory, rather than spontaneous. The Decree nº. 61.993 was enacted then in 28th of December of 1967 for that purpose, and it was applicable to virtually all the manufacturing industry but the capital goods on order; as well as to part of food industry; to all sectors linked to the wood and leather industry and to the clothing and shoes industry. According to this legislation any price increases intended by the industry became compulsory subject to the

[14] Cf. Maria da Conceição Tavares, Luiz Otávio Façanha and Mário Luiz Possas, "Estrutura Industrial e Empresas Líderes" (Rio de Janeiro, FINEP, 1978), mimeo.

[15] Cf. Dionísio D. Carneiro Neto, "Política de Controle de Preços Industriais – Perspectiva Teórica e Análise Institucional da Experiência Brasileira", in Aspectos da Participação do Governo na Economia, Série Monográfica (Rio de Janeiro, IPEA/INPES, 1976), nº. 26, pp. 135-74, quoted by Milton da Mata, op.cit. p.919

analysis and approval of CONEP. Furthermore, the transitory character of price control was replaced by the conviction that price control should prevail until inflation ceases.[16]

After an analysis of other countries' experience, with emphasis in the French system[17], the government became aware of the inadequacy of CONEP to administer this new phase of price control. A new council(Conselho Interministerial de Preços) was then established to take care of this task. After that, when firms decided to increase the price of any product, they had to demonstrate beforehand that its costs were raised as well. Average rates of returns on capital for 6 years, for isolated firms or even for industries were established and became part of the price control management. Actually, the control rules were very detailed and complex,[18] representing an intervention in the firms' administration secrets unimagined in a democratic society. When applying for price readjustment, many industrial secrets of the firms had to be disclosed to government officials, with little guarantee that it would not be disclosed to their competitors. In addition to all the market distortions, price control also raised many suspicions of corruption.

The main penalty for failing to follow the rules of price control were the cut of credit facilities, applied by the Central Bank.

The new mechanism of price control created by CIP took into account the rate of return of net operational assets of the firm in 4 to 6 years, assuming an 80% of capacity utilisation. If the idle capacity was higher than 20%, the price was fixed according to a comparative exam with other products in the market and the price level of the competitors. In both cases CIP had the purpose of stabilising the market price, which is in fact the objective of any cartel. It is useful to remember that CIP was also responsible for fighting predatory competition, particularly "dumping".

For products already established in the market, the policy was to give price readjustment according to cost increases, guaranteeing the stability of the margin and therefore the crystallisation of a certain relative price structure. Moreover, this rule was reinforced by the low frequency of readjustments and the non-written rule of avoiding substantial divergences in prices of similar products. Therefore, prices tended to be relatively rigid, with every firm maintaining its participation in its market.

[16] The irony of history is that most of the price control system would be abandoned in 1992 just because it was distorting relative prices during inflation acceleration.
[17] Cf. report by J.F. Pécora to the Ministry of Finance in 13th of November of 1967, quoted by M. da Mata, op.cit., p.920
[18] For a comprehensive analysis of the price control policy implemented by CIP see Claudio R. Frischtak, "Regulação Estatal de Preços Industriais no Brasil: a experiência do Conselho Interministerial de Preços", (DEPE/IFCH, Universidade de Campinas, Master Thesis, 1980)

Based on the rules for price control above described, Frischtak suggests that:

"...by defining or ratifying the sector leadership and by making institutional the process o price signalising, CIP action reduces the degree of uncertainty of the oligopoly market and organises it contributing to crystallise a certain market structure." [19]

"Concerning to the identification and ratification of leadership it is made basically through sector agreements which along the time enlarged the number of products and firms being controlled. As having been said in chapter II (p. 89), the CIP defines itself or together with the sector association or trade union, the firms that should priority participate in the agreement, based on their share in production or in sector sales.

By organising such an agreement, the CIP would be just confirming an accepted situation or creating and legitimating a leadership not yet established. And, not the least, by making the cost structure of those firms as representative structures for price readjustment of a group of producers, the CIP establishes a standard behaviour based on the possibilities and necessities of the dominant firm.

An analogous process, although no so explicit, is followed in the absence of sector agreement. In this case, the CIP tends to focus on big firms, presumed leaders, assuming that the others firms would naturally (or under pressure of presumed penalties) follow the price readjustment made for the controlled leader.

The process of controlling prices not only creates or reinforces the role of the leader firm but also makes it institutional.

It is possible that an specific sector already had a certain degree of self co-ordination in order to dispense an institutional signal; nevertheless, given the power of the state regulatory function, the signal became accepted by the sector as a whole."[20]

Therefore, the price control mechanism employed by the CIP was not only competition preventing, through market rigidity. It was much more harmful. Firstly, it promoted concentration. Secondly, it indicated price leadership giving the signal for tacit agreements when the price controlled was exercised individually by the dominant firm. And

[19] C. R. Frischtak, op.cit. p.176.
[20] Claudio Frischtak, op.cit., pp. 176-77.

thirdly, when there was a sector agreement, there was no need for blustering cartels; they were organised with the incentive of the government. The CIP called meetings with associations or trade unions and, together, they talked about costs and fixed prices.

What is the use for CADE or any competition agency in such an environment?[21] The public interpretation of the tasks performed by CIP, was that it was preventing economic abuses through price controls, even if by doing that it ended up organising cartels. Nowadays, these would probably be called 'nice cartels' by some of the competition law professionals (academic researches, professors and lawyers) active in Brazil.[22]

2.2.2.2. The New Role of Producers Associations

The practice of CIP in controlling prices by meeting with firms or its associations call attention on the new role of those private firms' organisations.

Much has been written showing the role of those associations, during the industrialisation period, to protect the Brazilian infant industry:[23] The very few associations that existed at President Getúlio Vargas' first term of government (1930-45), were all official and benefited from government contributions. These were state federations (one for each state) linked under the National Industry Confederation (CNI). The most important state federations belonged to the main industrial states: São Paulo (FIESP) and Rio de Janeiro (FIRJ – presently FIRJAN). There were also producers' trade-unions (at that time they were around 160 unions), whose main function was to negotiate collective wage agreements with the workers' trade unions at the Ministry of Labour or at the labour courts[24].

The Confederation and the state federations acted heavily in order to raise tariffs protection, exchange rate protection and import controls. They also manoeuvred to build an infrastructure industry (metallurgy of iron and steel and cement). The targets of the industrial associations were mainly to protect the domestic market and to promote the domestic private capital.

This interference with the exchange rate policy in order to subsidise the imports of industrial intermediate and capital goods was maintained during President Dutra's

[21] Cf. Milton da Mata, op.cit. p. 917, according to the press, only four firms were punished by CADE for abuse of economic power.
[22] This is not a joke. In a seminar organised by IBRAC (Brazilian Institute for Competition Advocacy) in Campos do Jordão, in December 2000, during a round table, there were allegations by some participants against some government officials' intention of making cartel a crime per se in the reform of the competition law. According to these allegations, there could be 'nice cartels' and therefore it should be subject to a rule of reason analysis; we only forgot to ask them 'nice to whom?'.
[23] A seminal book in this area is that of Maria Antonieta P. Leopoldi, Política e Interesses na Industrialização Brasileira – as associações industriais, a política econômica e o Estado (Rio de Janeiro: Paz e Terra, 1980). Unless quoted most of this section came from this book.
[24] Eli Diniz and Renato Boschi, "Globalização, herança corporativa e a representação dos interesses empresariais; novas configurações no cenário pós-reformas", In Renato Boschi, Eli Diniz and Fabiano Santos, Elites Políticas e Econômicas no Brasil Contemporâneo (Fundação Konrad Adenauer, São Paulo, 2000)

government. In fact two industrialists, one from FIRJ and one from FIESP, occupied respectively, the Ministry of Finance and the presidency of the Bank of Brazil, the main Brazilian financial institution, during his administration.

During President Vargas' second term (1950-54), there was a balance of payment crisis, which provoked a transformation of the exchange market: a free exchange market was created, which should co-exist with the official one. The struggle of the federations was then to include as many industries as possible in the list of those to be elected for import goods at the subsidised official rate of exchange. In 1953, the Instruction no. 70 of SUMOC (the Superintendence of Money and Credit of the Bank of Brazil) established the so called multiple exchange rate regime and defined five degrees of essentiality for import goods, applicable to the industries. At the same time, it stimulated the internationalisation of the Brazilian industry by authorizing foreign firms investing in Brazil to bring in capital in the form of machines and equipment.

In 1955, the new president Juscelino Kubitscheck, launched the Instruction 113 of Sumoc, authorising the entrance of foreign investment through the import of equipment, without the need for exchange coverage. Although this policy benefited mainly the foreign investors (domestic industries could only do the same by financing it with foreign short run capital), it did not receive much criticism from the industrial federations. Since it activated some sectors of the Brazilian economy (construction, transport material, electric and electronic and the motor car industries) it created the possibility of many new businesses. Moreover, this instruction also gave bonus for exports of manufactured goods, which benefited the domestic industry.

Those new measures, conjugated with the Target Plan, broke the old alliance of the Vargas' government. As it was seen before the new triple alliance makes room for foreign investment in large scale, but without neglecting the domestic capital. Kubitscheck created three executive-groups with the participation of entrepreneurs. The new government structure became more complex and changes occurred in the way the industrialists acted: now they were integrating the executive-groups with government officials, isolated from the previous structure and its traditional political and regional pressures.

At the same time there were changes in the industrial federations and also in the National Confederation (CNI), as a result of leaderships of the Vargas era leaving the scene. Besides the fact that the state federations were now dominated by executives of the new industries of Rio de Janeiro and São Paulo, the parallel associations representing specific

sectors of the industry and representing them in the government executive-groups became increasingly important as well.

By the end of the Kubitscheck government, new types of associations become known, either representing foreign firms (American Chamber of Commerce) or political associations such as the Confederation of Producers Classes (Conclap) and the Institute of Research and Social Studies (IPES). This characterised an emergent anti-populist alliance, which together with the militaries of the Superior School of War (ESG), would start the military coupe d´Etat of 1964.

Although Kubitscheck was successful in attracting the industrialists to support his target plan, there were still some conflicts between the government, the official federations and the parallel associations, mostly concerning the exchange market and the presumed benefits to foreign capital created by Instruction 113.

After a period of uncertainty, which goes from the new government of President Jânio Quadros (1960) up to the beginning of the military regime in April 1964, everything changed. The military government intervened in all aspects of Brazilian politics, reducing the importance of the political class including the political capacity of the corporate structure of the industry to influence the macro economic policy.

The new role performed by the CNI, the industrial state federations and producers' trade unions, and the industrial parallel associations, was micro economic: they were called to discuss wage and price control with the government at the Price Control Council (CIP), as mentioned above. An enormous amount of associations proliferated since then, and became responsible for talking about costs and prices with the government. According to Diniz & Boschi,[25] up to 1987, 77% of the existing 227 parallel associations were created after 1964 (the beginning of the military regime).[26] They were specialised by the type of good or service being produced and some firms belonged to various associations.

Those authors attributed to the rapid industrialisation of the 1964-78 period the fact that 34% of the associations were created during those years. At the same time, they attributed to the progressive enlargement of the democratisation process of the 1979-87 period, the other 43% of the associations created. It is difficult to accept that this associative process would be the result of both the intense industrialisation without democracy during the first period and of

[25] op.cit., p. 29-30

[26] According to data from the National Confederation of Industry, there are at least 300 important parallel associations. Amore detailed research would be necessary to investigate the total number of them, since many of them are not registered (there is no need for that) either in their state federation or in the national confederation.

economic depression in the second period during the democratisation process. What really remains for the whole period is wage and price control agreements with decisive participation of the producers' parallel associations. Therefore, it is reasonable to presume that the proliferation phenomenon of parallel associations is linked to the way price control was enforced in the country.

As the previous section has shown, the associations met with government officials at the price control agency to discuss cost increases and to negotiate price readjustment.[27] So, the point at the end of this section goes beyond that made by Frischtak and summarised in the previous section. The price control in Brazil not only organised and stabilised the oligopoly prices contributing to reduce inflation, but also organised a structure for cartel functioning by making the Brazilian industrialists used to meet and talk about costs and prices.

According to Adam Smith in the Wealth of Nations:

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary"

In Brazil, the producers' associations did not have to go against the Adam Smith advise or even waste their time by talking amenities. The government made room for it: the law of price control and the action to enforce it strengthened and facilitated that meeting and the conversation on costs and prices. It is equally true that they continued to do so even after the end of price control in Brazil.

2.3. 'Stop and Go' and Recession – 1975-84

2.3.1. Politics and Economics during the 'Stop and Go' and Recession

In 1974 the "miracle age" was finished. The problems inherited from the previous years' policies begun to emerge, mainly due to: (i) the new and adverse external conditions caused by the sharp increase of oil prices. This more than doubled the value of imports, and with respect to exports, although it maintained its trend of growth, that was not enough to

[27] It is important to remember that the enforcement of wage control was only possible by the co-operation of industrial association mainly during the time of the miracle period when some shortage of skilled labour force was reported.

match the amount necessary to finance it; the result being an increase of foreign indebtedness by 37%; (ii) The external dependence of capital and intermediate goods for the industry due to the imbalance growth; (iii) and to inflation, which more than doubled in comparison to 1973.

After five years of GDP rates of growth not below 9%, the economy entered a phase when there were years of low rates of growth, with low inflation, as well as years of low rates of growth, with inflation speeding. Up to the first half of 1979, inflation was around a yearly rate of 40% and increasing, and the GDP was growing at a yearly rate around 6%. The Ministry of Finance decided then to prepare a very restrictive budget and to start a restricted monetary and credit policy in order to control inflation and the increasing imbalance of the country's external accounts.

Both the official diagnosis of demand pressure and the intention of a recessive policy that followed, received strong criticism and a public opinion campaign against it, mainly from the industrialists through their associations, federations and the CNI. They succeeded in provoking the substitution of the Minister of Finance Mário Henrique Simonsen for Antônio Delfim Netto. That was their mistake. Delfim Netto opposed this view of excess demand, and according to his diagnosis of cost inflation, there was a lack of supply, which could be fulfilled by activating a presumed idle capacity.

With the support of businessmen and the public opinion, the result was remarkable: GDP grew 8% and the industrial production 11%. However, the general price index grew 102% and the external accounts became totally unbalanced. The only way to escape from a debt-default, was to put the country in the worst recession Brazil ever experienced, with inflation reaching an astonishing rate of 200%. The main and good consequence of this economic disaster, led by Delfim Netto, who was previously greeted as the "magi of the economic miracle of the end of the sixties", was the end of the dictatorship of the military regime.

2.3.2. Competition and Antitrust during the 'Stop and Go' and Recession

There is not much to say about antitrust during this period. Price controls continued to be employed, although not as rigid as in the beginning. The CIP acted in a bureaucratic way, differently from the 1968-74 period, when fighting inflation was a government priority. At that time, the price control policy was successful and price deceleration was obtained. During the 1976/78 period, the empirical evidence shows that CIP was quite generous to the industrial sector. It allowed the plain readjustment of prices according to costs and eventual

productivity gains were appropriate by the firms. This conclusion came from the fact that the price readjustments allowed by CIP, for controlled sectors, were quite similar to those not subject to price control.[28]

Hence, the CIP continued to promote agreements among firms, without however causing any reduction in prices but only making them homogeneously high.

2.4. The New-Democratic Regime – Years of Uncertainty: 1984-94

2.4.1 Politics and Economics

The Brazilian experience along the 80's and the beginning of the 90's has been characterised by a general tendency towards stagnation associated with the persistence of deep macroeconomic unbalance — in particular, by high and increasing inflation.[29] This old economic disease, has even reached, in the post-80 period, an annual rate above 2,500% (1989), with the average situated around 580%, in contrast to the annual average below 40% of the 70's.

Notwithstanding the localised spells of growth, usually related to the expectation on the future behaviour of inflation, the economy has grown at an average of only 1,25% p.a., between 1980 and 1992. As a result the per capita income dropped 7.6% during the same period. Thus, along those years, a considerable deterioration of the living conditions of a significant share of the population has been verified, without evidence of overcoming the structural problems related to misery and social inequality.

More than simply reflecting the external unbalance (derived from the crisis related to the external debt) and the internal one (associated to the persisting public deficits and the continuation of extremely high inflationary levels), this period is characterised, in fact, by the exhaustion of the post war development strategy. This plan was based on the substitution of imports and on strong state intervention in productive activities and has oriented the Brazilian industrialisation process since the beginning of the 50's. The failure of the several attempts to stabilise the economy along the 80's can therefore be attributed, to a large extent, to the lack of acknowledgement of the need to promote structural changes that would lead to a new pattern of development. This new pattern should be less dependent upon state intervention and commercial protectionism. In addition to that, there was also a complete inability on the government side, to raise the political support required for the accomplishment of the reforms.

[28] Cf. Milton da Mata, op. cit. p. 948.
[29] The eighties is usually called in Brazil as a 'wasted decade'.

The long sequence of frustrated stabilisation plans during the 80's and the beginning of the 90's (five plans from 1986 until 1994) has produced a strong economic instability which led to a continuous tendency of inflationary acceleration. Inflation has failed to acquire an explosive character, such as occurred in other countries, solely due to the characteristics of the Brazilian monetary correction system (to a large extent guaranteed by the government itself). The financial system developed domestic substitutes for the currency (ultimately, also guaranteed by the government), that allowed a less painful coexistence (and, sometimes, an even profitable one) with the inflationary process for those who had access to such innovations. Nevertheless, excluding those moments when speculative behaviour led to the non-sustained growth of the demand (as, for example, along 1989), what is observed is a long run tendency to the increase of unemployment, especially during the second half of the decade. Moreover the investment rates have been reduced all along this period, which contributed to render future growing perspectives even more tenuous.

From 1993 on this picture begins to change. The economy starts to show signs of recovery, although still in the midst of the strong instability generated by still high inflation rates. This recovery was stimulated by a more favourable external situation — with the recovering of capital flows for the emergent markets, in a context of accentuated decreases in the international interest rates. Also contributed the surmounting of the political crisis derived from the president impeachment process. This growth already reflected the changes in the conduction of the economic policies, which characterised the turn of the 90's. In particular, it reflects the progressive removal of the mechanisms of protection against external competition and the steps being taken towards the deregulation and privatisation process. A new economic environment began to be outlined, leading the enterprises to incorporate, with an increasing tendency, the rationalisation of costs and productivity increase in their development strategies.

In February of 1994, the government took the first step for a new stabilisation program, the Real Plan, which would launch a new currency in July of the same year. The perspective was that no stabilisation process could succeed if it did not bear the structural changes that would eliminate the basic causes for the inflationary process. Such causes were generally deeply incorporated not only to the behaviour of the economic agents, but also to the very essence of the previous development model. Under this perspective, structural reforms acquired a crucial dimension for the consolidation of a new phase of sustained development. In the short run, stability should be sustained only through the adequate

handling of the instruments of monetary and exchange policies, maintaining the economic growth below its potential.

Competition and Antitrust

Once again, there is not much to say about antitrust in Brazil during this period. The CIP continued to exist but not really performing its presumed task of controlling prices. What could such a council do, with an inflation rate higher than 500% a year? It was put in action again after 1985 with the first of several stabilization programs, the "price-freezing" scheme of the so-called Cruzado Plan. All the stabilisation programs from 1985 up to 1994, with a price control scheme rapidly became a failure. It is useless to say anything about the effectiveness of CIP; at that time inflation reached a rate of 3.000%. Obviously, there was no room to talk about competition policies in that environment.

2.5 Democracy and Economic Reforms – 1994-2001

2.5.1. Politics and Economics

Brazil has gone through five economic plans to curb inflation during the restoration of democracy, including one where prices were frozen. In 1993, the new President Itamar Franco, assumed after the impeachment of President Collor de Mello. Following four successive changes of Finance Ministers, President Itamar Franco appointed Senator Fernando Henrique Cardoso to command the economic policy. His central proposal was to promote an adjustment of public accounts as a pre-requirement for any effort to reduce inflation. In a concrete manner, the implementation of the Programa de Ação Imediata (PAI - Program for Immediate Action) resulted in an ample cut-down of government expenses. At the same time steps were taken for the conclusion of agreements concerning the external debt and the renegotiations of state debts (a process which had already been dragging itself for almost five years). In December of 1993, the government disclosed to the public its stabilisation project. It should follow a sequence of pre-announced measures, where once again stood out the issue of budget equilibrium. This would be achieved through the creation of the Fundo Social de Emergência (FSE - Social Emergency Fund) and of a set of tributary measures. Therefore, this government's proposal presented a new approach (with respect to Brazil) against inflation, without price freezing or contract breaching.

Two new elements, revealed by the spell of growth observed along 1993, should be emphasised. The first aspect refers to the performance of the external sector, which was for the first time facing liberalisation of imports in a heated up economic conjuncture. Although

the full impact of this new situation had not yet entirely been felt (as the most recent external tariff reduction had only occurred in July 1993), the increase of over 20% of imports was absorbed with no major traumas. The exports, even not counting on the exchange policy, were maintained in expansion, (7.6% per year), although at decreasing rates. To this growth had contributed the greater diversification of the destiny markets of our exports, with the increase of flows to the countries of Mercosur, a common market among Brazil, Argentina, Uruguay and Paraguay. The surplus of the commercial balance had reached the end of the year at the comfortable figure of US$13,1 billion, which represented a decrease of 14.4% as compared to 1992.

The second aspect refers to the average industrial productivity increase. During the 1985/89 period, industrial productivity had remained practically stagnant, increasing at an average rate of 0.3% p.a. During the following four years (between 1990 and 1994), the rate of the productivity annual average growth moved to around 8% p.a., reflecting a reaction to the external openness. It was also reflecting the investments carried out in the rationalisation of the production and new methods of organisation and management. This increase in average productivity allowed the accommodation of real wage increases in the industrial sector; the counterpart, nevertheless, has been a practically null increase of employment along the year.

The introduction of the new currency on July 1, 1994 occurred without great surprises, since all the main measures had already been announced with sufficient anticipation, and were then effectively implemented

The performance of the Brazilian economy in 1995 revealed both progresses achieved and challenges that still had to be surmounted if the purpose was to consolidate stabilisation. In the first category are included the maintenance of inflation at a reduced rate, the recovering of the monetary policy as an effective means of achieving stabilisation, and the approval of the reforms related to the state monopoly and foreign capital. Concerning the second category, we may emphasise the fiscal issue, which presented a considerable deterioration along the year, and the difficulties in implementing the reforms which aimed at a permanent fiscal adjustment (tributary, administrative and Social Security reforms), besides the need to further develop the privatisation program.

After reaching its seventh year of existence, the Real Plan was consolidated as the most successful effort at stabilisation of the last thirty-one years. The inflation rates have declined from levels which were close to 50% a month in June 1994, to less than 4,5% a year at the beginning of 1998, without the need for any type of direct control of prices or contract

breaching between private agents. After the creation of the URV (a reference unit of value), linked to the exchange rate variations, an adjustment of relative prices was carried out in such a manner as to neutralise the inertial component of inflation and thus recover the confidence in the Brazilian currency. In order to guarantee the initial success of this strategy, the change in the economic environment has been fundamental. An ample commercial liberalisation forced competition with imported goods, restricting the internal price increases. It also impelled the national producers towards obtaining gains in productivity.

Along the first two years of the plan, we had a significant inflation reduction, mainly through the contention of the prices of the so-called tradable goods, that is, those that were more subject to foreign competition. In that period, the price increases of non-tradable goods, such as public tariffs and services, were considerably above the general inflation rates. As of the second semester of 1996, nevertheless, a larger convergence between the price variations of these two categories of goods was verified, a tendency which was intensely strengthened along 1997. Such tendency reflects the end of the old Brazilian rule of linking readjustment of prices (inclusive public goods and wages and other incomes) to the previous general price index.

On the other hand, the fast rhythm of this progress has been strongly directed by the orientation of the exchange policy. At the beginning of the program, there was a nominal valuation of the domestic currency, as a result of the decision of the Central Bank not to intervene directly on the exchange market. After the exchange crisis occurred in Mexico in March 1995, the exchange floating system was introduced within sliding bands established by the Central Bank, who then began to act directly in the exchange market. This resulted, in practice, in a mechanism of exchange devaluation effected with no determination of fixed periods nor link to the inflation rate, but adapted to the evolution of the relation between the internal and external prices and to international capital flows. In fact, since then the exchange policy has been allowing profits to the exporters, as the devaluation rates have been higher than the increase of wholesale industrial prices.

Another important factor to the success obtained in the struggle against inflation has been the adequate conduction of the monetary policy. Right after the implantation of the Real Plan, there was a considerable increase of the monetary aggregates, with the Central Bank approving the increase for the demand of currency resulting from the abrupt decrease of inflation and from the re-establishment of the credit channels. In October 1994, nevertheless, certain measures were taken towards the contention of credit, with the objective of holding

back the consumption increase that could result in a new inflationary explosion, as it was quite above the growing capacity of the production. These contracting measures, after additional restrictions in April 1995, began little by little to be softened as of the middle of that year, being further followed by a declining path of the interest rates until the end of October 1997. The intensification however of the crisis in the Asian Southeast showed the need for a more conservative monetary policy. Nevertheless, the prompt reaction of the economic policy to the external crisis, through the increase of internal interest rates and the announcement of a set of measures aiming at a fiscal adjustment in 1998, have guaranteed the continuation of the international investor's confidence in the success of the stabilisation program. This initiative allowed a return to the declining path of the interest rates as a target of the monetary policy, already as of December 1997.

The behaviour of production along this entire period has followed a path that is typical of a stabilisation program dependent on the exchange rate. After a strong increase of the internal demand and of the GDP, it became necessary to impose restrictions to consumption, which led to an intense deceleration of the activity level during the last three-quarters of 1995. Nevertheless, still at the end of that year, the levels of production and consumption began to show signs of recovery, which was intensified during 1996, pointing to the consolidation of the growth process in 1997, when the Asian crisis occurs. The investment rate at constant prices of 1990 reached the mark of 19.1% of the GDP during last year. For the average of the first four years of the Real, the GDP has grown around 4% per year.

Although still below the potential of Brazilian economy, this rhythm indicates the need for the creation of more solid conditions, from the point of view of the macroeconomic fundamentals, in order to allow development to return to its historical post-war average rates of growth. Significant steps have been taken in that direction, as for the example, through the constitutional changes which allowed breaking through the state monopoly on sectors such as oil, electrical energy and telecommunications, as well as the elimination of the distinction between national and foreign companies. The consolidation of stability in an environment of sustained development depends on more significant steps towards the control of the public deficit, on a permanent basis. It means the need of implementing additional reforms, such as the administrative reform and of the official system of Social Security. At the same time, the privatisation program requires a reduction in state intervention in the productive activities, which constitutes additional motivation to the resuming of investments in the infrastructure sectors, including through external capital. This way, there will be greater possibilities of

more adequately planning the public policies, among them the social policies, within a process of redefinition of the role of the State in the national life.

In any way, the stabilisation process has already produced, along the life period of the Real Plan, significant results on the situation of the less privileged among the population. The most important of them has been the increase in the consumer power of the poorest share, which did not possess means to protect itself against the corroding effects of inflation on their incomes. It is important to notice that, at the beginning of the Real Plan the minimum wage was 30% less than the cost of a cesta básica (basket of basic goods required by a family); nowadays is about 30% higher.

At the same time, after a temporary increase in the unemployment rates in 1995, increases have been registered both in the levels of employment as in those of average real salaries, in the main metropolitan Brazilian regions, along these years.

All along these years the Real Plan has survived from several world crises: starting with the Mexican crisis, followed by the Asian, Russian, Turkish and finally a daily Argentinean crisis. To deal with this situation, the Brazilian economic policy team has employed all the orthodox economic instruments, including high rates of interest, increase fiscal adjustment and the help of the International Monetary Fund. The first time it appeal to the IMF was during the Russian crisis when, in January of 1999, the Real was deeply devaluated -- around 50% at the end of the year. The second time was in August of 2001, during the most recent Argentinean crisis when the Real suffered another deep devaluation – 30% up to the end of September. Currently, the situation seems to be under control, aside from the last world crisis due to the terrorist attack to the United States.

2.5.1. Competition and Antitrust

Competition and Antitrust entered a new phase after the reforms put in practice in 1994. The Real Plan was not only a stabilisation plan, it was actually a plan of reform of the Brazilian economic, social and institutional structures. Stabilisation, economic opening to external competition, privatisation and regulatory agencies made it possible to enforce competition rules. And in 1994 then, the first step was taken with the enactment of the Law 8884. Among the innovations presented by the new diploma, was the control of mergers and the insertion of economics in a subject that was a field for lawyers since its very beginning.

The new competition law issued in June 1994 modified the previous stature in several ways: (i) it created the possibility of imposing performance commitments for the firms; (ii)

granted CADE administrative and financial autonomy; (iii) made it impossible to have administrative appeals on CADE decisions; (iv) transformed CADE into the final authority on merger decisions, created the performance commitment; and introduced the concept of dominant position in the market following the European doctrine; (v) instituted the definition of abusive increase of prices, as the increase of prices not justified by cost increases; (vi) defined the role of the Ministry of Finance as responsible for the economic report on mergers procedures and infringing conducts.[30]

According to the new law, The Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, the Secretariat for Economic Law (SDE) of the Ministry of Justice and the Administrative Council for Economic Defence (CADE), an independent body administratively linked to the Ministry of Justice, constitute the Brazilian antitrust authorities. The SEAE and SDE have analytical and investigative functions, while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.

Since then, there have been other changes both in the way those institutions used to act and in the law itself. In 1999 the SEAE/MF disclosed (Directive 39) a Guide for Economic Analysis of Mergers; in 2001 this Guide was modified and adapted to serve to SEAE/MF and SDE/MJ analysis (Joint-Directive 50 of SEAE and SDE). The Guide informs, in a clear and transparent way, procedures to be followed by both secretaries when analysing horizontal concentrations submitted to the antitrust authorities.

In 1999, two other important directives were issued: the first one granting SEAE the authority to institute fines for firms which deny, omit or delay the delivery of documents necessary to the analysis of cases (Directive SEAE no. 45); and the other one (Directive MF no. 305) enlarging the investigative power of SEAE in cases of illegal conducts..[31]

The most recent initiative of anti-cartel enforcement in Brazil focuses on the implementation of a leniency program, designed to encourage parties involved in antitrust conspiracies to co-operate with the authorities, providing them with evidence of illegal activities. In December 2000 then, the Federal Law 10.149 was enacted to give the Brazilian authorities the power to grant administrative amnesty associated with full, automatic criminal

[30] These changes were described in Lúcia Helena Salgado, A Economia Política da Ação Antitruste (São Paulo, Ed. Singular, 1997), pp. 175-85.

[31] For a full description of Directives no. 39, no. 45 and no. 305 see Claudio Monteiro Considera and Paulo Guilherme Corrêa, "Desenvolvimento econômico e política antitruste: razões para a adoção das portarias no. 39 e 45 da Seae e no. 305 do Ministério da Fazenda", SEAE, Working Paper, 3, November 1999.

immunity for conspirators co-operating with antitrust investigations.[32] This is a particularly important point, since the law in Brazil considers cartel activities both an administrative infringement of the economic order and a crime.

The leniency program together with the new powers of investigation, also introduced by the new law, has given Brazil's antitrust authorities additional tools to increase the detection and successful prosecution of illegal agreements among competitors.

The new statute establishes that SDE, on behalf of the Federative Republic of Brazil, may sign agreements giving full amnesty or reducing by one or two-thirds the penalty applicable to individuals or corporations that have 'infringed the economic order' and that choose to collaborate with the investigations. Such 'leniency agreements', as described by the Brazilian law, can only be signed if the SDE does not already have enough evidence to secure the conviction of the corporation or individual at the time the agreement is proposed. Thus, even if the antitrust authority is aware of the infringement of the economic order, a party may qualify for the leniency program provided the authority did not have sufficient evidence to secure a conviction.

Federal Law 10.149 establishes that one of the investigative agencies, the SDE, may enter into a leniency agreements with the offender without the need for prior approval by CADE. That provides participants in the leniency program with further legal certainty, since once the agreement is signed the antitrust authority must honour it. Therefore, there is no need for a recommendation of amnesty, which would be subject to a revision by CADE.

Another important point is that CADE is nevertheless responsible for formally declaring the final act of the leniency agreement: the reduction of the applicable penalty imposed on the offender (which might be up to 100 per cent, i.e. full amnesty). It is important to note that full amnesty is automatically granted when the antitrust authorities were previously unaware of the reported infringement to the economic order. Under other circumstances, the applicable penalty is reduced from one to two-thirds of the original penalty. The exact amount of reduction takes into consideration the effectiveness of the collaboration and the good faith of the offender in complying with the agreement.

In October 1999, Brazil and the United States signed the Mutual Legal Assistance Treaty to facilitate co-operation among their antitrust officials. This agreement was a

[32] For a full description of the Law see Claudio Considera, Paulo Corrêa and Frederico Guanais, "Building a leniency and amnesty policy: the Brazilian experience" in Global Competition Review, The International Journal of Competition Policy and Regulation", London, June/July 2001, pp. 44-46.

significant innovation and was ratified in December 2000 by the Brazilian Parliament.. Similarly, Brazil was also the first non-member country to confirm its association with the OECD's Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.

Since early 1999, however, SEAE and SDE started approximately 10 hard-core cartel investigations. Recent investigations have related to important industries, such as civil aviation, orange juice production, maritime transportation, aluminium and petrol stations. Investigations also focused on the effects of international hard core cartels, such as the lysine and vitamins conspiracies. Most of the success in finishing the investigations in order to send them to CADE has been due to the new investigative power introduced by Law 10.149. Up to now though there has been no application for the leniency program.

It is important to call attention to the new way of action of official and parallel producers' associations. With the end of the industrialisation directed by the State and the restoration of democracy in Brazil, the legislative became the central focus of the political process. Therefore and mainly after the Constitutional Congress elected in 1986, the entrepreneurs as such other relevant participants in the conflict of interests turned their focus to the National Congress.[33]

Although, there has still been some lobbying at the executive level, their main focus of intervention became the National Congress. The entrepreneurs' participation was diversified from the usual action through lobbies and other forms of influencing the congressman to include also direct representation in Congress. According to Diniz and Boschi the businessmen increased their participation from around 25% to 36% of chairs in Congress. Furthermore, the participation of entrepreneurs' entities authorised to act in Congress increased from 44% in the beginning the eighties to 67% in the beginning of the nineties'. During the 1993-95 period, 50% of the 120 new entities labelled to act in Congress were entrepreneurial entities.[34]

These entities influence these subject-commissions, through participating in the discussion of specific issues. Concerning antitrust law they act mainly at the Commission of Constitution and Justice (CCJ); the Commission of Consumer Defence, Environment and Minorities (CDCMM); and the Commission of Economy, Industry and Commerce (CEIC) in

[33] This change is well documented in Eli Diniz and Renato Boschi, op. cit., pp.49-81.
[34] Cf. Eli Diniz and Renato Boschi, op. cit., pp. 64-65.

the House of Representatives and the Commission of Economic Subjects (CAE) in the Senate and also at some Congressional Commissions of Investigation (CPI).

These conflict of interests has been impacting the antitrust policy enforcement. Some examples are:

1. The deposition of antitrust authorities before the CCJ and CAE concerning the AMBEV merger. This was provoked by associations of beer distributors and by Kaiser, an AMBEV competitor.
2. The three times deposition of the antitrust authorities before the CPI of the pharmaceutical industry concerning allegations of cartel formation and abusive price increases in the industry. It also investigates an alleged lack of law enforcement of the antitrust authorities.
3. Several depositions of antitrust authorities before CAE and CCJ concerning price abuses and anti-dumping policies.
4. Several depositions of antitrust authorities before CDCMM concerning abuses against consumers.
5. The CCJ is investigating the exclusivity agreement between Microsoft and its commercial representative in the city of Brasília, TBA Informatica LTDA.. This case has been under investigation by antitrust authorities since one of TBA's competitors filed a complaint with the Brazilian System for Competition Defence.
6. There is a request to open a CPI to investigate the orange cultivator sector's accusation of a cartel among the orange juice producers. The association of orange producers has provoked this.

The AMBEV case is a typical example of the clash of conflicting interests in antitrust enforcement.. The antitrust investigative authorities called for a structural measure – the selling of important actives in order to prevent AMBEV from becoming a monopolist in beer production. Most of the pressure for the approval of the merger, alleged the importance of having a large Brazilian brewery to compete in the foreign market and capable of exporting guaraná (a typical Brazilian soft drink). The dispute went on for several months as a political matter rather than an economic one. In the end, CADE imposed a very soft decision – the divestiture of an unimportant brand of beer (less than 5% of the market) and some behavioural remedies concerning employment and distribution. Only the ordered divestiture was really

followed and. AMBEV is now a profitable monopolist in beer production, while their competitors are experiencing losses in their accounts.

Another example is the pharmaceutical industry. After the CPI pressed by Congress and by the Minister of Health (a senator himself and the likely candidate of the current administration for the next presidential election), the government decided to reintroduce the price control of drugs.

This decision was against the antitrust authority position. SEAE, mainly, has been advocating a regulatory enforcement for this sector similar to those of many other countries. The State should have access to a drugs program for the very poor (people who is assisted by the government health care), reimbursement of medicine through private health care plans (optional) and the generic drugs program supported by the government. The result would be a free market for this industry, encouraging investment and competition. Up to now price control is causing only economic damages.[35] The production decreased around 10%, about 20% of employees at the industry have been fired, and some new plants announced to be installed in Brazil have been directed to another Latin American country.

Apparently, the economic difficulties Brazil has been fighting, has made the Brazilian people forget many lessons from the recent past. Populism and nationalism seems to be back threatening many institutional, economic and social progresses already reached.

3. The Present State of Arts and the Future

Currently, a working group is preparing, a new structure for the Brazilian System of Competition Defence, as determined by the President. It gathers, in a National Agency for Competition, the three institutions presently responsible for the enforcement of the Competition Law. The agency will be an independent body linked to either the Ministry of Finance or to the Ministry of Justice. CADE, although within in the agency, will keep its financial independence and have the final authority on the subject, unless one of the parties appeals to the courts. The directors of the agency will have a 4 years renewable mandate, while the counsellors of CADE will have a 5 year non- renewable mandate instead of a two year renewable one, as it is now.

At the same time an amendment of the Competition Law is being prepared, not only to adapt to the new conformation of the system, but also making it more agile and efficient with

[35] The only gain up to now seem to be political. The support for the Brazilian President and the vote intentions to the Ministry of Health both increased, presumably because of this measure.

respect to investigation procedures and mergers analysis. The amendment will establish among other issues, the following noticeable innovations:

1. The firms will have to file merger notifications ex-ante and not ex-post, as it is now. This will make time an ally for the antitrust authority and not for the firms, as it is in the present system. Sometimes firms delay the presentation of the necessary documents for the analysis of the case making it more difficult for the tribunal to adopt structural decisions. An examination of past decisions has shown that, at the maximum, CADE has imposed mainly behavioural remedies and only a few structural decisions. In the AMBEV case, as mentioned above, it imposed the divestiture of an inexpressive brand of beer in addition to certain behavioural remedies, some of them against the alleged efficiencies of the merger, and difficult to monitor.
2. There will be a clear separation between the investigation and judgement roles.
3. It establishes a new procedure for the analysis of the cases. Only cases clearly causing harm to competition will be argued at CADE, by the general director of the agency. If he decides not to and CADE, informed by a report from general director, evaluates in an oposite way those early terminated cases, it might call the case to be submitted and examined by the tribunal. There is an important change from the consumers perspective: the general director will act, in name of the people, as the promoter of competition. Nowadays, only the firms are allowed to defend their case in the tribunal.
4. As a consequence to CADE being thereafter responsible only for the cases really harmful to competition, it will be more rapid in judging the important cases.
5. Similarly, both CADE and the Agency will have more time to investigate illegal conducts, mainly hard core cartels.
6. Finally, it clarifies that the final decision on competition law comes from the antitrust authorities, even those related to regulated sectors, where there are specific agencies in charge.[36] They will have to work jointly in these matters.

The preliminary project has been open for public consultation for three months and will now be sent to Congress. The main criticisms concerned a presumed excessive power of

[36] See, Claudio M. Considera and Kélvia Albuquerque, "The Relationship Between Competition Policy and Regulation in the Brazilian Economy", SEAE, Working Paper 10, August 2001.

the general director and the consequent diminishing of the power of CADE. After many academic seminars, meetings with professionals of the field, articles in newspapers, this difficulty seems to be overcome. Actually the criticisms appeared to have been political ("I have not read the project, but I am against it"), rather than conceptual. It is still possible though, that the vested interests against having a strong and efficient institution might eventually influence to introduce changes in the original project, making a mess out of it. It has happened before to other agencies.

It is not a waste of time to remember that Competition Law shows its gains only in the long run. In the short run when the politicians make their personal political calculus, populism actions may be much more profitable for the people and usually gains support and are greeted. Competition Law, such as Democracy and civil rights in Brazil, are very infant institutions and might be at bay.

4. Political Economy Aspects of Competition Law and Policy in Brazil

The Brazilian political and economic history is embodied with elements that affect the definition and the enforcement of antitrust law and policy in the country. These elements are: a) the prevailing ideological climate; b) the expected net effects (costs and benefits) of the lobbying activity by large local groups; c) the existence of economic inefficiencies derived from the import substitution (IS) regime; and d) equity demands inherited from the import substitution (IS) regime.

During the recent Brazilian history, the ideological climate (social preferences towards the best state of the world) does not seem to have favoured competition as the rule of the economic game; the private sector did not take it as the core of the economic activity nor as an outward orientation as a constitutive part of business strategies. On the contrary, the ideological climate seems to have favoured "negotiation" among firms, state interventionism and an inward orientation. The strategy of *nationalism pro-development* turned "industrialisation" into a major national (public) goal, made import substitution the strategy to achieve it and protective tariffs, control of entry and subsidies among other economic policies oriented to foster it (the IS regime). Not surprisingly, until the end of the 80's, economic policy had basically favoured producer (especially industrial producer) welfare to the detriment of other social groups (specially consumers).

For several reasons, the expected net return of lobbying against competition enforcement tend to be high in Brazil for large local groups. First, economic policy has

reduced transaction costs of organising producer interest groups. Price control policy, which lasted up to 1994 – in particular – not only helped to bring together producers but – by proposing price formulas and institutionalising the role of the leader firm in oligopolistic markets – helped to unify producer's interests as well. As transaction costs of agreeing to submit a petition to the government is low, interest groups' incentive to support competition are less than the potential gains from seeking rents through political action.[37]

Second, economic policy has facilitated the access of producer groups in the structure of government. As is usually the executive branch – and not the legislative branch – the source of regulatory measures and therefore the target of lobbying in Brazil, economic policy reduced the costs of lobbying.[38] Third, measures controlling entry – specially those implemented by the Council of Industrial Development (*Conselho de Desenvolvimento Industrial)* – reduced the number of firms in many industrial sectors, generating smaller producer interest groups and, therefore, lower lobbying costs. Also, in smaller producer interest groups, each member gets a greater fraction of the benefit from reduced antitrust enforcement, increasing the return of the lobbying activity. Fourth, the ideological climate has traditionally disfavoured competition and consumer welfare, which increases the probability of success of lobbying and therefore its expected return. Finally, lobbying against competition policy will be protecting existing rents in a (transition) environment where other rents are supposed to vanish. As transition to a market economy reduces other sources of privileges, the "value" of this "residual" rents to large local groups tend to be higher than before, increasing the expected return of the lobbying activity.

Among several economic inefficiencies derived from the IS regime, at least two are more relevant for our analysis here. The first is that the relative high expected net return of the lobbying activity constitutes a disincentive to invest in alternative productive activities (even more when we compute LDC's traditional market failures that reduce the expected net return of productive investments, such as labour and financial market failures), which disfavours competition. A second consequence is inefficient entry, since domestic markets were insulated from foreign competition. Inefficient entry implies restructuring during the transition period, which increases the costs of competition and turns demand for "bigness" by large groups theoretically acceptable for the competition authority.

[37] [William Glade, Privatization in Rent Seeking Societies, 17 World Development 673, 680 (1989)].

[38] In fact, SEAE, until recently, was mainly composed by officials that were responsible for enforcing price controls in CIP for the last two decades. And this is not so uncommon: a great part of Clicac officials – the Panamanian antitrust agency – come from the previous Oficina de Precios.[For examples on the mechanism used by interest groups to obtain private benefits in Venezuela see Ana Julia Jatar, Competencia o Componenda, Economia Hoy, Oct. 5, 1993 at 6. And Peter Schuck and Robert E. Litan, Regulatory Reform in Peru, Reg. Jan-Feb 1987, at 36, for the Peruvian case].

As political and economic power have been concentrated, equity demands also seem to be high: not only for social objectives, such as employment (during IS regime labour-intensive sectors were disfavoured), but also for "fair" outcomes of the economic activity. Fairness is sometimes a tricky concept. For small business, whose interests were historically under-represented by economic policies toward IS, it will appear as a right to participate in the market. For consumers, as much of the costs of IS development strategy was born by this interest group (in the form of low quality- high price products), the transition to a market economy creates the expectation of "fairer" market outcomes (which is not equivalent to better product at lower prices). Groups representing equity demands may sometimes be easier to organise– such as the preservation of employment -- than those who favour competition and consumer welfare.

Considering the background described above, we would like to exam the following questions: a) What are the objectives of antitrust law and policy in Brazil? b) What should be the objectives of antitrust law and policy in Brazil? These are two quite distinct theoretical questions. The first question assumes a positive approach toward the analysis of competition policy. Antitrust law and policy objectives in Brazil are assessed not only by the exam of the provisions of the Brazilian antitrust law but also by: examining enforcement decisions by CADE (the adjudicative body); the prosecution initiatives taken by its sister agencies (SEAE and SDE); and, as far as possible, by identifying the effective winners and losers of antitrust actions.

The second question is normative: We try to discuss the trade-off between efficiency and equity (or, more generally efficiency and broader economic or social objectives). But instead of approaching the problem only theoretically – which would take us directly to the troublesome world of social preferences and social choices – we will focus on some likely consequences of considering broader economic or social objectives in the enforcement of antitrust law in Brazil.

4.1.What are the objectives of antitrust law and policy in Brazil?

4.1.1. Main provisions of the act

The stated goals of the Brazilian antitrust law -- Law no. 8884 of 1994 -- is the prevention and repression of infringements to the economic order -- as it is defined by the Brazilian Constitution – based on the principles of free enterprise; free competition, social role of private property, consumer protection and the repression of abuse of economic power.

Separate provisions prohibit anti-competitive conduct and anti-competitive mergers. There are neither general motivations– equivalent to the "promotion of common market", as in the EU law – neither explicit equity objectives. The constitutional concept of economic order – however – is vague enough to include among its objectives, full employment and the "national interest". "National interest", in particular, is a concept that will appear in the definition of the "rule of reason", as we will see later on. Until recently, there were no sector exemptions or exception to the law, as in the US, for instance.

According to the General Telecommunications Act of 1997, however, ANATEL – the regulatory agency – replaces SDE and SEAE in merger analysis and is allowed to take preliminary decisions on conduct cases, leaving CADE the role of a reviewing court. Decree no. 3327 of 2000 creates ANS – the regulatory agency of the health plan industry – and is even more extreme in that matter: It defines, as an attribute of the agency, the "regulation of the conditions of competition in the health plan industry", apparently, leaving no room for CADE or for any other antitrust body. A new draft for the Brazilian antitrust law is being discussed by the government, and both agencies are strongly opposing initiatives regarding any changes.[39] A recent decision taken by AGU (the Attorney General's Office) stipulates that the Brazilian Central Bank is in charge of controlling mergers and repressing anti-competitive conducts in the banking industry.

Article 20 of the antitrust law proscribes, as an infringement to the economic order, "(...) any act in any way intended or otherwise able to produce the effects listed below, even if such effects are not achieved (...)": a) to limit, restrain or in any way injure open competition or free enterprise; b) to control a relevant market of a certain product or service; c) to increase profits on a discretionary basis; and d) to abuse one's market control. Article 20 also excludes from violation, the control of a relevant market achieved by competitive means.

Article 21 specifically prohibits "impos[ing] abusive prices, or unreasonable increase of prices, of a product or service" . To characterise the imposition of abusive prices or unreasonable price increase, the article refers to: a) changes in costs or in the quality of the product; b) the price of the product that suffered a minor change; c) the price and its evolution in comparable competitive markets and d) the existence of an agreement that results in the price increase. Article 21 also prohibits "discontinuing production or other business activities without good cause"; "terminating or limiting business for unreasonable reasons" and

[39] It was suggested to Anatel that the prosecution and investigative functions could be shared with SDE/SEAE, which could be interesting at least for the fact that it introduces some institutional competition among government bodies.

"imposing unreasonable contractual terms or conditions". Article 21 is usually interpreted as an illustrative list, meaning that they are only unlawful if they produce the effects enumerated in Article 20.

Article 54 is usually seen as the merger control provision of the law. Since its language is broad enough to include all kinds of agreements and contracts, article 54 has also been interpreted as the "rule of reason" provision (efficiency defence) of the law. Paragraph 1 provides that a contract or transaction shall have the following four attributes in order to be approved: a) it increases productivity, improves product or service quality, increases efficiency or fosters technological or economic development; b) the resulting benefits are "evenly distributed" between merging parties and consumers; c) it does not eliminate "a substantial portion of the relevant market" and d) it is limited to acts that are necessary to obtain the alleged benefits. Paragraph 2, however, contains a special provision that permits mergers to be approved if they satisfy three out of four requirements and are "of national interest or otherwise required to the benefit of the Brazilian economy, provided that no damages are caused to end-consumers". Article 58 provides for CADE to establish "performance agreements" with firms seeking approval under article 54 in order to "guarantee the accomplishment of conditions" imposed for the approval of the operation. In particular it sets some parameters for the establishment of conditions, as paragraph 1 requires that "when defining the performance agreements, it will be taken into account the degree of international competition to which the firm is exposed to; changes in employment; among other relevant circumstances". And as it was mentioned above, although notification is compulsory it is not pre-merger.

CADE´s Commissioners are appointed by the President and approved by the Senate for a two year term. Reappointment is possible for one additional term. Article 30 provides that SDE must initiate an administrative proceeding at the request of the Senate or House of Representatives without first conducting a preliminary inquiry.

4.1.2. Enforcement

From 1994 to 2000, CADE examined approximately 850 conduct cases. Compared to years before 1994, it seems a remarkable achievement: From 1962 to 1975, CADE decided 11 proceedings and only one resulted in condemnation. Roughly half of the cases (484) were brought in 1997, when many matters left over from previous years were disposed of. In 1997, CADE dismissed approximately 99% of all conduct cases examined, most of which (290) were abusive pricing cases started in 1994, soon after the stabilisation plan (the Real Plan)

was launched. In 1998, only 8 cases – out of 112 -- were considered unlawful and, individually, abusive pricing cases still accounted for the major part of the cases examined by CADE. In 1999, a Congressional commission, the Medication Inquiry Commission, required SDE to begin administrative proceedings into high-price prescription drugs. The expectation was that, even after the devaluation of the Brazilian currency and considering that most of inputs are imported, these proceedings could lead to the prompt condemnation of firms that had performed high price increases. Accordingly, SDE has begun 53 abusive pricing proceedings involving more than 300 drugs, even though a solid jurisprudence developed by CADE would not support the initiative.

In 1999 CADE condemned what perhaps constituted the only hard-core cartel so far, the steel cartel case. The case consisted in a parallel increase in the prices of flat rolled steel products by the only three domestic producers, two of which linked by a 50% cross-ownership. Prices increased after representatives of the Brazilian Steel Institute – including representatives of the three firms -- met with officials of SEAE and reported that they would increase their prices by a certain amount on a specific day. As the top executives admitted to have met before SEAE's meeting, CADE considered that meeting the necessary "plus" in the case and concluded that the price increase was unlawful.

CADE has also condemned some soft-core cartel and non-cartel agreements. Soft-core cartel cases were mainly against professional associations (medical, accountants and others) for the publication of price-tables or the standardisation of service. Non-cartel agreements referred mainly to co-operative associations among doctors (Unimed's). Competitive concern came from the existence of an exclusivity requirement -- under which doctors who were members of Unimed were forbidden from contracting with other health plans – and from sometimes high Unimed's market share in specific towns.

CADE has also considered some vertical restraint and price discrimination cases, although they were few in number and most of them were considered lawful. Relevant exceptions are two tying cases in which CADE considered unlawful that the supply of maintenance services was conditioned to the sale of new machines and another case in which – following some of the recommendations issued by SEAE and SDE -- CADE considered unlawful exclusive dealing agreements between British Tobacco and some retail establishments.

Merger examination increased very quickly, as it became compulsory since 1994. During 1994-97, CADE reviewed 99 merger cases (46 only in 1997), a number that increased

to 144 in 1998, to 226 in 1999 and to more than 400 in 2000. In the 1994-96 period, 50% of the cases suffered some kind of intervention. This tendency, however, has changed since then. In 1997, CADE intervened in 19% of the mergers and since 1998 in less than 3%. The result suggests that merger control enforcement has been consistent with international benchmarks. Only two mergers were blocked between 1994-96, and none since 1996. Market-share has not been considered either a necessary or a sufficient condition in order to consider that a transaction will harm competition or reduce consumer welfare,[40] as the modern theories of industrial organisation would admit. There were several cases in which the HHI reached 10000 (the level that indicates monopoly) and nevertheless the merger was approved either with or without remedies[41]. For example, in the acquisition of Frumtost by Allergan, CADE authorized the deal without any remedy despite Frumtost being the monopolist in a specific therapeutic class and Allergan the only effective potential competitor (in fact, at the time the transaction was examined, Allergan was about to start marketing its own brand). On the other hand, in the case of two proposed joint-ventures in the Brazilian beer industry (Brahma-Miller and Antarctica-Anheuser Busch), CADE imposed several restrictions to the transactions based on its effects on potential competition – although there were minor changes in the HHI due to operation.[42]

Merger remedies have been, in general, behavioural, instead of structural ones. By June 2000, CADE reported to have applied 12 purely behavioural measures under its supervision and six other cases that mixed behavioural and structural remedies. Behavioural measures included social objectives – such as the development of a program to support the relocation of workers unemployed by the operation (Panex-Alcan- Alumínio Penedo – AC no. 79/1996); and broader economic objectives -- such as the establishment of annual export targets for long years (Grace and Crow Química – AC no. 24/1995 and), the establishment of annual investment levels (Antarctica-Anheuser Busch AC no. 83/1996) and the definition of price formulas (Kolynos-Colagate – AC no.27/1995). Competition-oriented measures were also adopted. For instance, in Ultrafértil-Fosfértil (AC no. 02/1994), CADE approved the merger under the condition that the company did not increase the proportion of sales to its own shareholders to the detriment of non-shareholders rivals. In a similar case (AC no.54/1995), CADE required Copesul " to do its best efforts" to avoid shortage of inputs to non-integrated rivals in the second generation level of the petrochemical industry.

[40] CADE 1998/99 Annual Report.
[41] Gesner Oliveira. President's Vote on the Ambev case. 2000. Available at CADE's Homepage
[42] See Correa, P. The Role of Merger Guidelines in the Enforcement of Antitrust Laws: The Anheuser Busch- Antarctica case. Journal of Latin American Competition Policy. December, 1998.

Only in a few cases structural measures were adopted. In the Metal Leve-Mahe, CADE required a divestiture of assets of one of the buyers that were used to manufacture piston covers. In the Kolynos-Colgate case, CADE conditioned the authorisation to the "suspension" of the use of Kolynos brand in Brazil for four years. In the AmBev case, the decision was conditioned to the divestiture of the "Bavaria" brand, among other requirements.

4.1.3.Comments

It seems fair to conclude that, from a strict legal point of view, the Brazilian antitrust law, is targeted to the prevention and the repression of economic power, to the detriment of other objectives, as these other goals are not clearly stated and exemptions are not contemplated in the text of the law. In fact, article 15 states that the law applies to all individuals and firms, either public or private, legally constituted or not; even if they operate in a legal-monopoly basis.

The absence of the expression of particular interests in the text of the law –either in the form of legal exemptions to antitrust or in the form of other objectives -- may have several non-exclusive explanations. First, although it has recently started to change (as shown before), interest groups in Brazil have traditionally lobbied the executive branch, not the legislative branch. Second, the absence of vigorous antitrust enforcement previous to 1994 reduced the threat of the new law and, therefore, the expected return of lobbying for changes in the new law. Third, although Brazil had started implementing important market-oriented reforms since 1990 (mainly trade liberalisation and privatisation) the ideological climate had not changed much.[43]

It is a bit more difficult to evaluate the motivations of recent exemptions. All of them were suggested by the executive branch (even those related to telecommunications or health plan industry). Who are the potential beneficiaries of those actions? In the banking industry it is reasonably clear that the private sector would be the winner while consumers of banking services – mainly credit consumers—would be the losers. The Brazilian Central Bank is poorly prepared to perform typical antitrust enforcement. A declared governmental objective is to restrict the Central Bank's attributes to the typical functions of the implementation of monetary policy, transferring to a new agency the prudential regulation role. In fact, negotiations between high-ranked-officials from the Central Bank and the antitrust bodies regarding the enforcement of the antitrust law was already in place and well developed when

[43] On the contrary, in 1994, when the law was discussed and approved, the country was governed by Mr. Itamar Franco a center-left politician with ideological taste closer to the IS model than to competition and international trade.

AGU's decision surprised both groups. AGU's decisions were provoked by career officials while antitrust negotiations were conducted by officials appointed by the president. This may suggest that: a) career officials were protecting their "market", avoiding to loose power to other agencies – while appointed official did not have a proper market to protect as they are appointed on a temporary basis; b) career officials were captured by the banks' interests – while appointed officials were not as they were recently nominated. The banking industry, on its behalf, was particularly interested in keeping competition policy under the Central Bank's responsibility at this point: Febraban (the association of banks) had been prosecuted by SDE for fixing the interest rate.

Evidence on antitrust enforcement suggests that antitrust policy in Brazil is achieving its traditional objectives of promoting competition and defending the public interest. There are some caveats, however. First, the 850 cases figure may be misleading. It encompasses several different decisions, including the review of decisions by SDE to close a preliminary investigation, the review of SDE's administrative proceedings and the review of appeals to cease and desist orders by SDE (under Article 52). It also overstates the antitrust law enforcement against anti-competitive conducts because half of the cases were brought in1997, an atypical year. Antitrust prosecution has put a strong emphasis on abusive pricing cases. Right after the Real Plan was launched, senior managers and businessman of large wholesale firms and shareholders of large department stores were criminally prosecuted for excessive price increases, under a different piece of legislation. Even though most of the abusive pricing cases were appropriately dismissed by CADE, SDE, under the Senate's requirement, had to start several new proceedings in 2000. Less than 10% of the cases brought between 1997-1998 were considered unlawful. Although CADE has condemned some soft-core cartels, only one hard core cartel case has been condemned after six years.[44] Other typical antitrust actions – against verticals and price discrimination -- were very few in number.

Second, merger control was not compulsory prior to 1994, which makes the increase in the number of mergers reviewed, once it became mandatory, a natural outcome. More importantly, there are serious doubts whether the proposed remedies protected the efficiency and consumer welfare or ended up been biased towards producer welfare (specially local producers) or towards social or other economic objectives, rather than efficiency. Behavioural remedies do not eliminate the incentive the merging firm has to behave anti-competitively;

[44] Australia however, last year condemned 9 cartels involving 15 companies, Canada condemned 25 companies in eight different industries and Italy condemned at least 9 conspiracies and collected more than US$ 600 million in fines from insurance companies and petroleum refining firms.

requires monitoring of its accomplishment and provides for "escape valves" (possible circumstances under which accomplishment is not required, such as changes in the macroeconomic environment).

Behaviour remedies are, therefore, not only difficult to monitor: they are difficult to enforce. In 1997, for example, CADE had to recognise that "(...) Ultrafertil/Fosfertil's marketing policies have increasingly concentrated in the supply of raw materials to its shareholders, with negative consequences to non-shareholdings companies (...)", as competitive conditions in the fertiliser industry changed. Several other measures – social and economic -- were just impossible to accomplish, as macroeconomic conditions have changed overtime.

Even when structural measures were adopted, some doubts about their efficacy to protect the public interest emerge. In the Kolynos-Colgate case, for example, rather than banning the use of a specific brand (Kolynos) for four years, which reduced consumer choices and did not guarantee competition in the Brazilian toothpaste industry, it might have been better to have required its divestiture to a competitor with a lower market-share. As the remedy requirement expires this year, the merging firms, which already control 65% of the Brazilian toothpaste industry, will be able to sell *Kolynos* again. It is worth noting that CADE offered the buying party a choice of three remedies, including the outright sale of the "Kolynos" brand and its "suspension", alternatives that involve different impacts on competition.

In the AmBev case, despite suggestions from SEAE and SDE to require the divestiture of all business assets related to one of the three leading beer brands (Antarctica, Brahma or Skol); and the recommendation from the Attorney's office of CADE to block the merger, the decision was for the approval with minimum requirements (the sale of a brand that represented less than 5% -- of a total market-share of the merged firm that varied between 65% to 90%-- among other measures of less impact). As Kaiser, owned by Coca-Cola, was opposing the merger and as one of the most repeated argument favouring the transaction was that the merger was of "national interest" since it would generate "national player"(champion) in the international beverage (and not only beer) industry, several observers suggested that the decision was more industrial policy than competition oriented. Finally, in both cases, remedies included -- to some extent -- the use of the merger firm's facilities by merger's rivals, which is not very usual out of the context of essential facility doctrine and natural monopoly discussion. AmBev must offer access to its distribution system and Colgate had to

make public offers of its production capacity in order to supply potential or effective competitors.

This caveats must not be interpreted as mere mistakes made by a developing country in its effort throughout the learning curve. Brazil antitrust experience has been appointed as one of the most successful among the new comers. According to Clark (2000), "(...) While there have been disagreements about the final result in few cases, most notably the recent AmBev case, any perceived shortcomings therein do not appear to have resulted from any fundamental error in analysis or judgment (...)".[45] Similarly, Kovacic (2000) found that "(...) In private conversations, each of the CADE commissioners revealed a sophisticated understanding of both technical details and broader considerations of competition policy analysis. Their backgrounds suggested why this was so. Three commissioners had doctorates in economics or finance. Two held doctoral degrees in law (the equivalent to a SJD degree in the United States) and had written their dissertations on topics involving competition policy. The sixth commissioner held an LL.M degree from Harvard Law School and was writing his SJD dissertation for a Brazilian university on merger policy. (...)".[46]

Antitrust enforcement is not the direct outcome of the maximisation of a hypothetical social welfare function by some benign bureaucrat. Even when bureaucrats are seeking to maximise the public (and not their own—private) interest, antitrust enforcement may be better understood in a broader context in which government activity is the outcome of competition between interest groups for access to the governmental power to redistribute wealth. Therefore, antitrust enforcement is dependent upon both the interests and political strength of all interested agents. By changing the relative strengths of different interest groups, the political equilibrium is altered and so is the antitrust enforcement. Because producer groups are often more compact, focused and their members are relatively more interested in action and because of the difficulty of organising large groups, producer groups tend to be more influential than consumer groups. Moreover, the stake of any particular consumer is normally too small to justify individual political investments, aggravating the free-riding problem and the effects of externalities derived from this type of investments.

As part of the government activities subject to competition between interest groups, antitrust enforcement in Brazil has probably been affected by the prevailing ideological climate; the expected net effects (costs and benefits) of the lobbying activity by large local

[45] Clark, J. "Competition Law and Policy Developments in Brazil. OECD Journal of Competition Law and Policy. Vol. 2, no.3, 2000.
[46] Kovacic, W. "Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy". St. John's Law Review, Vol 74: 361-405, 2000.

groups; the economic inefficiencies derived form the IS regime; and by equity demands inherited from the import substitution (IS) regime. The ideological climate and equity demands may have favoured more interventionist actions, such as the abusive pricing initiatives and some intrusive behavioural remedies (defining investment plans or social objectives). High expected net returns from lobbying activities and some inefficiencies inherited from the past helps to explain a more lenient approach toward producer welfare. All this may be accentuated, of course, by institutional design, as it may alter unevenly the costs of lobbying among different interest groups or it may create different incentives for the decision-maker. Correa (2001)[47] and Clark (2001)[48] have addressed some of these issues. Both recognise, for instance, that post-merger control increases the costs of the adoption of structural remedies and that a short term mandate coupled with the possibility of reappointment may introduce some bias toward more supportive interest groups.

These are reasons that help to explain why although antitrust enforcement in Brazil has been very active since 1994, it has emphasised abusive pricing cases to the detriment of hard-core cartels, verticals or price discrimination and why merger remedies seemed sometimes to have favoured local producers to the detriment of consumers and of the public in general. Political economy variables, therefore, help to explain why although antitrust policy in Brazil has been in place since 1994, it was not always focused on the traditional efficiency –consumer welfare objectives.

4.2. What should be the objectives of antitrust law and policy in Brazil?

Considering the ideological climate; the high expected net effects of the lobbying activity by large local groups; the economic inefficiencies derived form the IS regime; and the equity demands inherited from the import substitution (IS) regime, it seems unlikely that competition policy would ever prevail over other economic and social objectives when the trade-off is incorporated in the antitrust law. In fact this has been more or less so even when antitrust law did not give much room for objectives other than competition and consumer welfare. It does not mean that we believe that competition or consumer welfare has always to be the most important objective of the societies. Of course not. Social cohesion in many circumstances may require some lenient approach towards competition. But at least when the institutional characteristics are as those discussed above, the choice between efficiency (or

[47] Correa, P. " Bureaucratic decisions, representation of interests and the government 's draft proposal for the creation of the National Agency for Consumer Protection and Competition Policy". Paper Presented at OECD-SEAE-SDE-CADE Seminar. Brasília, May, 2001)
[48] Clark, John, op.cit.

consumer welfare) and other economic or social objective should not be made by the antitrust authority: It should be made by some other institution say, for instance, Congress.

Congressional decisions may have many advantages in this case, as it increases the lobbying costs; the decision makers are submitted to permanent evaluation (better accountability) and they are usually more transparent (as Congress is usually better monitored by civil society than antitrust agencies). This may be particularly important in Latin American countries where, by many standards, policy making tend to be less visible, more closed and centralised; dominated by high level administrators in the executive branch, many of them not facing electoral review and with indeterminate tenure in office.[49]

For instance, equity demand (demand for fairer market outcomes) and the ideological climate (social preferences towards state intervention) seem to have been the main motivation behind the recent decision of the Brazilian government to control prescription drug prices. Freezing drug prices while input prices (mainly import prices) are increasing (due to Brazilian exchange rate devaluation) in the very short run can keep consumption levels unchanged. Social preferences toward this kind of policy can be inferred by several means, among which, a significant improvement in the rate of president's approval in the national pools and supportive speeches made by congressman either from the opposition or linked to the government. The price control policy however, was implemented through a new specific law and not through antitrust, as was first intended by some policy-makers. The risk of controlling prices through antitrust has already been recognised by ABA Antitrust Law Section's Special Committee on International Antitrust, when commenting on competition policies inaugurated in Eastern Europe and other emergent market economies: "(...) the abuse of dominance law could, if applied unwisely, effectively restore price control under the guise of antitrust, thus taking back the freedom and rewards that market gives (...)".[50] It is important to recognize, however, that avoiding the misuse of antitrust, although positive in itself, has cost a lot of political capital for the Brazilian antitrust authorities, as they had not only to oppose Congress, part of the government and the generalised public opinion , but also to be sympathetic to drug firms (by dismissing or merely closing unsustainable administrative proceedings into high prices).

[49] Merilee S. Grindle, The New Political Economy. World Bank Working Paper No. 304, 1989.
[50] Introduction and Recommendations of ABA Antitrust Law Section's Special Committee on International Antitrust, 62 Antitrust and Trade Regulation Rep. (BNA) no.1551, at 171 (Feb 6. 1992).