Recht und Gesellschaft
Law and Society

14

Luiz Felipe Rosa Ramos

Antitrust and the Multivalued Function of Competition

Nomos

Vereinigung für Recht und Gesellschaft
Law and Society

– vormals Vereinigung für Rechtssoziologie –

Edited by
Prof. Dr. Susanne Baer, Prof. Dr. Kai-D. Bussmann,
Prof. Dr. Gralf-Peter Calliess, Prof. Dr. Susanne Karstedt
and Prof. Dr. Matthias Mahlmann

Volume 14

Luiz Felipe Rosa Ramos

Antitrust and the Multivalued Function of Competition

HART PUBLISHING

Nomos

Onlineversion
Nomos eLibrary

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN: HB (Nomos) 978-3-8487-8313-7
ePDF (Nomos) 978-3-7489-2703-7

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-5605-0

Library of Congress Cataloging-in-Publication Data
Ramos, Luiz Felipe Rosa
Antitrust and the Multivalued Function of Competition
Luiz Felipe Rosa Ramos
306 pp.
Includes bibliographic references.

ISBN 978-1-5099-5605-0 (hardcover Hart)

1st Edition 2021

Para Malu.

"In this manner, they endeavored to endow the market system with economic legitimacy. But, by the same token, they sacrificed the sociological legitimacy (…)" Albert O. Hirschmann, 1982.

"My rules for research: 1. Listen to the Gentiles (…)" Paul Krugman, 2008.

Table of Contents

ACKNOWLEDGMENTS

One of the learnings from writing this book on competition was that significant things cannot be done without cooperation and exchange. Any list containing the names of those who cooperated and exchanged thoughts with me would be incomplete. I hope to be fair at least with the ones who were directly relevant for completion of this book. Errors that remain are, of course, my sole responsibility.

When I first presented, in 2015, the research proposal that originated this book, my supervisor Professor Celso Campilongo said I had a "rough diamond" in my hands. I thank him not only for helping me lapidating it in so many ways, but also for that shine in his eyes that decisively stimulated my research. I am not sure I have arrived at the precious stone Professor Campilongo was looking for, but his support surely gave me the energy of a digger.

My co-supervisor Professor Tobias Werron was crucial for the definition of the methods and several references used in this work. Regarding Professor Tobias, I could only update the words someone else has written about a very different character: "*he depends for his results not all upon pedagogical fireworks but rather upon a quiet manner and a remorseless logic. He gives the impression of absolute intellectual integrity, a very rare quality and so immensely impressive when encountered*"[1].

In São Paulo, Professor Vicente Bagnoli, Professor Laurindo Minhoto, Professor Elizabeth Farina, Professor Juliano Maranhão and Professor Calixto Salomão Filho made inspiring comments and suggestions during the doctoral committee. I also discussed a former version of the present ideas with Professor Nadya Guimarães, Professor Calixto Salomão Filho, Professor Roberto Pfeiffer, Professor Philip Steiner, Professor Samuel Barbosa and Professor Rodrigo Broglia Mendes. I am thankful to all participants of the Nucleus of Studies on Competition and Society (NECSO-USP) and to its co-founder Guilherme Misale. An embryo of the thesis was discussed with Carlos Eduardo.

In Bielefeld, I had inspiring discussions with Professor Elena Esposito, Professor André Kieserling, Jelena Brankovic and Leopold Ringel. I am

---

1 Adapted from Robert H. Bork, *The Antitrust Paradox: a Policy at War with Itself* (1978; 1993), New York, The Free Press, xv (about Aaron Director).

also indebted to all participants of the *Recht und Regulierung Kolloquium*, especially to Professor Alfons Bora and Professor Michael Huber, who opened the doors of the colloquium to debate one chapter of the thesis that originated this book. I also need to thank Linda Heiken, Karsten Pieper and Katharina Braunsmann for the generous welcome at Bielefeld University. I was supported by a scholarship from CAPES during the months of studies in Germany.

In New Haven, I have benefitted from meetings and/or classes with Professor George Priest, Professor Henry Hansmann, Professor Monica Bell, Professor Calixto Salomão Filho, Professor Fiona Scott, Professor Bruce Ackerman, Professor Daniel Markovits, Professor Douglas Melamed and Professor Guido Calabresi. I am in debt to Gilad Abiri and to all participants of the Doctoral Workshop at Yale Law School for reading a shorter version of these ideas. I am also thankful to the Fox International Fellowship at Yale University and to the 2017-2018 Fox Fellows.

I have also benefitted immensely from comments and criticism received at several conferences where I presented parts of this work. Such conferences include Abrasd (Fortaleza, 2016), Law and Society (New Orleans, 2016), IVR World Congress (Lisbon, 2017), Law and Society (Toronto, 2018) and Abrasd (São Paulo, 2018). I especially thank Edvaldo Moita, Marco Loschiavo, Gabriel da Fonseca and Lucas Amato for commenting on my work in such events and in other moments.

I am glad to have had a group of colleagues and friends reading and commenting an advanced version of the thesis that originated this book: Ademir Pereira Júnior, Mario Cabral, Osny da Silva Filho and Yan Vieira. I also had stimulating conversations in the final moments with Guilherme Palu and Fabricio Rocha. Francisco Cruz and Lilian de Melo helped me adjusting the formal aspects of the thesis before submission. I thank Eva Rocha for pushing me to improve my English writing in some passages. I am also thankful to Adriano Oliveira for the English classes years ago and for reviewing grammar mistakes in chapters I to III. Finally, thanks are due to members of Advocacia José Del Chiaro (AJDC).

Family and friends were important in different moments of my life, including those periods of a Ph.D. candidate's existence that only resemble a life. I will just add here those who were closer in a special moment: Amadeus Orleans, Arthur Marim, Bianca Tavolari, Igor Rolemberg, Lais Sangalo, Marcelo Almeida, Murilo Vannucci and Vitoria Croda. Without the love and support from Eliana, Luiz Roberio, Ana Beatriz and João Gabriel this work would just have been impossible.

More than academically elevating, the last years were quite transformative. I can only feel blessed to have had my great love, Eva, walking by my side all along.

FOREWORD

True interdisciplinary work at the intersection between sociology and law is rare. Sociologists usually focus on how law works; legal scholars are more interested in making law work. And while there is certainly exchange of knowledge between both camps, the actual conceptual work is usually pursued separately from each other. Yet, once in a while a scholar comes along who, well-versed in both disciplines and equally interested in how law works and how to make it work, manages to transcend this polite-but-distant relationship. Luiz Felipe Rosa Ramos is such a scholar. His book "Antitrust and the Multivalued Function of Competition" develops a socio-legal approach to antitrust law that combines the interests and strengths of both disciplines. Elegantly organized around three guiding questions, "What has been tried?" (to establish competition as a central goal in antitrust law), "What has been missing?" (introducing sociological ideas on competition) and "What could be tried?" (testing these concepts in the main areas of antitrust law: cartels, mergers and exclusionary conduct), the book shows that it is indeed possible to transform sociological theorizing into legal thinking if the research question is well-defined and the author is able to pull it off.

From a sociological perspective, the book's most obvious achievement is how it succeeds, in chapter two ("Competition as a social form"), in reconstructing the history of sociological thinking about competition and in advancing the author's conceptualization of functions of competition in antitrust law. The whole story, of course, cannot be repeated in detail here. Suffice it to say that the second chapter treats the reader to what to my knowledge is the most comprehensive and perceptive review of sociological reasoning on competition to date. Not only does it justice to the writings on competition in the Western tradition, from the late 18th century to today, which would be an achievement in its own right. It also connects this tradition to Brazilian social thought. In so doing, it offers an important reminder that the history of Western sociology is only part of a much broader global history of social thought. Transferring conceptual ideas from the Western tradition to other areas of the world, therefore, requires respect for and knowledge of non-Western traditions. In this case, this contextual sensitivity leads to important insights into the (post-) colonial history of Brazil, which has shaped, among other things, the specific role of per-

sonal relationships and the perception of competition in Brazilian society. Indeed, the creativity evident in this book is to no small part due to the ability of its author to juggle ideas from various historical periods and sociocultural contexts.

Last not least, the author also demonstrates the maturity of judgment necessary to select specific ideas from the wealth of these traditions to integrate his arguments and re-define competition as a goal of Brazilian antitrust law (in particular, he adopts a specific version of functionalist reasoning proposed by the German sociologist Niklas Luhmann in a truly creative way). The result is a great piece of scholarship on all counts that suggests an openness of mind and independence of thought on a level that would be impressive for any scholar, let alone an early career one like Luiz Felipe Rosa Ramos. And as if that was not enough, the book is also well-written, elegantly conceived and a real pleasure to read. May it find many open-minded readers among sociologists and legal scholars alike!

Tobias Werron

Professor of Sociological Theory and General Sociology at Bielefeld University

PREFACE

The originality of Luiz Felipe Rosa Ramos's book is multiple. Therefore, the publication of this work ought to be celebrated. It is far from trivial or usual to reconstruct or even attempt to build a sociology of antitrust law. The Author is bold. He attempts to do just such. Illustratively, I highlight three points with regards to such boldness. First of all, Rosa Ramos outlines a rigorous historical-evolutionary panorama of the sociological and legal-sociological literature regarding competition and antitrust. Subsequently, he establishes refined comparisons between, on the one hand, the antitrust theorized and practiced in central countries and, on the other hand, the peculiarities concerning a sociology of competition in society and market such as in Brazil. Eventually, he combines - with the utmost competence - solid theoretical knowledge of the doctrine of antitrust law and the sociology of competition with extensive professional experience as a lawyer in an important firm specialized in the area of his study. All in all, Rosa Ramos brings together authorized academic credentials and professional experience enabling him to examine the links and incompatibilities between law and the sociology of competition.

The rationality, concepts and objectives with regards to antitrust, despite the endless and well-presented controversies on the matter in the present book, are shared internationally. Such is true that there are local peculiarities, but nothing which authorizes watertight distinctions among the antitrust logic in Brazil, Germany or China. Procedures, the speed of investigations, the quality of case law and the intensity of penalties in each jurisdiction may vary; however an international cartel, for example, when identified and proven, has a good chance of being punished in all affected markets.

The Brazilian Antitrust Authority (CADE) enjoys recognized international prestige. Quite possibly, CADE ranks among the most mature and consolidated administrative antitrust courts in emerging countries. The exchange regarding confidential information, collusion, exclusionary conduct and other typical international antitrust figures possess uniform characteristics and effects across the planet. None the less, the local business culture, the degree of the State presence in the economy, the effectiveness of corruption control, the territorial extent of markets, the degree of technological autonomy, monetary stability, international, regional and social

inequalities, for example, may overlay competition and also specific competition law, from one country to another. Rosa Ramos's work seeks to analyze some of these particularities.

Economists, sociologists and lawyers, from all over the world, will find in Rosa Ramos's work precious findings in order to deepen comparisons and, in such way, to better understand not only Brazilian Antitrust, but Competition Law and the functioning of society in their own countries. Here lies an outstanding merit of Rosa Ramos's book. It was written bearing Brazil in mind, but its analyses are valid for scholars from anywhere. If we admit that modern society is strongly competitive and that the functioning of the economic system has in competition an environment which reproduces that of the market, competition becomes a fundamental concept for describing the communicative operations of current life, in all spaces in the global world.

In addition to such, innumerous anticompetitive behaviors translate sociologically into interactions, that is, into common systems of communicative symbols which operate as prerequisites for reciprocity or complementarity of expectations. *Alter* and *ego* interpret veiled actions, expressions and surreptitious intentions, often - as in the parallel behavior or in the exchange of secrets -, in the hope of enjoying favorable activities and avoiding unfavorable ones, one in relation to the other. In communicative terms, here lies a fundamental aspect of sociology of competition: the way of communication or coordinated silence among rivals, with regards to things which cannot be said. Again, the pattern undergoes cultural variations, but such tends to reproduce itself so that not only jurists and economists, but also social theorists can contribute to the understanding of anticompetitive practices. Rosa Ramos – with the eyes of a lawyer with sociological sensitivity or the sociologist specialized in antitrust legislation – is attentive to these details.

The present work takes as one of its theoretical references the Theory of Systems, of the sociologist Niklas Luhmann. Rightly, it seeks to acclimate it to the "tropical mirror", an expression which appears in the title of the Thesis whose rise was given to this book. For Luhmann, the unity of world society does not lie in ethical or political demands, but in the emergence of comparative conditions among functionally disparate systems, such as law and economy. This requires the demarcation of boundaries between the legal system and the economic system. Would the specifics of the "tropical mirror" reside here? I suppose not. Rosa Ramos does not dismiss or refuse such specificities, nonetheless, situates them in further areas. He seeks to understand how, in modern society, antitrust law processes and in-

ternalizes competitive economic operations and, conversely, how the economic system presupposes antitrust law as a purifier of its internal environment: competition.

Rosa Ramos counted on the decisive guidance of Tobias Werron when it came to the elaboration of his work. Admittedly one of the greatest scholars in the sociology of competition today, Werron received Rosa Ramos at the University of Bielefeld for a fruitful and decisive period of study. The international dimension of the work was complemented by a successful passage of studies at Yale University and dialogues with relevant scholars in this area. The result of such is the work the reader presently has at hand. An extremely important contribution to the sociological description of competition law.

Celso Fernandes Campilongo

Professor of the Faculties of Law at the University of São Paulo and the Pontifical Catholic University of São Paulo; ex-Commissioner of the Brazilian Antitrust Authority (CADE).

INTRODUCTION

In 2016, the Nucleus of Studies on Competition and Society (NECSO-USP) conducted an exploratory research on the perception of competition in the Brazilian case of society. Questionnaires were applied to entrepreneurs, executives and employees related to companies of various sizes in different business sectors. The professionals were asked about their understandings regarding competition, their knowledge on antitrust and the specificities of competition in Brazil. The answers obtained by the group, among which we now pick a few examples, anticipated some of the issues that will be discussed in the present book[2].

Competition came out of the responses as a multifaceted and ambiguous phenomenon. A bakery owner expressed his view on competition as "the other bakeries in the neighborhood that sometimes make a point of coming here to see the price of products and lower a few cents". "The problem", he said, "is that some shopkeepers make unfair competition, fighting over cents in the price of some products and selling goods that have nothing to do with their store". For example, "a clothing store on the street started selling ice cream, which is disloyal to my bakery that also sells ice cream because it sells other food products but does not sell clothes".

The partner of a medium-sized food retail chain, in turn, described competition as "a much broader concept than mere rivalry between firms", as it is determined by "the strength of buyers, the strength of suppliers, the potential for new entrants into the [market] sector, and the number of substitute products to this sector". Competition would be beneficial both for consumers, "because it could create a price war and the consequent collapse of prices", and firms, which will always have to "maintain the quality of their products and services, so as not to lose market presence".

The managing partner of a high-income financial consultancy also responded to our questionnaire. In his answer, competition means "the freedom to dispute the market with the main existing players, as long as in an

2 See https://necsousp.wordpress.com/ Although such responses were used only for internal discussion, they served as a prototype for a further research project whose results were presented at the 23rd International Seminar of the Brazilian Institute for Competition, Consumer and International Trade Studies (IBRAC, 2017).

ethical and fair manner". A firm that "wins the competition" shows that it is "alive" in the market and can become a "reference" in its activity. Nonetheless, in order to "beat its competitors by conquering the market", there will be need for "investments in the company (in people, method and process)".

The level of knowledge regarding antitrust regulation also varied among the responses. The bakery owner had on the counter a placard from a cigarette manufacturer saying that it "supports competition" – an obligation resulting from an antitrust investigation – but he does not know what competition compliance policies "are about". The partner of the food retail chain argued that law has an important role in the "merger of two companies that can greatly alter competition in a sector, even turning it into a monopoly", but his business does not have formal policies for competition compliance either. The partner of the financial consultancy said that his company "follows the rules required by regulatory agencies (…), in addition to internal policies of good practices" that maintain "excellent internal relationship and enormous credibility with customers".

With regards to the specificities of competition in Brazil, the bakery owner alleged that "small shopkeepers already have a lot of competition to face" and do not need further incentive to compete, whereas the culture of competition is necessary for big firms, "such as Car Wash's [a Brazilian corruption investigation] constructors". The food retail entrepreneur also stated that "sectors involving smaller enterprises are mostly characterized by extreme competition, while sectors with large firms are characterized mostly by duopolies", but he added that competition has no need "to become cultural in society", since it is a "concept of the business world" whose distance to "disunity" is "very small". The investment partner declared that there is "monopoly of some sectors" which prevents "development" of the nation, because of "protectionism and accommodation". As to the "culture of competition", he complemented, "we need to learn a lot from the big ones in each sector".

In our small sample, there seems to be no consensus around what competition actually means and on who benefits from it. There is also doubt about which parties would need a greater culture of competition in Brazil: whether only large firms, the entire economic sector, or even other spheres of society beyond the business world. Finally, the impact of the notions of competition as constructed by the Brazilian antitrust agency (the CADE) seems to remain limited, although it apparently varies by company size. Even if they are intended to make no empirical proof, such results are a

fine illustration of the problems and the hypothesis addressed by the present work.

The main problem from which our research stems is that competition has not been semantically consolidated as a goal of antitrust. People usually know antitrust as a "competition policy", antitrust agencies claim to foster a "competitive process", antitrust attorneys call themselves "competition lawyers" – but only a few scholars have dedicated their works to decrypt what competition could possibly mean as an autonomous drive for antitrust[3]. As far as one can see through the tropical mirror, this is an international issue. "*Both judicial and non-judicial writing manipulates the terminology and concepts*", argue the authors of an eminent treatise, "*often without penetrating the underlying substance*". As to competition, the same treatise observes:

> "*In passing the antitrust laws, 'Congress was dealing with competition, which is sought to protect, and monopoly, which it sought to prevent'. While rhetorically reassuring, this simple formulation is hardly self-defining, and it conceals a diversity of possible objectives*" [4].

Indeed, such "rhetorically reassuring" formulation has not prevented the concern with competition in antitrust from overflowing to the broader public discourse in the last few years. The media[5], the political system[6] and

---

3 Thus, this is not a book that deals directly with the notion of power. For a brief review on antitrust history through this perspective, see Eleanor Fox, *Power: Trust and Distrust* (2020), Concurrentaliste, Journal of Antitrust Law; examining legislation and court decisions in the US and in Europe, Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997); for a perspective from Brazil, see Calixto Salomão Filho, *A Legal Theory of Economic Power: Implications for Social and Economic Development* (2011), Edward Elgar, Cheltenham.

4 Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, xix and 3. Referring to the disagreement among antitrust practitioners and theorists on the meaning of competition as a "scandal", Oliver Black, *Conceptual foundations of antitrust* (2005), Cambridge, University Press, 6.

5 See "The Economist", *The University of Chicago worries about a lack of competition* (Apr 12, 2017). Before, "The Economist", *Too much of a good thing* (Mar 26, 2016).

6 See Democrats, *A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power* (2017), available at https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. See also the so-called "Big Tech hearing" before the US Senate Commerce Committee in October 2020: https://www.youtube.com/watch?v=sWIa3OLOhhk.

non-specialized publications[7] have been reflecting the call for "more competition". Antitrust scholars have taken the problem seriously and different nuances of the debate are showing up[8]. In Brazil, two of the most important antitrust scholars have recognized a "disappointment" or even a "paralysis" in the realm of antitrust[9].

This book is not directly concerned with the current competitive structure of Brazilian markets, nor does it deliver a critique of a comprehensive set of CADE's decisions. We are interested in such topics as long as they help us better assessing our main research object: antitrust doctrine. Antitrust doctrine is a privileged arena for observing the discussion on antitrust goals, including competition, and the concepts thereby associated. Scholars have been discussing the goals of antitrust without the need to defend a specific party nor the pressure to decide a singular case. Although our primary focus is Brazilian antitrust, we accept it as being deeply tangled with the international debate.

Our fundamental hypothesis is that antitrust doctrine has not consolidated a concept of competition that is both (i) legally coherent (with antitrust statutes and decisional criteria) and (ii) socially adequate (to competition empirical manifestation and its modern imaginary). Despite the efforts and advances, they have not resulted in a concept of competition that is consistently applied by agencies and perceived by the public as a specific antitrust goal. We also suppose that the supremacy of economic theory as a

---

7 For instance, Jonathan Tepper, Denise Hearn, *The myth of capitalism: monopolies and the death of competition* (2019), New Jersey, Hoboken.

8 See, among many, Joshua Wright and Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy* (2020), Stanford Journal of Law, Business, and Finance, vol. 21, n. 01 (arguing that antitrust populism, conceived as rejection of rigorous economic analysis and suspicion of experts and independent agencies, "is legitimized because it has entered the antitrust community more than ever before"); Carl Shapiro, *Antitrust in a Time of Populism* (2018), International Journal of Industrial Organization, available at SSRN: https://ssrn.com/abstract=3058345; Lina Khan, *Amazon's Antitrust Paradox* (2017), 126 Yale Law Journal 710; and generally the debate on the "New Brandeis School". In the European context, see Oles Andriychuk, *The Normative Foundations of European Competition Law* (2017), Cheltenham, Edward Elgar (arguing that the main constitutional importance of competition lies in the ethical value it represents for society).

9 See Calixto Salomão Filho, *A paralisia do Antitruste,* in *Revista do IBRAC – Direito da Concorrência, Consumo e Comércio Internacional* (2009), vol. 16, 305-323 (referring to a loss of "theoretical density" in antitrust) and Paula Forgioni, *Os Fundamentos do Antitruste* (1998; 9th ed. 2017), São Paulo, Revista dos Tribunais, 128 (identifying, despite the advances, that Brazilian antitrust agency has focused almost exclusively on mergers, which rarely present relevant competition problems).

source of antitrust doctrine has contributed to such failure. If we are right in such outlooks, the supporters of competition as an antitrust goal could benefit from a socio-legal approach which incorporates other sources, such as the sociology of competition. As much as presumptions and definitions are made explicit, critics will also gain from enhanced transparency in the debate.

The strategy chosen to address such issues is essentially three-phased, each phase corresponding to one chapter of this book. The first step asks: "*What has been tried?*". It retrieves important moments of the debate on antitrust goals to understand how competition has been differentiated from other goals. The same concern illuminates our assessment of Brazilian antitrust doctrine and its eventual impacts in CADE's practice. Closing the first chapter, we explore non-dogmatic sources of antitrust, such as political philosophy, economic analysis, law and economics and a promising law and society approach.

The second step asks: "*What has been missing?*". It tells an alternative story about competition that is centered on sociological works. Essentially, we look at social forms and potentially addressed social problems. The Brazilian nuances of such story are also outlined, as well as imbrications with the country's economic structure. The purpose of this chapter is to build a concept of competition that corresponds to its modern imaginary and emergence in places like Brazil. Such task is ultimately endeavored based on the works of Niklas Luhmann, Tobias Werron, Harrison White and classics of Brazilian social thought.

Finally, the last step inquires: "*What could be tried?*". It thoroughly analyses three antitrust cases in Brazil so as to identify the criteria used by the antitrust agency. We test whether the concept built in the precedent chapter could be compatible with antitrust reasoning in each of its main branches: cartels, mergers and exclusionary conducts. Such exercise is made with a view of current tendencies of antitrust analysis, so as to cope with its evolution. The chapter ends with theoretical considerations on the possible impacts of such an approach for antitrust, for legal doctrine and for legal sociology.

The method underlying our strategy is unavoidably multiple and cannot be coupled with a single theory. It is only so because of the complexity of our research object and due to the paths implied in the problems here addressed. As it happened to come out of the responses to NECSO's questionnaires, competition can be seen as a mere rivalry between bakeries, as investing to "win the market" or as a structure that includes buyers, suppliers, potential entrants and substitute products. Competition's effects are

often ambiguously evaluated, and though there seems to be a tendency of its dissemination, one can still cast doubts at its real extension in the economy and at its need "to become cultural in society". Agencies maintain the job of spreading the competitive word, but placards supporting competition do not necessarily lead to compliance with antitrust-specific views, and even those who follow the policies of "good practice" are eager to learn with the "big ones".

All things considered, this book is partially a history of ideas' enterprise, as we are concerned with the historical construction of competition both in antitrust and in sociology. Partly, it is also sociological work, since we develop a second-order observation of the legal system and outline a social form of competition in the Brazilian context. Finally, and mostly in the last chapter, we will take a step that is usually done by legal doctrine: working on a concept based on distinctions adopted in antitrust decisions. The work that derives from the above-mentioned problems, hypothesis, strategies and methods is nothing but an*other* story about antitrust. It can nevertheless interest someone who is not only longing to see oneself in the other, but prone to find "*the other in oneself*"[10].

10 Viveiros de Castro, *Prefácio* in Beatriz Azevedo, *Antropofagia: Palimpsesto selvagem* (2016), São Paulo, Sesi SP, 16.

I – ANTITRUST GOALS AND COMPETITION

i.i. Three snapshots of the "Antitrust Goals" debate

What follows is not a typical approach to the "evolution" of antitrust. This book is not concerned with antitrust several "Eras" or with its successive "Schools". It will focus instead on three historical moments regarding the debate on the goals of antitrust – moments we call "snapshots" so as to emphasize their fragmentary character. Although fragmented, such discussions around the Sherman Act (I.I.I.), the Chicago School (I.I.II.) or the recent aspects of the mentioned debate (I.I.III.) are illustrative enough for our theoretical purposes. We will proceed with a question in mind: how was the concept of *competition* developed in those moments and how has such development been related to antitrust *goals*?

i.i.i. Antitrust goals in the origins of antitrust

"The day of combination is here to stay," said John Davison Rockefeller after he had stepped aside from active management of Standard Oil in 1882. "Individualism has gone, never to return"[11]. Those were more than dramatic words of an empty prophecy: the oil company had been experimenting continuous expansion and by 1880 controlled much of the United States' petroleum refining[12]. At the time, such growth meant the need to face existing state laws and organizational complexities. Samuel Dodd, Standard Oil's general solicitor since 1881, devised a solution that became both famous and infamous. He created a legal instrument whereby indi-

---

11 Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (1991), available at https://erenow.com/modern/theepicquestforoilmoneyandpower/3.html. (last access on December 18, 2017).

12 The share of industry-refining capacity controlled by Standard Oil rose from about 10 percent in 1870 to roughly 90 percent in 1880. Cf. Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017), 7.

vidual owners of businesses would transfer their stocks to an entity, which could held the entire stock or majority interest in several companies.[13] "Because it was a trust in the sense in which the word was then understood", since it "vested a fiduciary obligation in a few for the benefit of many", the instrument was called "trust".[14] In the words of its creator, power of combinations could be used both for "good" and "evil", but in any case it "must not be destroyed; it must be regulated".[15]

Lawmakers from the United States seemed to agree at least with the need for regulation. Senator Sherman from Ohio declared on March 21, 1890[16]:

> *"Unlawful combinations, unlawful at common law, now extend to all the States and interfere with our foreign and domestic commerce and with the importation and sale of goods subject to duty under the laws of the United States, against which only the General Government can secure relief"*

The type of "combination" that was object of Senator Sherman's concern was the same candidly named after a "fiduciary obligation in the benefit of many" years earlier, the "trusts":

> *"But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by com-*

---

13 Rockefeller held certificates representing 41 percent of the value of the issued certificates – other eight individuals shared the remaining. See Barak Orbach, Grace Campbell Rebling, *The Antitrust Curse of Bigness* (2012), Southern California Law Review vol. 85, 611.

14 This was the explanation given by Dodd at a special meeting in March 1892, when the board of trustees of Standard Oil decided to terminate the Trust Agreement. Dodd lamented that "other persons (…) found this trust plan a convenient one, and it is alleged that it has been adopted for and adapted to purposes quite different from those which actuated the framers of this trust". Barak Orbach, Grace Campbell Rebling, *The Antitrust Curse of Bigness* (2012), Southern California Law Review vol. 85, 615 – 616.

15 It is interesting to confront Dodd's view with the one of Frederick Pollock, the famous British jurist. In his correspondences to his lifelong friend, the American Justice Oliver Wendell Holmes Jr., Sir Pollock stated: "an intelligent monopolist can undoubtedly be a benefactor as well as an intelligent despot. But intelligence can not be guaranteed, which is why both despotism and monopolism are in principle unwelcome". Fredrik Neumeyer, *Monopolkontrolle in USA* (1953), Berlin, Duncker & Humblot, 38.

16 Congressional Record Senate (1890), 2456, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

> *bining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president"*[17]

Contrasting "combination" and "competition" as though they were direct opposites was a habit of Americans in the 1880s[18]. "The sole object of such a combination", in Sherman's view, was "to make competition impossible":

> *"It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer."*[19]

Such remarks reveal a great deal of pressure suffered by U.S. Senate at the time, but only partially the economic structure of the country. After the Civil War (1861 – 1865), great developments in transports and communications in the United States had been followed by strongly linked markets, large enterprises and multiple-location business operations. On the one hand, the flourishing industrial arrangements could mean reduced costs, as firms integrated backward to sources of supply, or forward into downstream production processes or distribution[20]. On the other hand, the agricultural sector, still a major part of the American economy in 1890, was depressed by the deflation of the 1879-93 period and felt harmed by monopolies such as the railroads[21]. In many cases, the rise of large business firms – increasingly equated to "trusts" in the imaginary of the time – also implied

---

17 Congressional Record Senate (1890), 2457, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

18 Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 9.

19 Congressional Record Senate (1890), 2457, available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

20 Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 9.

21 George Stigler, *The Origin of the Sherman Act* (1985), in The Journal of Legal Studies, Vol. 14, n. 1, 1-12.

intensified labor vs. capital conflict and displacement of smaller firms with the loss of control from local communities[22].

Economic structure aside, the pervasive antitrust sentiment, as William Letwin puts it, did not spring up overnight[23]. One of the oldest American political habits, hatred towards monopoly expressed differently at different times. But it had always meant a feeling against an unjustified power that raises obstacles to equality of opportunity, either in the older form of a special legal privilege granted by the state or, at the time, as an exclusive control enabled by a trust. Since the Civil War, the fear of plutocracy had decisively substituted the fear of oligarchy. The rapid growth of national wealth gave new grounds for believing that corporations were monopolistic and would use their wealth to make it serve their own interests. Such a belief led to attacks that were increasingly specific, aiming at certain practices instead of corporations in the mass. As liberty was deemed endangered, the optimistic Americans, usually averse to fatalism, would search for a cure in regulation. But which stakeholders could be mobilized for that "curative" purpose?

Economists were hardly one of them: nearly all the economists of the epoch were convinced that any attempt to prohibit combinations would be either unnecessary or futile[24]. Not many lawyers felt that statutes were

---

22 See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982), 34 Hastings Law Journal 65, 103-104 ("With the rise of trusts, interdependence became impotence. Decision-making was transferred from traditional power centers to the great industrialists. Self-reliant farmers, business owners, and local leaders became dependent on the discretionary power of a few very rich men. Local control of society ended as numerous small power centers were swept away by the new class, one perceived as greedy and evil"); see also James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880 – 1918* (1989), in Ohio State Law Journal vol. 50 n. 2, 258; finally, William E. Kovacic, *Module 1: Origins and Aims of Competition Policy* (2011), International Competition Network, available at http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html (last access on December 10, 2017)

23 See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 59 - 67.

24 Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 42. A first attempt to organize a professional society of economists in the United States had been made shortly after 1880 by Edmund James and Simon Nelson Patten, who completed their studies in Germany. They believed the aim of the Society would be "to combat the widespread view that our economic problems will solve themselves". In a later attempt in

needed, and even fewer suggested how the statutes should be framed[25]. Democrats believed that no law likely to be passed would be as favorable to competition as the common law declared in the *North River Sugar* decision, a state court verdict from the Court of Appeals in New York[26]. Even consumers, who could be expected to react to the economic effects of monopolies, had their pressure softened by the fact that the 1880s was a decade of steeply declining prices[27], in addition to all known obstacles of non-organized political influence[28].

Interested in avoiding an uncomfortable reputation of being the "Party of Monopolists", the Republican Party had compelling need to condemn the trusts. One of its senators found additional reasons: he blamed General Russel Alger, involved with Diamond Match Company's monopoly, for his unexpected defeat in the Republican presidential nomination. Soon af-

---

1886, a 'balanced' position between liberalism and interventionism was sought, but many economists were convinced that Darwin's laws governed the evolution of human society, and so combination was regarded as an evolutionary advance. Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 71 - 76. Tracing the "evolutionary vision" as part of a longstanding dialect between two opposing, incommensurable ideologies in antitrust policy, William H. Page, *Ideological Conflict and the Origins of Antitrust Policy* (1991), Tulane Law Review Association vol. 66 n. 1.

25 Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 83-84.

26 See *The Sugar Trust Illegal* (1890), New York Times, available in http://query.nytimes.com/mem/archive-free/pdf?res=990DEFD6123BE533A25756C2A9609C94619ED7CF (last access on December 17, 2017).

27 Cf. Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005), Cambridge, Harvard University Press, 41. Before, Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 160 (stating that such tendency was extended beyond 1890). To exemplify with an important product in antitrust discussions, the real price of refined oil fell by nearly 80 percent between 1860 and 1893. Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017), 6 – 7.

28 Stating that consumers were a less effective lobbying class than small businesses, Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 6; also Thomas J. Di Lorenzo, *The Origins of Antitrust: An Interest-Group Perspective* (1985) 5 International Review. Law & Economics, 73. Not every author agrees that small businesses were the dominant interest group. See references in Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), 1. Finding modest support for interest group in the Sherman Act, George Stigler, *The Origin of the Sherman Act* (1985), in *The Journal of Legal Studies,* Vol. 14, n. 1.

ter being defeated by future president Benjamin Harrison, Senator Sherman began to take serious interest in the trust question. He received numerous letters during the late 1880s on the antitrust issue. All of them came from small businesses which complained about innovations in transportation (such as refrigerated rail cars in meat-packing, and tank cars in oil refining) that displaced small producers who could not avail themselves the new technologies[29].

On March 21, 1890, Sherman submitted a bill which intended to destroy all those combinations "which the common law had always condemned as unlawful"[30]. Such historical account of the common law was nevertheless inaccurate[31]. For a long time, common law had supported an economic order in which the individual's opportunities were limited by the exclusive powers of guilds, chartered companies and patentees. Even if it began to oppose to this system at the end of the sixteenth century, by the middle of the nineteenth century it had lost enthusiasm for the task[32]. While the state corporate law failed to deal with the trust problem[33], the English bodies of law against contracts in restraint of trade or against com-

29 Noting that small oil companies located in Ohio "had the greatest influence on Sherman", Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust* (2002), available at http://www.pitt.edu/~troesken/papers/letters.pdf (last access on December 18, 2017).

30 Congressional Record Senate (1890), 2456 available at http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

31 See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act* (1966), The Journal of Law & Economics, vol. 9, 36 – 37. Showing that the common law never proved to be a very effective means in controlling monopoly, let alone fostering competition, Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954), Stockholm, Norstedt & Söner, 9-53.

32 Cf. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965; 1981), Chicago, The University of Chicago Press, 19 – 52 (noting that the idea that the common law opposed monopolies from the earliest time "was invented largely by Sir Edward Coke, who argued that monopoly was forbidden by the Civil Law, and implicitly by Magna Carta as well as by certain statutes of Edward III's reign").

33 As late as 1900, the eminent treatise writer Christopher Tiedeman argued that the only way to prevent the continuing growth of the giant business corporation was to "return to the previous era of individual, legislatively granted corporate charters". Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2013), New York, Wolters Kluwer, 35.