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I. THE RECENT BRAZILIAN ECONOMIC DEVELOPMENT: FROM PRICE CONTROL TO REGULATORY RULES AND COMPETITION POLICY¹

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1. Introduction

Brazil and Latin America as a whole have a common history of authoritarian interference in all aspects of economic and political life. During the past century, the economic and political market in Latin American countries has functioned on a very restricted way, with the exception of the period of political freedom experienced from the end of World War II through the beginning of the sixties.⁴ During that time, the democratic virtues that defeated Hitler's tyranny weighted in and became examples to be followed. Overall, the Brazilian experience of economic freedom in the marketplace is relatively new and its full implementation only had effect from 1994 on. Therefore, since competition policy and democracy are solely possible in a free market, we might say both are infant institutions in Brazil.

This paper traces the historical background of building a competition law in Brazil linking it with economics and politics.⁵ It highlights that the Brazilian political and economic history is embodied with elements that affect the definition and the enforcement of antitrust law and policy in Brazil. These elements are: 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 favoured competition as the rule of the economic game. The private sector did not take it as the core of the economic activity, as an outward orientation or 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 (import substitution). "Industrialisation" in a context such as this, was therefore a major national (public) goal and economic policy consistently favoured producers (especially the industrial producer) welfare to the detriment of other social groups (especially consumers).

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

2.1 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.⁶

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 1949.⁷

In 1956, Juscelino Kubitschek 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 sectorised 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 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, Kubitschek 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, Kubitschek 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).⁸

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.⁹

The end of Kubitschek 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 led 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.

2.2 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 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 the derived demand in the non-durable consumer goods.¹⁰

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 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 n°. 24.150 and 'the Water Code. This action was amplified during the fifties by the promulgation of the Laws n°. 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.¹¹

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 n°. 5 and its attributions established by Delegated Law n°. 4, both on 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 n°. 4.137 of 10th of September of 1962. This law regulated the abuses of economic power, such as disloyal competition, abusive speculation, collusion, agreements with competitors, abusive price increases, etc.

3. The Military Governments – 1964-1984

3.1 Politics and Economics during the 'Miracle'- 1964-74

Inflation was a common fact throughout the Brazilian industrialisation process. 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 in 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'état 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 1967.¹²

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.¹³

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.¹⁴ 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.

3.2 Competition and Antitrust during the 'miracle'- 1964-74

3.2.1 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.¹⁵

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 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.¹⁶

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 n°. 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 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.¹⁷

After an analysis of other countries' experience, with emphasis in the French system¹⁸, 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,¹⁹ 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.

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 of price signalling, CIP action reduces the degree of uncertainty of the oligopoly market and organises it contributing to crystallise a certain market structure."²⁰

"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 not 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 other 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 a 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."²¹

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 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?²² 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 researchers, professors and lawyers) active in Brazil.²³

3.2.2 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.²⁴ 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 courts²⁵.

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 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 authorising 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.

The end of the Kubitscheck government knows new types of associations 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,²⁶ up to 1987, 77% of the existing 227 parallel associations were created after 1964 (the beginning of the military regime).²⁷ 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 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.²⁸ 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.

3.3 Stop and Go' and Recession – 1975-84

3.3.1 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 began 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 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.

3.3.2 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.²⁹

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

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

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.³⁰ 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.

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.

4.2 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 stabilisation 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.

5. Democracy and Economic Reforms – 1994-2001

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 the 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.

5.2 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, were 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 statute 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.³¹

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.³²

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 immunity for conspirators co-operating with antitrust investigations.³³ 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 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.³⁴

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 businesspeople 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.³⁵

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 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 have 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 depositions 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 (with less than 5% of market share) 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 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 are assisted by the government health care system), 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 has caused only economic damages. 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 its recent past. Populism and nationalism seem to be back threatening many institutional, economic and social progresses already reached.

6. 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 or 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 tends 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.³⁶

Second, economic policy has facilitated the access of producer groups in the structure of government. As it 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.³⁷ 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.

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 ideological climate; the high expected net effects of the lobbying activity by large local groups; the economic inefficiencies derived from 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 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.³⁸

7. Concluding Remarks

In the past two years, at the request of President Fernando Henrique Cardoso, a working group prepared a draft-bill with a new structure for the Brazilian System for Competition Defense. Among other important changes, the new model gathers SEAE, SDE and CADE into the National Agency for Competition. This agency will be an independent body linked to either the Ministry of Finance or to the

Ministry of Justice, and CADE, although within the same structure, will keep its financial independence and will be the final authority, unless one of the parties appeals to the courts. The director of the agency will have a four-year renewable mandate, while the counsellors of CADE will have a five-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 to adapt to the new conformation of the system and make it more agile and efficient. This introduces also new important features to the law, mainly: pre-merger notification system, early termination for simple cases, the participation of prosecutors in the trial representing consumers' interests and the definition of cartel as a per se injury.

The draft-bill was open for public consultation and after most of the modifications were incorporated it was sent back to the Civil Cabinet, from where it should be dispatched to Congress. Currently it is uncertain when, if ever, that will happen. However, whether or not the agency is created and the amendments to the Law are adopted, will in the end determine the future of Competition Law in Brazil.

NOTES

- 1 This paper was prepared for the February 2002 meeting of OECD Global Forum. It is substantially based on a previous version presented at the Fordham Conference on Competition Policy, NY, October 2001. The views presented here are the authors' own and should not be attributed to the Brazilian Government. The authors thank Mariana Tavares de Araujo for her helpful comments.
- 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
- 3 Professor of economics at IBMEC and at Universidade Cândido Mendes, and Deputy-Secretary for Economic Monitoring of the Ministry of Finance - Brazil
- 4 It is worth noticing that, according to José Murilo de Carvalho in **Cidadania no Brasil** (Rio de Janeiro: Civilização Brasileira, 2001), when President Fernando Henrique Cardoso leaves office in 2003, he will be the second civilian president democratically elected, that in 75 years of the Brazilian republican history, will have delivered its post to another civilian president also democratically elected. The other one was President Juscelino Kubitschek in 1960.
- 5 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).
- 6 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).
- 7 Data from Joel Bergsman, **Brazil – Industrialisation and Trade Policies** (Oxford, Oxford University Press, 1970), p. 92.
- 8 UN/ECLAC, **External Financing in Latin America** (New York, UN, 1965)
- 9 Carlos Lessa, "Fifteen Years of Economic Policy in Brazil", in **UN/ECLA Economic Bulletin for Latin America**, XI (Dec.1964).
- 10 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).
- 11 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.
- 12 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).
- 13 In 1991, when the privatisation started, the government owned more than 800 firms in all sectors of the economy; the large majority of them created or incorporated during the military government.
- 14 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.

- 15 Cf. Maria da Conceição Tavares, Luiz Otávio Façanha and Mário Luiz Possas, “Estrutura Industrial e Empresas Líderes” (Rio de Janeiro, FINEP, 1978), mimeo.
- 16 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
- 17 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.
- 18 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
- 19 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)
- 20 C. R. Frischtak, **op.cit.** p.176.
- 21 Claudio Frischtak, **op.cit.**, pp. 176-77.
- 22 Cf. Milton da Mata, **op.cit.** p. 917, according to the press, only four firms were punished by CADE for abuse of economic power.
- 23 This is not a joke. During 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 could have asked them ‘nice to whom?’.
- 24 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.
- 25 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)
- 26 **op.cit.**, p. 29-30
- 27 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.
- 28 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.
- 29 Cf. Milton da Mata, **op. cit.** p. 948.
- 30 The eighties are usually called in Brazil as a ‘wasted decade’.

- 31 These changes were described in Lúcia Helena Salgado, **A Economia Política da Ação Antitruste** (São Paulo, Ed. Singular, 1997), pp. 175-85.
- 32 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.
- 33 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.
- 34 This change is well documented in Eli Diniz and Renato Boschi, *op. cit.*, pp.49-81.
- 35 Cf. Eli Diniz and Renato Boschi, *op. cit.*, pp. 64-65.
- 36 William Glade, *Privatisation in Rent Seeking Societies*, 17 *World Development* 673, 680 (1989).
- 37 In fact, officials that were responsible for enforcing price controls in CIP for the last two decades mainly composed SEAE, until recently. And this is not so uncommon: a great part of Clitac 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.
- 38 Merilee S. Grindle, *The New Political Economy*, World Bank Working Paper, No. 304, 1989.

II. PERSPECTIVES FOR BRAZIL-OECD TECHNICAL COOPERATION IN COMPETITION ISSUES¹

1. Introduction

Brazil has had an antitrust law since 1962. However, like other developing countries, this law remained unused for many years due to some well known reasons (e.g. from the early thirties to the late eighties, Brazilian economic growth was based on import substitution industrialization). This implied a protectionist environment in which there was no room for competition policy issues on the public agenda. In 1994, a new competition law substituted the previous statute in a context of broad economic reforms, such as trade liberalization, regulatory reform, and macroeconomic stabilization.

Although the Brazilian domestic economy is still the basis for its economic growth, the country has received a substantial amount of foreign investment since the adjustment reforms in the last decade. Foreign capital has played a significant and diversified role in fields such as mining, metallurgy, telecommunications, computers, chemicals and petrochemicals, pharmaceuticals, capital goods and vehicles; and in the year 2000 Foreign Direct Investment in Brazil amounted to US\$32.7 billion. Currently, four of Brazil's top ten corporations are foreign-based, and twelve of the twenty-five biggest companies are multinationals.

Brazil has controlled inflation since 1994 and has made significant progress in containing fiscal deficits and in order to ensure long term growth. A brief prepared for President George W. Bush in the beginning of his term last year indicated that Brazil has over half of South America GDP and population. Regarding the size of its economy, it was estimated that it is approximately twice the size of Russia and India and is comparable to China's economy. Furthermore, Brazil is the second largest market in the world for executive jets, helicopters, cellular telephones and fax machines; fourth for refrigerators; fifth for compact discs; and ranks third for soft drinks. Moreover, in 2001, Brazil became the fifth country in the world with purchase power parity of over U.S. \$ 1 trillion

The Brazilian System for Competition Defense is composed by 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 Defense (CADE), an independent body administratively linked to the Ministry of Justice. SEAE and SDE have analytical and investigative functions while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.

The Secretariat for Economic Monitoring is divided into five general departments – general-co-ordinations, four of which reflect the major divisions of the economy: The General-Co-ordination for Industrial Products (COGPI); the General-Co-ordination for Agricultural and Agro-industrial Products (COGPA); the General-Co-ordination for Public Services and Infrastructure (COGSI) and the General-Co-ordination for Commerce and Services Affairs (COGSE). The fifth one, created during the reform of the Secretariat in 2000, is the Department for Competition Defense (COGDC), which is responsible for the investigation of

¹ Paper prepared by Cleveland Prates Teixeira (General Coordinator for Anti-Cartel Enforcement), Marcelo de Matos Ramos (General Coordinator for Commerce and Services Affairs), Luís Henrique D'Andrea (Coordinator for Information Technology), Mariana Tavares de Araújo (Advisor at Seae) and Kélvia Albuquerque (Advisor at Seae).

cartels. COGDC has a particular structure within the agency to better perform its attributions; it is decentralized into three sub-divisions in Brasília, Rio de Janeiro and São Paulo.

SEAE's antitrust staff is predominantly comprised by economists (45); there are also six engineers; four attorneys; four professionals with degrees in agriculture, three in international relations; two with major in business; and seven from different academic backgrounds.

With the enactment of the new competition law in 1994, a strong emphasis was given to merger control, to capacity building and to the diffusion of competition values throughout the society. However, repression to anti-competitive conducts, and anti-cartel enforcement, in particular, was relatively neglected. Since 1999, important initiatives taken by antitrust authorities were related to anti-cartel enforcement. Efforts were also made to increase efficiency and to improve transparency of economic analysis. Measures to reduce budgetary limits were also introduced.

In the present economic context, the repression against anticompetitive practices is the main challenge faced by the Brazilian antitrust authorities. As so, priority has been dedicated to hard core cartel cases, either national or international. In this last case, the main task is to identify how collusion among multinationals affected the Brazilian economy and consumers. Generally accepted as the most egregious antitrust violation, hard core cartels tend to be one of the main obstacles to economic development in developing countries and, therefore, can not be tolerated.

In order to prioritize anti-cartel enforcement, among all the anticompetitive practices, SEAE has brought out many legal improvements during 1999. The first initiative taken by SEAE was the adoption of legal measures that increased its capacity and powers to search firms and to require private documents during the enforcement of the Brazilian Antitrust Law (Law N° 8884/94). The second important initiative was an institutional restructuring that released resources for the creation of three new units, in Brasília, Rio de Janeiro and São Paulo, as mentioned above, entirely devoted to anti-cartel investigation.

2. Possibilities of international cooperation between Brazil and the OECD

Brazil and OECD (or OECD member countries) have not yet fully explored their potential for international cooperation in antitrust.

Among the main initiatives of the ongoing OECD-Brazil cooperation program, it is worth mentioning Mr. John Clark's visit in 1999, to discuss specific competition issues with the staff of SEAE, SDE and CADE, which resulted in his report "Competition Policy and Regulatory Reform in Brazil"; a second visit in the following year to advise on the legal framework of the draft-bill proposing a new structure for the Brazilian System for Competition Defense and several amendments to the current law; the organization in 2001 of two international seminars; the first in May, in collaboration with SEAE, SDE and CADE on the topic "Enhancing Competition Policy in Brazil: New Legislation and Policies"; and a second one in December of the same year, on Merger Analysis for the staff of the three agencies. In addition, since the beginning of 2001, SEAE has been granted access to the exclusive OLISNet/OECD data bank, which allows SEAE's personnel to research restricted technical documents. Moreover, through the OECD, SEAE has developed a very close relationship with US authorities both from the Federal Trade Commission and the Department of Justice. These antitrust authorities have frequently shared their views on specific issues, and members of the staff of both US agencies have been to Brazil on several occasions as invited speakers in seminars held in the country.

Brazil's long experience both in bilateral and in multilateral international cooperation has shown that, more often than not, previous informal exchanges pave the way for a solid formal relationship

between cooperating parties. It is clear that acting in such a way authorities of both sides are able to discuss their strategies and fine-tune their ideas, drawing more realistic guidelines that lead to successful medium and long term international cooperation projects. Hence, although various exchanges with OECD personnel during the last three years have been highly regarded by SEAE as a first step to build a sustainable plan for cooperation, it may be the time to consolidate formal experiences in activities that can be better planned, periodically assessed and reevaluated.

After consulting its five departments, SEAE prepared the following preliminary list proposing a number of topics that could be supported by an international cooperation agreement, either through seminars, conferences, foreign advisors or other programs:

a) Regulated Markets

- Open-access in regulated markets (oil, electricity, telecom etc.);
- Competition in regulated sectors;
- Regulatory models for sewage services that would create incentives for competition in the sector;
- Efficient regulatory models for the energy sector that would create incentives for the firms to invest;
- Proposed models for integration of the transportation sector which could result on a more efficient market and lower tariffs.

b) New Economy Markets

- The interface of antitrust and intellectual property;
- Impact of digital convergence in antitrust analysis.

c) Retail Markets

- Logistics and conditions of entry;
- Identification of Geographic Relevant Markets.

d) Topics in Merger Control

- Appropriate techniques to analyze conglomerate mergers;
- Alternative forms to identify market-power;
- The use of econometric models on the definition of relevant markets;
- Design of Remedies.

e) Antitrust in the Financial Services

- Prudential Regulation vs. Antitrust;
- Relevant Market Identification in Financial Services.

f) Anti-cartel Enforcement

- Advise on interrogation procedures;
- Training on methods for search and seizure of documents during raids;
- Suggested measures to guarantee effectiveness of leniency programs.

III. BRAZILIAN ACTUAL EXPERIENCES IN INTERNATIONAL COOPERATION IN CARTEL CASES¹

1. Introduction

Brazilian experience in international cooperation in cartel cases is relatively recent. Two basic reasons, intrinsically linked, explain this fact. stipulate

First, it should be mentioned that only after 1994 an effective antitrust policy has been possible in Brazil. The implementation of the "Real Plan", in this year, yielded inflation control through the functioning of free market forces, gradual opening of the economy and privatization of state owned assets. These set of reforms actually made competition enforcement possible, eliminating the scenario of price control, trade barriers, and government enterprises, which hindered its effective application in the past. A new competition law was also enacted, law n.º 8.884, which converted the Administrative Council for Economic Defense (CADE), the Brazilian administrative antitrust Tribunal, into an independent agency², substantially enhancing Brazilian Competition System's³ effectiveness thereafter.

The second reason is that the opening of the Brazilian economy, a relatively recent phenomenon, launched in the 1990's, elucidated the need of international antitrust cooperation. The development of international commercial operations increased the impacts of foreign antitrust illegal conducts on Brazilian consumers. This actually resulted from the whole process of globalization. Nowadays, with world-wide transactions of firms, eventual collusive practices tend also to have global impacts.

On the other hand, within the context of market globalization, the constant improvement of investigation techniques in foreign agencies, with its consequent effects on antitrust enforcement, also represented an important factor of cooperation development recently observed. When an agency in one part of the world sues one specific firm, other foreign agencies are indirectly warned of possible impacts in their jurisdictions. This is what happened in the vitamins and lysine cartel case, as will be further described. Less developed antitrust agencies benefit from prosecutions undertaken by more developed agencies. This mechanism actually corresponds to a self inducing antitrust enhancement process where one prosecution increases the probability of further ones, rising, consequently, the cost of cartel agreements.

As a result of the above mentioned aspects, only at the end of the 1990's cartel cooperation initiatives were undertaken in Brazil. We can separate these initiatives into two basic categories: the formal ones and the informal ones. We classified formal cooperation initiatives as those derived from agreements

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² Competition enforcement in Brazil was inaugurated in 1962 (with the creation of the Administrative Council for Economic Defense - CADE).

³ The Brazilian Competition System is composed by three institutions: the Secretariat for Economic Monitoring (Seae), the Secretary for Economic Law (SDE), and the Administrative Council for Economic Defense (CADE). The first agency is administratively linked to the Ministry of Finance while the other ones are subordinated to the Ministry of Justice. Cartel cases are brought upon SDE, which, jointly with Seae, conducts the investigations. SDE concludes its technical opinion enforcing legal aspects, while Seae conducts its technical opinion stressing economic issues. Seae's advice with respect to cartels is not mandatory. CADE, an administrative tribunal, renders the judgment on the cases after analyzing the technical opinions of the other agencies.

signed between Brazil and other countries. Informal cooperation, defined by exclusion, were considered any other kind of technical support.

2. Formal International Cooperation

The most important existing formal agreement regarding cooperation between competition authorities in Brazil was signed in October 1999 with the Government of the United States of America. This agreement aims at facilitating the exchange of information among antitrust officials in both countries. Nevertheless, it still has not been ratified by the Brazilian Congress. Consequently, all the technical assistance between Brazil and the United States in anti-cartel enforcement still remains informal.

The agreement specifies certain requirements to be followed by both national antitrust authorities⁴ as well as a number of possibilities regarding technical cooperation and enforcement activities, such as:

1. prompt notification to the other party with respect to the enforcement activities that: (a) are relevant to enforcement activities of the other Party; (b) involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party; (c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states; (d) involve conduct believed to have been required, encouraged, or approved by the other Party; (e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or (f) involve the seeking of information located in the territory of the other Party.
2. The consideration of coordination of enforcement activities with regard to related matters,
3. the possibility of requesting consultations regarding any matter related to the agreement,
4. the option to require, after prior consultation, the other party's competition authorities to initiate appropriate enforcement activities whenever a party believes that anticompetitive practices carried out in the territory of the other adversely affects its important interests.
5. The following technical cooperation activities, within the competitions' agencies reasonably available resources: exchanges of information to the extent compatible with their respective laws and important interests; exchanges of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate.

It should be finally pointed out that eventhough the agreement has not yet entered into force, its simple existence and expectation of future validity has already proved to be profitable. All the informal exchange

⁴ (i) for Brazil, the Administrative Council for Economic Defense (CADE) and the Secretariat for Economic Law Enforcement (SDE) in the Ministry of Justice; the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance; (ii) for the United States of America, the United States Department of Justice and the Federal Trade Commission;

of informations and technical assistance between Brazil and the United States is actually facilitated by the fact that competition authorities have already agreed upon common standards of cooperation. Brazilian authorities believe that Congress endorsement will occur in the near future.

3. Informal International Cooperation

Despite the signature of the international agreement between Brazilian and North American Antitrust authorities, the most valuable source of international cooperation continues being informal. Particularly in three important recent cartel cases, this type of technical assistance proved to be essential.

The first one is the Lysine International Cartel. Two months before the signature of the above mentioned agreement, in September 1999, in the International Cartel Workshop in Washington - DC, the U.S. Department of Justice presented in detail their work in the Lysine International Cartel Case. After the case went to trial, the available material became public, what allowed the disclosure of relevant information to Brazilian antitrust officials.

Transcripts of Lysine Cartel meetings sent to Brazilian authorities showed that Latin America and Brazil were included in the world market division set by the international cartel. Once the national industry did not produce lysine, Brazilian consumers became subjugated to the exporters' decisions, as there were no available choices. Consequently, prices in Brazil became artificially higher. Brazilian subsidiaries of Lysine producers are being prosecuted at the present moment. The case is in SDE and will be further sent to CADE for judgement.

The second case, the Vitamins International Cartel Case, was also discovered by the U.S. Department of Justice. Seae decided to initiate its own investigations after press releases announced the prosecution of this cartel in the United States. Notwithstanding, Seae's lack of expertise in hard core cartel investigations hindered further developments in this case. Market data studies didn't allow any substantial conclusion about the cartel in Brazil. The fact of being a relatively small market in terms of international vitamins trade (approximately 2%) hampered the detection of the cartel by simple market information. In addition, vitamins buyers heard by Brazilian authorities revealed a great amount of skepticism about the international cartel effects in the country.

Furthermore, the fact that the case had not gone to trial in the United States unabled the share of documents because of confidentiality restraints. Hence, all the cooperation remained informal.

Nevertheless, some important hints provided by North American authorities were essential for the analysis of Brazilian officials. One important information received by Seae was that the Vitamins Cartel operated very similarly to the Lysine Cartel. This led to the conclusion that there was a budget that allocated quantities to be sold for each group of products that could be sold by each company in different regions of the world.

The second important hint was provided by an oral statement of a former director of a large vitamin producer. The director revealed that Latin American operations of the major vitamins companies were centralized in Brazil and helped Brazilian authorities to detect the whereabouts of former Latin American regional managers.

Only after an interview of one former regional manager a relationship between illegal business practices in the United States and the ones in Brazil was established. Some executives of the main vitamin companies ordered their Latin American colleagues to organize quarterly meetings with competitors in São Paulo to exchange information about prices and sales quantities of vitamins A and E. Latin American

executives were instructed to produce meticulous reports of the regional market which would contain informations such as competitors' selling amounts.

Sales managers, nevertheless, argued that they completely ignored collusive directives established by the international headquarters. One local manager expressed his astonishment when he received direct complaints of the Latin American Manager after having sold more than what had been previously planned. He informed that this fact repeatedly occurred whenever sales surpassed the stipulated amount, what clearly denotes the enforcement cartel practice in Brazil.

After gathering these informations, Seae sent a presentment to SDE which opened an Administrative Process. The case is being analyzed at the present moment by SDE, who will send it to be judged by CADE.

The third case analyzed in Brazil that received international informal technical assistance was the Airline Companies Case.

In August 1999, the presidents of the four major Brazilian airlines met in a luxury hotel in São Paulo. Five days later, the prices of the flights between central airports of Rio de Janeiro and São Paulo had gone up, in the four airlines whose presidents had met, by 10%. The price increase affected the most lucrative market in Brazilian air transportation, connecting the two major cities in the country and carrying thousands of business travelers on a daily basis. The four companies, moreover, had 100% of the market share for regular air transportation services in that route.

The airlines where required by Seae to explain the reasons for the same price increase on that specific day. In response, the companies gave unspecific answers not mentioning competitor's price increase or any matching policy. No explanation about the choice of the date was provided. After discarding alternative rational economic explanations for the price increase, Seae's conclusion was that a price parallelism with a plus factor had occurred. A presentment was sent to SDE for the opening of an Administrative Process.

For the elaboration of Seae's presentment, informal technical contacts with North American officials in DOJ was very helpful. They contributed with their expertise giving substantial advice on the case, as well as providing Brazilian officials with the latest developments in price parallelism cases in the U.S.

While presenting their defense the companies changed their line of argumentation. They claimed that what had happened was price leadership. The airlines said that the leader company had increased its prices and the rivals just matched the price increase. The main tool for that was the computerized system of the Airline Tariff Publishing Company (ATPCO). The companies claimed that the leading airline published on ATPCO a price increase on August 6th to happen only on August 9th. The competitors just matched the price change.

At this point, the informal cooperation with the U.S. DOJ became essential since ATPCO had signed a consent decree with the U.S. government in which they had agreed to change their system in a way that competing airlines in the United States would not be able to visualize their rival's price increases before their sale availability⁵. This change, however, remained restricted to the United States and Canada, since it had been made to comply to their laws. Services offered by ATPCO remained the same elsewhere.

⁵ This change would no longer permit airlines to benefit from privileged information that the ATPCO system gave them.

In other words, in the rest of the world, competing airlines can still announce future price increases in the ATPCO system that may not occur.

This is exactly what had occurred in Brazil. The leading airline published its prices on the 6th of August immediately providing this information to other airlines through a specific command in the ATPCO system but holding this information from the computer reservation systems until the 9th. Consequently, from the 6th to the 9th of August only competing airlines knew that the leader was planning to increase its prices. Customers and travel agents completely ignored this information. If the competitors had not matched the price increase, the leading airline could have cancelled it and the customers and travel agents would never had known.

Brazilian Antitrust authorities maintained close contact with DOJ officials which helped on the gathering of documents related to the North American ATPCO case as well as on the elucidation of several doubts and misunderstandings related to the North American prosecution.

In addition, some DOJ specialists visited Seae's office where a closer explanation regarding the case permitted a greater number of suggestions related to the investigations.

4. Final Remarks

Two basic conclusions derive from the lines above. First, all international anti-cartel cooperation between Brazil and other countries remain informal. Second, this cooperation is, until now, almost totally related to the United States.

Informal cooperation is surely desirable as it can be expeditious, direct and can sometimes reveal hidden aspects, clues or hints not always present or possible in formal mechanisms of technical exchange. Nevertheless, this sort of cooperation has the disadvantage of being excessively based on personal contacts. In this sense, informal contacts can be a close substitute of formal ones in the short term, but not in the long term. Persons come and go, institutions remain. Two international government entities have the need of establishing formal contacts with the constant change of information, otherwise, a periodic cooperation can disappear in the future.

In the case of the informal assistance between Brazilian and North American cartel authorities, it surely is the result of the personal close contacts of its members. This is a very positive aspect. However, formal paths need to be further used and developed, not only with the United States but with other jurisdictions.

Brazilian competition authorities surely have the interest in developing cooperation agreements and contacts with other countries. As was previously said, the effective detection of anticompetitive practices can substantially be enhanced through the sharing of information between agencies and the better understanding of each other's laws and enforcement policies and activities. In this context, the greatest challenge of Brazilian competition authorities is to widen its international cooperation in two directions: 1) to other countries and 2) to the establishment of formal sources of technical assistance.

**ANSWERS TO OECD QUESTIONNAIRE ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS**

ANNEX A

This questionnaire covers the period from 1st January 2000 to the present.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.

See files available on Internet : <http://www.oecd.org/daf/competition>

2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Brazilian antitrust law n° 8.884/94 (also on Internet) does not impose any significant restriction on our ability to cooperate.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hardcore cartel, please provide the following information about such requests (you need not identify specific cases):

- a) the number of such requests;

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- b) the requested country or countries;

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- c) descriptions of the requests, such as the type of information or assistance required;

The Brazilian antitrust agencies: Secretariat of Economic Monitoring and Secretariat of Economic Law have requested officially certified copies of some documents related to the lysine, vitamins and graphite electrode cartels.

- d) the number of requests that were granted, and for those that were not, the reason(s) given, if any, by the requested country for the refusal; and

The requested documents mentioned above were provided.

- e) for the requests that were granted, your assessment of the usefulness and importance of the information or assistance received, and for those that were not granted, your assessment of the impact of the refusal on the investigation or case.

The official copies of the documents have allowed us to avoid legal problems with respect to the certification of the documents used in their investigations.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

We haven't received any formal request from a foreign competition agency for information or assistance in an investigation or case involving hardcore cartels.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

The use of such instruments of co-operation has been very useful in cartel cases investigation that demands prompt responses from the antitrust authorities. (see also separate contribution on "Brazilian experience in international co-operation in Cartel Cases).

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

Some kind of situations could make the co-operational effort ineffective mainly if it concerns less developed countries. For example whether the requested country doesn't have antitrust law enforcement, the absence of formal exchange of information could seriously harm the investigation procedures. The entry in some anticompetitive behavior also could be stimulated in these countries, among others negative effects that could threaten some enforcement efforts.

Mergers

The great amount of co-operation measures between Brazilian and foreign antitrust authorities apply to hardcore cartels cases, so the questions regarding co-operation in mergers cases present in this section does not necessary apply. However, to provide you a background, some kind of information has been extremely useful for us, such as ones concerning the relevant market's definition, impacts of mergers on the market, the remedies adopted which could also correct the anticompetitive behavior's outside the original jurisdiction, among others.