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Brazilian Administrative Council for Economic Defense: An Approach from Sociology and History

MARCO ANTONIO LOSCHIAVO LEME DE BARROS †

TABLE OF CONTENTS: 1. Introduction; 2. Sociological and Historical Framework to Analyze Legal and Economic Institutions; 2.1. The Pendulum Between Market and Government; 2.2. The Institutional History and Sociology Standpoint of View; 3. CADE's Institutional History; 3.1. The Beginning of the Economic Competition Protection; 3.2. The Defense of Popular Economy; 3.3. The Consolidation of the SBDC; 3.4. CADE as an Administrative Court; 3.5. The New CADE; 4. Final Remarks.

ABSTRACT: This paper is a sociological and historical analysis of the Brazilian Administrative Council for Economic Defense - C.A.D.E. The main objective is to indicate that C.A.D.E. has become a reference for the development of the Brazilian System of Competition Defense due to institutional factors. I argue that a fundamental process of strengthening C.A.D.E.'s power was the institutional learning process incorporated at the structural level, which allowed the agency the ability to review its positions and constantly rebuild its structures and functions during different moments in Brazilian antitrust history. Besides the institutional learning, C.A.D.E. was also subject to different institutional influences over the past decades. A decisive moment was the 1990s when a national privatization program was carried out and the competitive protection system was articulated with regulated sectors and policies in Brazil. An important framework to understand these transformations are the systemic sociology of organizations and legal developmentalist literature. Both approaches – with different backgrounds – help to clarify that many institutions are derivative from previous ones, and that they are also embedded in certain operations related with society. In C.A.D.E.'s case, Brazil's judiciary and executive branch played an important role in shaping the agency divisions and functions. The paper underscores four different moments of the agency: the Malaia law C.A.D.E.; the 1962 C.A.D.E. – a collegiate agency of the ministry of justice; the 1994 C.A.D.E. – an autonomous federal agency – and the new C.A.D.E. per the Antitrust Act. Finally, C.A.D.E.'s case confirms that the existence of previous institutions has become an indispensable assumption for their development in light of a continuous institutional learning process.

KEYWORDS: *Brazilian Administrative Council for Economic Defense/C.A.D.E.; Development; Institucional Learning; Institutional Influence; History; Competition.*

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1. INTRODUCTION

The Brazilian Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica - hereinafter C.A.D.E.) is an "administrative court" established in 1962 as an agency of the Ministry of Justice and transformed in 1994 into an autonomous federal agency. Its new attributions as an adjudicatory court were established by the enactment of Act No. 12.529/11,[1] also referred to as Brazil's new Antitrust Act. Among its functions, C.A.D.E. is the agency responsible for administrative trials of infringements against economic order and merger review, by means of the so-called acts of concentration.

Despite considering all its preventive and repressive functions, the most significant role played by C.A.D.E. is the implementation of a policy and a structure to defend economic competition in Brazil. In this sense, Luiz Carlos Delorme Prado, former C.A.D.E.'s Commissioner confirms that "the consolidation of the Brazilian system for the defense of competition, which culminated in the enactment of Act No. 12.529/11, must be seen as the result of a historical process going back to the 1930s."[2]

The purpose of this text, based on a historical analysis, is to indicate that the consolidation of the system for defense of competition did not take place as a process of simple legal transplant and endowment of factors from foreign experiences. C.A.D.E.'s history underscore a trajectory of successes and failures of models and interests in a complex relationship between market, law and government economic program in Brazil.

Beyond the argument that "institutions matter," the theoretical framework for this analysis is inspired by the systemic sociology of

† PhD Candidate at the University of São Paulo Law School. Visiting researcher at University of California, Los Angeles School of Law. A first draft of this paper was presented at the 36th Annual Meeting of the Law & Society Association. I am thankful for the comments from the professors and participants in the session 'Brazil: Development and Regulation' and the assistance of Kevin Massoudi. This paper was granted by the São Paulo Research Foundation.

[1] Decreto No. 12.529, de 3 de Novembro de 2011, DIARIO OFICIAL DA UNIAO [D.O.U.] de 1.12.2011 (Braz.).

[2] LAERCIO FARINA ET AL., A NOVA LEI DO CADE 99 (2012).

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organizations[3] and works of legal developmentalist scholars[4] that affirms that institutions are "embedded" and, thus, their functions depend on the previous existence and relations with other institutions (institutional influence) and also on internal structures that permit institutions to review and amplify their actions (institutional learning).

From a systemic point of view, it is important to understand that institutions are "embedded" because they can be observed as functionally differentiated social systems. Institutions are differentiated from their environment or, like pointed out by the main social system theorist Niklas Luhmann, institutions acknowledge as their own only communications between members, and only when they communicate as members.[5]

However, paradoxically, all institutions operate simultaneously within a given environment, thus this observation is also about a dynamic process of constant reconstruction of the institution operations (structures and programs) in relation with their environment (other systems). Institutions stimulate their growth reciprocally, by arranging businesses for mutual relations or by establishing common facilities that must be supported by both parties.

In this sense, it is not possible to deny the histories of institutions or, as theoretical institutionalists argue, the importance to understand their continuities. Institutions are designed to succeed and to be preservative, but given uncertainty about future, usually manipulation and failures happen and it is not always possible to overturn constraints.

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[3] By systemic organization sociology we mean any kind of development of Luhmann's sociological theory of organizations. An important example is the work of Dirk Baecker. For a full comprehension of systemic organization sociology see the special issue on Niklas Luhmann and Organization Studies on the *Journal Organization*: David Seidl & Kai Helge Becker, Organizations *as Distinction Generating and Processing Systems: Niklas Luhmann's Contribution to Organization Studies*, 13 ORGANIZATION J. 9 (2006) and STEFAN KÜHL, ORGANIZATIONS: A SYSTEM APPROACH (2013). For a general account about legal institutions from a sociological perspective in Brazil see CELSO CAMPILONGO, POLÍTICA, SISTEMA JURÍDICO E DECISÃO JUDICIAL ([*Politics, Juridical System and Judicial Decision*] (2nd ed., 2011).

[4] Legal devolpmentalists scholars is a general term that refer to legal sociologists that considerer in their analysis an embedded approach towards law and society. For this paper, we classify the works of Alice Amsden, Peter Evans, Katharina Pistor, Curtis Milhaupt and Charles Sabel as legal developmentalists.

[5] In this perspective, an institution functions consists of recursively operations of decisions – understood as communication of choice attribution between alternatives and nothing else -, that they generate only own their sequent operations. *See* NIKLAS LUHMANN, ORGANIZACIÓN Y DECISIÓN, AUTOPOIESIS, ACCIÓN Y ENTENDIMIENTO COMUNICATIVO (2005).

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This description can be translated into straightforward concepts of institutional influences and institutional learning, especially carried out by a legal developmentalist literature based on the dynamics of learning processes, specifically "the learning centered approach to development" of Charles Sabel and Sanjay Reddy.[6] In this framework, it is highlighted how institutional modifications can occur by focusing on the influences and the learning process in their internal structures.

This paper presents an institutional case study of C.A.D.E. By institutional case study, I mean the sociological and historical approach about the transformations of structures and operations of certain institutions. I argue that C.A.D.E. together with the Secretariat of Economic Monitoring (Secretaria de Acompanhamento Econômico - S.E.A.E.) has been a leader in a "constellation" of legal and extralegal norms in Brazil[7] that plays a symbolic role in implementing the Brazilian System for Competition Defense (Sistema Brasileiro de Defesa da Concorrência - hereinafter S.B.D.C.). The paper is organized into four parts. Part II recalls the pendulum argument between the market and government to explain the sociological and historical framework regarding organizations. After understanding the key concept of embeddedness, presupposed in the pendulum case, the paper argues the importance of analyzing the institutional influences and the institutional learning process that permits to describe the complexity of institutions in modern societies. Part III details C.A.D.E.'s trajectory regarding the history of the antitrust in Brazil in four different moments from the early Republic period until the 2010s. In each moment, the decisive factors for the creation and development of C.A.D.E. are highlighted, with special consideration to the 1990s that represented the modernization of the executive branch, that evolved different administrative reforms and regulation of certain sectors. Part IV

[6] *See* Charles Sabel and Sanjay Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today*, 50 CHALLENGE NO. 5, 2003, at 73-92.

[7] The notion of constellation of legal and extralegal norms results from the finding of various centers of normative production as pointed out by the Brazilian legal sociologist José Eduardo Faria. As a matter of fact, the government intervention in the economy occurs in a fragmentary form in Brazil with the participation of other the Regulatory Agencies, Securities and Exchange Commission of Brazil (*Comissão de Valores Mobiliários*), Central Bank of Brazil (*Banco Central*), public agencies, public policies for the development of sectors of economic activity (civil construction, technologies, and others). *See* JOSÉ EDUARDO FARIA, A SOCIOLOGIA JURÌDICA: DIREITO E CONJUNTURA [*Juridical Sociology: Law and Contingency*] (2008)

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presents some final remarks that confirms the prominent position of C.A.D.E. in Brazil.

2. SOCIOLOGICAL AND HISTORICAL FRAMEWORK TO ANALYZE LEGAL AND ECONOMIC INSTITUTIONS

The study of legal and economic institutions has seen incredible growth in recent decades, however there is still little agreement about how to analyze them. A range of views about how to approach these institutions also reveal different perspectives about what an institution is and how they should operate in society.

Should we approach legal and economic institutions from the standpoint of rational-choice that considers them as a system of rules and incentives, thus centering thinking around finding an optimal design?[8] Or should we emphasize more on path dependence, as pointed to by historical institutionalism, that seeks to understand their continuities and failures?[9] We can also follow a sociological approach that reminds us that institutions are autonomous structures and programs from actors, that operate with internal norms and culture that continuously regenerate them across time.[10]

These cases provide us a starting point to understand the importance of the debate about institutionalism—differing frameworks to analyze institutions.[11] A very common approach also deals with the global perspective vis-à-vis particularism about institutions. This opposition reveals a complementary view about how the big picture of world society and evidence of particularities of local practices are entangled with one another.

[8] *See* Barry Weingast, *Rational choice institutionalism*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 660 (Ira Katznelson & Helen V. Milner eds., 2002).
[9] *See* Elizabeth Sanders, *Historical institutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS (Roderick Rhodes, Sarah Binder & Bert A. Rockman eds., 2006).
[10] Sociological institutionalism is related in this paper with the systemic organization sociology, see *supra* note 3
[11] *See* for a general account about institutionalism THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS (Roderick A. W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2006).

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We know that many institutional dynamics do not stop at national borders and that at the global level there are many struggles and disputes about which and how institutions should prevail and operate. Many economists, politicians and lawyers mention this by explaining the emergence of transnational legal regimes and the global rule by expertise. Transnationalism and rule by experts are characterized by large asymmetries and, thus, economic and political crises are byproducts – or even intended consequences – created by different intuitions in an uncertain world society, defined by sociologist Fischer-Lescano and Möller as "a society both without a head and without a center."[12]

Despite this broader perspective that can be historically explained by the oscillation of the pendulum between market and government in a global governance context, I argue that the study of institutions should also focus local practices, that can also reveal several asymmetries and entanglements. In this sense, this paper follows a historical and sociological framework to understand the particularities of C.A.D.E.'s transformation. First, I address the global picture about the development agenda to briefly discuss the relation between market, government and law. Finally, I discuss the historical and sociological framework mobilized in part III.

2.1. THE PENDULUM BETWEEN MARKET AND GOVERNMENT

One of the main topics that are still debated by scholars interested in the development agenda is the problem of emerging economies, or the economies of the "rest."[13] The main question in these cases is to know why the development race is an unequal process? Regarding this problem, it is necessary to explain how some "backward" economies managed to develop during the second half of the twentieth century, above all surpassing the traditional mold of labor division and maximization of production, while remaining strong with competitive markets at the beginning of the twenty-first century.

[12] *See* TRANSNATIONALISATION OF SOCIAL RIGHTS 16 (Andreas Fischer-Lescano and Kolja Möller eds., 2016).
[13] *See* ALICE H. AMSDEN, THE RISE OF THE REST - CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES (2001).

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The Neo-institutionalist literature,[14] strongly influenced by the formal weberian matrix,[15] articulates this problem highlighting the importance of strengthening the institutions. In this perspective, the development race was an unequal process because many economies did not undergo the "revolution of capitalism"— i.e., did not cope with a necessary step for a well-functioning market system and the establishment of a rational model of law.

The rational model can be explained as an endowment of certain factors that were transplantable just like an equation between "good law" and "good application" able to produce "good economic results." In this perspective, economic activities occur in an institutionalized and organized environment and the market is not only the result of interactions among rational agents, but also among the rules.[16] Therefore, law would have to be considered a regulatory instrument to exert and legitimate power while also being an effective mechanism to protect property in any economic structure.[17]

Historically, this can be exemplified by the efforts of the United States to promote policy changes in Latin America through legal reform, like those

[14] The Neo-institucionalist (or the New Institutional Economy) says that the problem of development is not the formation of capital, but the allocation of resources itself in the market, considering the cost of transaction. In this line, with the due specificity of each author, there are outstanding works by Ronald Cose, Oliver Williamson and Douglass North. They are considered new in opposition to the old institutionalist theories, especially those of John R. Commons and Thorstein Veblen.

[15] Max Weber was one of the first sociologist to say that law matters to capitalism, considering the rise of industrial Capitalism in nineteenth century Europe. Based on his historical investigation and analysis of ideal types he found that law, with a high degree of differentiation and substantial trust in general and pre-existing rules (Rational and Formal Law), contributes to the development of capitalism, insofar as it assures a high degree of calculability and the capacity to develop substantive provisions to adjust to the need for market operation. In this sense, legal scholar David Trubek says that the appropriate model for the market system to function is based on legalism, since it is the only means that can provide the necessary degree of certainty to meet the demands of the market, with general and universal rules. See David Trubek, *Max Weber on Law and the Rise of Capitalism,* 1972 WIS. L. REV. 720 (1972).

[16] *See* DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

[17] It would be important to discuss optimal designs and institutional arrangements to meet the specific needs of market operations, of strategic allocations of resources and to stimulate economic growth. For the present study what matters is to point out a few inefficiencies that could be diluted and resolved by the institutional arrangements. Market inefficiency could be determined from the result of a number of controllable and non-controllable factors. Thus, for instance, the following inefficiencies would be highlighted: (i) productive, when production does not occur at the least cost; (ii) dynamic, when an insufficient amount of resources is spent in seeking innovations of products and processes; finally, (iii) allocative, observed when the different goods and services are not produced and consumed in optimal quantities. In all these failures offered, according to the neo Institutionalist authors, it would be possible to recognize optimal institutional models that could mitigate or prevent failures, as, for instance, institutional means to reinforce the competitive pressure among the producers for a better technical development of production, or to implement programs of incentives and innovation processes.

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carried out by the Law and Development movement in the 1960s and 1970s endorsing the necessity of transplanting some successful design models. This movement had a second come back in late 1980s and 1990s focusing on the judiciary reform and regulatory law by arguing that common law institutions are better at fostering economic development.

However, history confirms that the Neo-institutionalist recipe and the Law and Development program did not fully thrive. Despite the outbreak of liberalization and privatizations during the 1900s, under the influence of the Washington Consensus, historical evidence shows that the industrialization process was not hegemonic and was not exclusively the result of rational models of law. On the contrary, there were great variations among countries and the passage from agriculture-based production to the constitution and implementation of an industrial policy is still underway in many developed countries and is regulated by soft law.

Hence, the question "Why was the development race an unequal process?" cannot be considered only as a matter of a top-down assimilation of certain structures from other countries or experiences. Institutions are subject to different empirical variations and path dependences.[18] Society, politics, law and economy operates in different forms, and even transcend state boundaries, and this cannot be ignored or naively rejected in any developmental perspective.[19]

What must be considered is that development is neither a progressive process nor transferable. There are several factors that make economic development a complex phenomenon around the world. Variations can deal with the problems of asymmetric distributions of information, difficulties in coordinating markets, besides, obviously, the very question of accumulation of

[18] North, *supra* note 11, at 115.

[19] Legal scholar Jorge Esquirol illustrate for instance the Latin America case with examples of *acquis légaux* – community gains - where rising social demands have challenged the orthodox formulas, he suggests the cases of the development of labor law, social function doctrine and the constitutionalization of socio and economic rights. *See* Jorge Esquirol, *The Failed Law of Latin America*, 56 AM J. COMP. L. 75 (2008).

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capital and political and cultural influences are fundamental to deal with this issues.[20]

The fact is that in many cases the answers to development problems are not formal solutions, but substantive and conceptual ones. These are issues involving the scope of regulation and allocation of resources in different sectors, the constitution of discretionary spaces for decision-making or even about the history and practices of institutions in society.

In this sense, a more sensible and accurate description about the development can be identified with an analysis that seeks an integrated perspective as a comprehension of the complexities of modern societies. This paper mentions two different approaches that can be correlated in the sense that both are descriptions about contingent distinctions of society and labels that institutions must be understood in context. We can mention the systemic sociology of organizations[21] and the legal developmentalist scholars.[22]

The systemic sociology of organizations can be said to be inspired in the social system theories, a theoretical approach that emphasizes the observations of differences of societies seen as constructed distinctions just as presented by German sociologist Niklas Luhmann. In this perspective, the idea of system is observed as a distinction between an environment and marked by certain operation that is also integrated into internal structures of the system.

What is important to highlight in Luhmann's view is that systems are unable to transcend their own boundaries that are marked by their operations. There is an "embedded" issue – or technically, an autopoietic operation of the system - that must be considered, since each operation of a system produces this boundary by embedding itself in a network of further operations, within which it gains its own unity-identity. For Luhmann's sociology the identity of the system is the marked side of a difference in relation to society, the unmarked side. This approach allows to reflect simultaneously the paradoxes of the marked and unmarked side, since the same is different. Thus, a systemic description of organizations understands institutions as organizational social

[20] *See* Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L. J. 209 (2011).
[21] *See supra* note 3.
[22] *See supra* note 4.

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systems that are embedded in their own operations, most of the time collective decisions, and at the same time differentiates from society as enviroment.[23]

Nevertheless, the embedded argument also appears in another debate of legal developmentalist scholars that discusses the role of the government as the main articulator of development strategies in society. In this perspective, rational law no longer plays a formal role, but provides a structure that can have multiple functions. Legal developmentalists argue that what is important is to recognize the dynamic process between the different relations established between law and society.[24]

What underlies both approaches is the importance of the "embedded" perspective towards institutions. The embeddedness argument had its origins with the economist Karl Polanyi and underscores in social science how institutions cannot be understood disassociated from society. The pendulum argument clarifies the issue, since it is possible to reconstruct the relations between market and government according to a given movement and via law/regulation performance.

The pendulum can reach its maximum point at one extreme and that means that market mechanisms can prove to be insufficient to stimulate economic development. Then the pendulum begins to swing to the other side, once again seeking the intervention of the government as a way of correcting the market failures. However, as soon as the pendulum reaches its maximum point, the government will also present failures.[25]

In addition, the analysis of the balance between market and government often remains superficial if we do not actually account for the disputes and struggles in the global governance context. It is also necessary to reveal the underlying structures and practices that are shaping this swing, usually explained by the rise of a technocratic management. This was pointed

[23] Luhmann, *supra* note 6.

[24] Katharina Pistor and Curtis Milhaupt, for instance, say there is a dynamic relationship as a two–way lane - *rolling relation* – between law and economy. It is a game of back and forth between the market and the law, in a relation to resolve the problems of the markets and successively new legal and extralegal configurations come out. In this dynamic, there are multiple functions of the law, such as coordination, regulation and signaling the new demands. *See* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (reprt. ed. 2010).

[25] *See* PAUL DE GRAUWE, THE LIMITS OF THE MARKET: THE PENDULUM BETWEEN MARKET AND STATE (2017).

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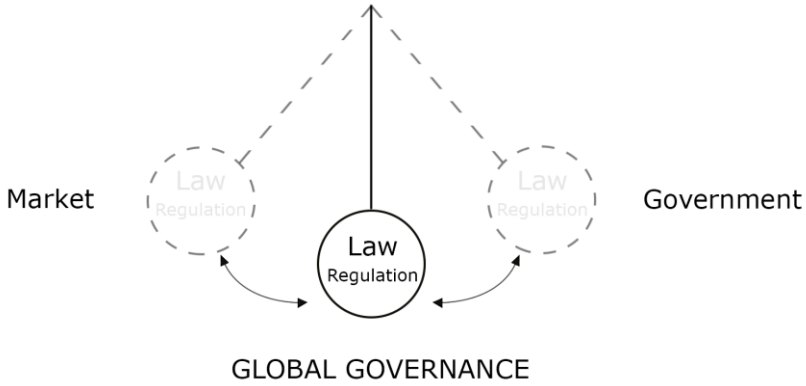
out by David Kennedy, "through the work of expertise, order and disorder are distributed unevenly, even inadvertently, among nations, economic sectors or classes, issues or problems through struggles about other things."[26] Ruling by experts can explain the global governance since the 1980s, characterized by the apparent paradox about the liberalization of markets accompanied by the intense regulation of institutions that protect the global players.



Picture no. 1: The balance between market and government via law/regulation in the global governance context.

The metaphorical image of the pendulum, swinging from side to side, schematically illustrate that government and market could not be polar alternatives, but rather complementary agents of an economic coordination in pursue of balance and more power in the global political economy. Just like stressed by both approaches the problems of the development agenda are complex and unique in its way in the sense that it is insufficient to explain how relations between government and market are de facto established disregarding the embeddedness of institutions.

Since the late 1800s, with the Sherman Act in the United States,[27] one possible way to study this ongoing relation between government and market is by underscoring the competition system. The basic assumption of the

[26] DAVID KENNEDY. A WORLD OF STRUGGLE: HOW POWER, LAW AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 19 (2016). *See also* PATRICK M. WOOD, TECHNOCRACY RISING: THE TROJAN HORSE OF GLOBAL TRANSFORMATION (2014).
[27] Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7 (1890).

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competition system is to generate goods for society by promoting an efficient economy, thus, any competition system implies a certain competition policy and law that carefully impose limits to economic power.

During 1990s an outbreak of implementation of new and reformed competition systems occurred around the world, mainly in Europe and Central Asia. The basic assumption for some political scientist and sociologists[28] is that this outbreak was a reflex of the neoliberal globalization,[29] hence competition system started to be described as a functional mechanism that empirically permit the concentration of economic power worldwide, despite the basic idea to generate goods for society. These authors highlight the important aspect that the discourse of competition system and law ignores asymmetries in the history, specially omits the colonialist and imperialist ideals, even the struggles for economic rights and the power of experts.[30]

Nevertheless, this paper offers a complementary account about the development of the competition system by focusing the institutional history and sociology. I present and discuss the embedded factors involved in C.A.D.E.'s case. In this sense, it is important to understand that different relations between government and market were important in shaping this institution in Brazil vis-à-vis the broader global context and ideals that influence these relations. I argue in the next section that the embeddedness can be revealed if we understand the importance of the institutional context, like the institutional learning and the institutional influences, as determinant for the development.

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[28] *See* WILLIAM DAVIES, THE LIMITS OF NEOLIBERALISM: AUTHORITY, SOVEREIGNTY AND THE LOGIC OF COMPETITION (1st ed., 2014) and HUBERT BUCH-HANSEN & ANGELA WIGGER, THE POLITICS OF EUROPEAN COMPETITION REGULATION: A CRITICAL POLITICAL ECONOMY PERSPECTIVE (1st ed., 2011).

[29] The paper refers to neoliberalism as a set of policies and rules that permits the extreme centralization and concentration of capital. Different from liberal tradition, neoliberal thought accepts that monopoly is not necessarily harmful if it proves to be efficient to the economy, thus, the idea of concentration has become a key-stone in the neoliberal theory and in practice justify the concentration of economic power within a few multinational corporations. Some examples of neoliberal policies are the privatization of state-owned enterprises, the deregulation of strategical economic sectors, and some examples of rules are the competition system and trade law that permits the liberalization of finance, encouraging stock market activities and the merge and acquisitions to happen. In this case rules are extremely functional for the capital expansion and concentration. *See, e.g.,* Gérad Duménil & Dominique Lévy, *Costs and Benefits of Neoliberalism: A Class Analysis*, *in* FINANCIALIZATION AND THE WORLD ECONOMY 17 (Gerald A. Epstein ed., 2005).

[30] *See supra* note 22.

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2.2. THE INSTITUTIONAL HISTORY AND SOCIOLOGY STANDPOINT OF VIEW

In the 1978 paper *Organizations and Decisions*, Niklas Luhmann argued that the origins of many political institutions were old corporations from religious brotherhoods that transformed into organizations of protection and discipline the political authority since the late Middle Ages in Europe. The German sociologist draws out two important observations from the example. First, Luhmann suggest that the origin and development of certain institutions depends on the network of interorganizational relations that stimulates its own growth. In addition, the example indicates that organizations influence each other and there are assumptions for the requirements of growth and constant reorganization of all other organizations.

Secondly, the example assume that the idea of organization implies a specific structure when society has reached a certain degree of complexity. This idea is explained by Luhmann by the observation of a co-evolution of the interrelations between organization and society, that become functionally differentiated.[31] From a systemic perspective, the shift from a pre-modern to a modern era was a reflect of the formation of a secular society with increase of complexity, marked by the emergence of functional differentiated systems.[32] Thus, specialized organizations – referred in the paper as institutions - emerged based on specific functions and programs.

For the paper, it is important to notice that this sociological point of view understands the relations between organization and as society in a dynamic perspective. In this sense, it is possible to discusses the increasingly grow of complexity and differentiation process in institutions. I argue that this discussion can be addressed by the idea of institutional influence and the importance of learning processes that reflect the orientations and routines applied to the new contexts and knowledge produced in each environment – derived from a legal developmentalist literature.

Institutional learning means to improve the performances of each institution in relation to others. The changes are gradual and improvements

[31] *See* NIKLAS LUHMANN, SOCIAL SYSTEMS (1995).
[32] *See* NIKLAS LUHMANN, OBSERVATIONS ON MODERNITY (William Whobrey trans., 1998).

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are always understood in the long term, since the entire learning process involves patience and reflection.

Accepting the idea of development as a learning process requires the comprehension of the dynamics involved, i.e., without a defined arrival point, and accepting situations as transient. The fact is that institutions have a great capacity for innovating to better meet demands according to the needs observed in time. However, there is no innovation without learning and knowledge, and cases of successful institutions underscore how it was important to renew their positions and reconsider their actions, and only manage this if they reconsider their own history to a certain extent.

Recently, Charles Sabel and Sanjay Reddy, for instance, emphasized that the important aspect in debating development is to discuss how to further learning conditions. The issue here is a critique of the notion of state-oriented development theories. After all, as already seen in the transplantable perspective, it is not enough to presuppose a single technical agent as holding the only power of decision, or as a pre-determined set of solutions or reforms to solve point problems. The scholars explain:

> Such a straightjacket conception of the order of things diminishes the attainment here and now of human potential, and accentuates the propensity to misapply technology and ideas, with too often disastrous consequences-discovered, and admitted, too late. No wonder development by dirigiste states and recipes seems to many more an invitation to collective self-abnegation than a reliable promise of regeneration.[33]

Solutions are built based on learning process. Here one avoids the mistake of a single, ready and finished solution, since one must take into account the specific needs and consider local experimentation as essential. It is a matter of looking at "*the learning centered approach to development*" as a process that is the result of a collective ability to construct and improve the institutions - which in this paper is called institutional learning and influences. Once again, Sabel

[33] *Supra* note 6, at 1-2.

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and Sanjay affirm that this approach recognizes the fundamental and pervasive incompleteness of our perceptions and cognitive capacities and at the same time the need for one another in other partially to overcome this incompleteness.

The fact is that considerable knowledge exists inside institutions and it cannot be ignored. This is because institutions produce knowledge that must be internalized in their procedures, norms, and above all in the routines of their employees. This accumulation of knowledge over time reflects a certain adjustment or reformulation of practices that are ultimately spontaneously or legally implemented by the institutions. Learning is not only to recognize the mistake and correct it, but to reconstruct the projects and plans of institutions per the new contexts and knowledge produced in practice.

This paper does not seek to normatively discuss models of institutional learning, or even to indicate the content of this learning – which would contradict the experimental concept of learning itself. The point is to highlight the importance of the qualitative gain when institutional learning is observed and implemented, insofar as routines, procedures, or strategies of the institutions are improved.

In the next topic, we apply this framework to describe and discuss C.A.D.E's experience.

3. CADE'S INSTITUTIONAL HISTORY

C.A.D.E.'s institutional history coincides with several moments of institutional learning and influences. In this case, it is enough to see how the performance of this agency gained space and repercussion in order to preserve economic competition in Brazil over time, and this transformation were recently consolidated by a new Antitrust Act.

As will be shown, the history of C.A.D.E. was marked by a series of failures and successes that can be described in four main moments, based on the specific legal arrangements concerning economic competition policies in Brazil: (a) the

https://doi.org/10.6092/issn.2531-6133/7361

beginning of the interest to regulate economic competition during the period between 1889-1930, (b) the defense of a popular economy between the Vargas Era[34] and the Juscelino Kubitschek administration,[35] (c) the consolidation of the defense system at the beginning of the 1990s until (d) today, with the internalization of the institution.

These four periods reflect different arrangements and conjectures faced by the institution. The agendas of the executive changed, just like the policies for competition in Brazilian markets. Indeed, at certain times C.A.D.E. actions to implement a system to defend economic competition were a complete failure, but during the late 1990s, in light of redemocratization and liberalization of Brazilian market, C.A.D.E. played a key role to help recover the Brazilian economy. In this sense, it was indispensable for C.A.D.E. to reflect on its own structures and operations. Here, the Brazilian judiciary played an important role in shaping the agency structure and the 1988 Federal Constitution (CF/88) to define its powers.

In brief, the purpose of this section is to justify the development process as embedded – understood as unique and circumscribed process, determined by local experience. The point of interest is to highlight the transformations of C.A.D.E. in four moments,[36] and verify how it was possible

[34] Getúlio Vargas was president of Brazil in two different moments. The first term that lasted fifteen years (1930-1945) was marked by the coup d'état during the period that became known as Estado Novo. Subsequently, Vargas was elected by the popular vote and governed the country from 1951 until 1954, when he committed suicide. His regime was marked by protectionist and populist measures, supported by a nationalist discourse. The period mentioned in the article refers to the end of his first term, when many companies and public industries were formed in Brazil. During his government, there was also an expansion of labor and social rights, although such conquests served as an instrument of control during the authoritarian regime. For a historical presentation about Getútilo Vargas, see LIRA NETO, GETÚLIO 1930-1945: DO GOVERNO PROVISÓRIO À DITADURA DO ESTADO NOVO [*Vargas: from the Temporary Government to the Dictatorship of the New State*] (2013).

[35] Juscelino Kubitschek was president of Brazil during 1956-1961. His term was marked by a developmental and national integration project, marked by the construction of highways and, above all, by the construction of the new federal capital, Brasília. Kubitschek's term became known as the "golden years." Throughout his term, the Brazilian economy was rapidly industrialized, going from rural to urban.

[36] See for a general account about Brazil's antitrust policy history Tércio Sampaio Ferraz Jr., *Lei de Defesa da Concorrência: Origem Histórica e Base Constitucional* [*Competition Law: Historical Origin and Constitutional Basis*], 45 ARQUIVOS DO MINISTÉRIO DA JUSTIÇA 175, 176- 77 (1992). *See also* CClaudio Monteiro Considera & Paulo Corrêa, *The Political Economy of Antitrust Policy in Brazil - from Price Control to Competition Policy*, *in* ANNUAL PROCEEDINGS FOR THE FORDHAM UNIVERSITY SCHOOL OF LAW: INTERNATIONAL ANTITRUST LAW AND POLICY 533 (Barry E. Hawk ed., 2002), and most recently Francisco Todorov & Marcelo Maciel Torres Filho, *History of Competition Policy in Brazil: 1930-2010*, 57 THE ANTITRUST BULL. 207 (2012).

https://doi.org/10.6092/issn.2531-6133/7361

to implement a system for defense of competition based on institutional learning and influences.

3.1. THE BEGINNING OF THE ECONOMIC COMPETITION PROTECTION

The first period refers to Brazil's First Republic (1889-1930), generally described as a liberal phase. The government operated de facto in an oligarchic and protectionist scheme in which all matters were manipulated by a dominant private elite to pursue their own interests. all rules and enforcements on the protection of economic relations were controlled by property owners of the sugar mills in the Northeast and the cattle-owning "colonels" in the sertão, and later, in a second moment, by the coffee planters of the Paraíba Valley and the West of São Paulo State. Coffee-planting was the greatest example of the concentration of economic power and the lack of economic protection policy. The only real interest was to reproduce the system of extensive monoculture for export.

It was in São Paulo and Minas Gerais states that "colonelism" as a political system reached its apex and contributed to the dominance the two states exercised over the federation. The "colonels" were involved with the governors' policies, who were also articulated by the president of the Republic, almost always coming from the two states. Usually the power of colonels was smaller in the periphery of the country, where export economy structures did not exist – such as in the south of Brazil which was populated predominantly by European immigrants who were small property owners.

In this structure, economic control corresponded to the interventions of the elites to strengthen their own production in market. In this way, the first initiative came from the main producer states (São Paulo, Minas Gerais and Rio de Janeiro) which, in 1906, celebrated the Taubaté Agreement (Convênio de Taubaté) to enhance the value of coffee, regulate its trade, promote increased consumption and create the Conversion Bank (Caixa de Conversão) establishing the minimum sales price.

This intervention mechanism is closely linked to the behavior of the foreign exchange. The Brazilian economist Celso Furtado indicated the way in

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which the coffee economy managed to 'socialize losses' and 'privatize profits.'[37] Consequently, this intervention process was complemented by monetary and financial mechanisms. A significant fact is that the Conversion Bank was already created in the first decade of the century, in 1908.

This price control structure depended greatly on foreign trade since Brazil exported coffee and imported all other manufactured products from Europe – this situation historically caused a disequilibrium in trade, resulting in a large public debt and the devaluing of Brazilian currency.[38] The result was that Brazil faced serious economic problems with the surplus international offer of coffee, without any entrenched insurance policy and with the international economic crisis background in 1929. This rudimentary economic scheme carried out by oligarchic structures collapsed and the institutional organization system on which it was based. Above all, the coffee defense system was dismantled.

3.2. THE DEFENSE OF POPULAR ECONOMY

The 1930s marked the beginning of the debate about the construction of a competition system to protect and ensure the market considering the growth of industries in Brazil. The objective of these discussions, especially with the proposal for amending the 1934 Constitution for establishing economic rights, was sanctioning and preventing the formation of industrial and trade monopolies, preserving free enterprise and the national economy.

A major fact of this second period was that the defense was carried out by the government intervention mechanisms in the economic domain with the creation of several executive bodies for specific markets, like the agriculture and the extractive industry. Monoculture elites did not have the same power in defining the political economy programs that were now marked as welfare policies. Besides these government bodies, a professional bureaucracy was also

[37] CELSO FURTADO, FORMAÇÃO ECONÔMICA DO BRASIL [*Economic Training of Brasil*] (2007).
[38] This was marked in Brazil history with the burning of surplus coffee stocks as the last measure by the Government to elevate the price of the product on the international market. The symbolic event indicated the complete economic deregulation of Brazil at the beginning of the Republic.

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established, such as the Administrative Department for Public Service (*Departamento Administrativo do Serviço Público* - D.A.S.P.).[39]

In the context of intense industrialization in Brazil, it is important to underscore the establishment of early state-owned companies such as Companhia Vale do Rio Doce and the official founding of Companhia Siderúrgica Nacional in 1942. The same modernization continued more intensively in Getúio Vargas second administration between 1950 and 1954 that marked a strong government intervention in the economy by implementing the Superintendency of Currency and Credit (*Superintendência da Moeda e do Crédito*), ensuring a process of import controls and, for our case, the implementation of strict measures concerning trade and price setting.

Legal measures were necessary to operate the welfare policies, like the Act No. 1.522/51 that authorized the federal government to intervene in the economy to ensure the free distribution of merchandise and essential services.[40] The main institutions that deals with this program were the Ministry of Labor, Industry and Trade, the Federal Committee of Supply and Prices (*Comissão Federal de Abastecimento e Preços* - hereinafter C.O.F.A.P.) and the auxiliary departments in the state and municipal levels.

C.O.F.A.P. and the auxiliary departments were empowered by the authority to purchase and distribute merchandise, set prices and control supplies. Thus, for instance, as to setting prices, the departments could promote economic inquiries, survey production costs, verify stocks and regulate the circulation of goods, according to the availability of goods and

[39] D.A.S.P. was to be a regulatory agency, for coordination and control, in charge of making procedures universal. But it faced problems throughout its existence, including the idea of how relations between State and society occurred at the time. The State was considered an opportunity for jobs without competitive exams, and the places were filled by personal nominations. During the first Vargas Administration (1930-1945), the State took on the role of inducing national development. The number of jobs expanded greatly, including the public sector. However, this growth followed the clientelist and job-giving logic, to the detriment of the university fostered by public competitive exams. The Brazilian State was becoming more modern, but continued the old practices. http://www.servidor.gov.br/institucional/historico_DASP.htm

[40] Decreto No. 1.522, de 26 de Dezembro de 1951, DIARIO OFICIAL DA UNIAO [D.O.U.] de 28.12.2008 (Braz.).

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services. In the 1960s, C.O.F.A.P. was replaced by the National Superintendency of Supply (*Superintendência Nacional do Abastecimento* - S.U.N.A.B.),[41] which implemented a policy for credit and development of production, expanded existing programs and operated the national system of warehouses and silos, all of which was to ensure a free distribution of merchandise and essential services.

At the same time as a series of institutions were established to protect the Brazilian economy, it must not be forgotten that the first antitrust legislation was enacted. This law sought only to discipline a series of infractions and abuses against the popular economy, and not to structure and organize a system to defend economic competition. As a matter of fact, the idea of protecting competition was seen by the politicians as nationalist rhetoric.

It is sufficient to consider the failure of Decree Law No. 7.666 of June 22, 1945 – known as "Malaia Law"[42] which established several acts against the social and economic order, instituting the Administrative Committee for Economic Defense (the former name of C.A.D.E.) to verify the existence of such acts and repress them. Once more, Luiz Carlos Delorme Prado, former C.A.D.E. Commissioner, explains that during the historical moment when this law was enacted, there was a strong opposition that considered the Act to be far too interventionist and influenced by leftist ideals.[43]

It was only in the 1960s, during the Goulart administration,[44] that new legislation came along allowing the government to intervene more strategically

[41] S.U.N.A.B. was extinguished by Decree No. 2.280, of July 24, 1997, and all its obligations and attributions were absorbed by the Treasury (Ministério da Fazenda. The Office of the Federa Budget of the Ministry of Planning and Budgets (Secretaria de Orçamento Federal do Ministério do Planejamento e Orçamento) was authorized to redistribute the balance of the budget endowments of the SUNAB after it had been closed.

[42] Decreto-lei No. 7.666, de 22 de Junho de 1945, DIARIO OFICIAL DA UNIAO [D.O.U.] de 22.06.1945 (Braz.). This statute became known as "the Malaia Law", referring to the nickname of its author, former Minister of Justice Agamenon Magalhães, given to him by journalist Assis Chateaubriand. http://www.alepe.pe.gov.br/sistemas/perfil/parlamentares/AgamenonMagalhaes/17.html

[43] The U.S. Department of State interpreted the law as an act of economic nationalism and pressured the Vargas administration to revoke it. Sectors of the opposition protested the measure calling the Committee for Economic Defense a Nazi-Fascist instrument that threatened the Brazilian economy. The law was immediately revoked by Provisional President José Linhares a few days after Vargas was deposed. *See supra* note 2, at 102.

[44] João Goulart was president of Brazil from 1961-1964, his term was interrupted by the military coup of 1964. During his government, Brazil suffered from inflation and its main policy was to

https://doi.org/10.6092/issn.2531-6133/7361

on the markets. This occurred with the enactment of Act No.4.137 of 1962,[45] article 8 of which created C.A.D.E. with national jurisdiction. The 1962 C.A.D.E. was a small collegiate decision-making agency, which, in those days, oversaw and controlled the abuse of economic power, promoting the judgment of infractions. In certain cases, C.A.D.E. could ask for judicial intervention to apply sanctions against the domination of markets, raising prices without fair cause, natural monopolies and the formation of economic groups.

However, it is interesting to underscore that the 1962 C.A.D.E. was not part of a structure program to defend economic competition. The discussion of how to formulate a system to defend competition was not on the political agenda. At that time, economic facts, free competition and monopoly would have sounded like odd political economic programs that necessarily had to be prevented by government in the name of defending a popular economy. In fact, Brazilian markets were controlled by multinational companies that organized themselves in a cartelized fashion authorized by government.[46]

The fact is that the government economic program was oriented to protect the popular economy and these measures were carried out during populist governments. In this sense, it is worth pointing out that the period between 1930 and 1945 was a great moment of social and economic legislation in Brazil. Nevertheless, this legislation was introduced in an environment of low political participation and precarious enforcement of civil rights. The problem was that social and economic protection were distributed to ensure continued populist government control of Brazilian society.

Hence, for the antitrust legislation, notions such as free competition and monopoly were ideas to be criticized. Some explanations were: no producer would have the means to exert real control over prices in a free competition, there was danger in free competition, since new suppliers or consumers constantly were added, and because of the monopoly it would be impossible for new suppliers to enter the market.

perform the basic reforms - economic and social measures of nationalist character that defended a great intervention power of the state in the economy.

[45] Lei No. 4.137, de 10 de Setembro de 1962 DIARIO OFICIAL DA UNIAO [D.O.U.] de 27.11.1962 (Braz.).

[46] See Kurt Rudolf Mirow. A ditadura dos cartéis [The cartel dictatorship] (1977).

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Economists point out that the populist economic programs turned out to be disastrous measures for Brazil.[47] It was wrongly assumed that price control could partly attenuate the inflationary forces in the 1950s. However, all it did was provoke price distortions, leading to scarcity in several areas of the economy. In addition, price controls triggered a process of rapid growth of state-owned companies since fixed tariffs for public utility service prices were not profitable for foreign companies, the outcome being difficulties in ensuring the expansion and modernization of private industries.[48] The government managed to consolidate its position in the field of electricity generation and distribution, public transport and other services that were essential for society.

The Kubitschek administration (1964-1967) is a good example that confirmed - in a planned fashion - the consolidation of this industrial development. This consolidation had already begun in the Vargas Era, above all with the implementation of the Plan of Goals (*Plano de Metas*) and growth of the base industry carried out exclusively by the executive.

During this second period, government intervention in the economy was a form of protection of the popular economy (and not of competition). As described by the Brazilian scholar Alberto Venâncio Filho the economic government policy for antitrust legislation and for establishing prices was affiliated to a certain protectionist environment which practically disappeared in the years after the end of the military dictatorship.[49] This was above all because competition, the golden rule of the market, was to be guaranteed by the executive in welfare policies.

3.3. THE CONSOLIDATION OF THE SBDC

The executive modernization process that occurred in the 1990s marked a decisive change of vision of the paradigm of public administration, and specifically about the protection of competition in Brazil. According to former minister of administration and state reform, Bresser Pereira, the 1990s

[47] *See* Werner Baer, Isaac Kerstenetzky & Annibal V. Villela, *The changing role of the State in the Brazilian economy*. WORLD DEV. J., 1973, at 23.
[48] *See supra* note 29.
[49] *See* ALBERTO VENÂNCIO FILHO, A INTERVENÇÃO DO ESTADO NO DOMÍNIO ECONÔMICO: O DIREITO PÚBLICO ECONÔMICO NO BRASIL (1998) [*State Intervention in the Economy - Public Economic Law in Brazil*].

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confirmed that the welfare policies did not thrive, mainly due to serious fiscal crises and public indebtedness that had marked the country's economy since the 1980s. The evidence was that the traditional protections guarantees and the enforcement of social rights were no longer successfully fulfilled. In short, government and market could not be seen as polar alternatives in Brazil's new economic policies.[50]

There were four main components of Brazil's administration reform, influenced by the Washington Consensus: (i) a new delimitation of state functions, with a privatization program; (ii) reduction of the degree of state interference in the economy through deregulation programs, and increasing the use of market control mechanisms; (iii) implementation of a management-oriented reasoning towards results and (iv) amplifying mechanisms of direct representative democracy, opening space for more social control of public decision-making.

In the economic area, it is important to underscore the introduction of the Real Plan (*Plano Real*), which inaugurated a new phase of the fight against inflation despite the failure of other plans. One of the aims of the plan was also to ensure free competition in various activities – even in some public services. Instead of direct intervention, government has become the main regulatory agent of economic activity just like expressed in the Article 174 CF/88 that states as the normative and regulating agent of economic activity, the state shall, in the manner set forth by law, perform the functions of control, incentive and planning, the latter being binding for the public sector and indicative for the private sector.

CF/88 marked a new structure for the interactions between regulatory sectors and the antitrust regime in Brazil. As pointed out by Brazilians scholars, Caio Mario Pereira Neto and José Inácio Filho, the government assumed two distinct but complementary roles in creating spaces for competition where it was non-existent and protection of these spaces opened

[50] *See* Luiz Carlos Bresser-Pereira, *State Reform in the 1990s, Logic and Control Mechanisms, in* INSTITUTIONS AND THE ROLE OF THE STATE 175 (Leonardo Burlamaqui, Ana Célia Castro & Ha-Joon Chang eds., 2000).

https://doi.org/10.6092/issn.2531-6133/7361

by regulation (enforcement of antitrust violations within regulated sectors).[51] Thus, C.A.D.E.'s power was strengthened since it was now the main agency to foster competition by fully exerting its tasks in competition adjudication in spaces non-regulated or by evaluating the compatibility of regulatory policy with competition law.

This new transformation required a new normative framework and marked the enactment of the most important Brazilian Antitrust Act, No. 8.884/1994.[52] Its purpose was to implement an unprecedented policy of competition in the country and enable the interaction between regulatory law and antitrust regime to be fully articulated. This Act, in fact, inaugurated a system to defend the competition system, consisting of the Secretariat for Economic Monitoring (*Secretaria de Acompanhamento Econômico* - S.E.A.E.) of the Ministry of Finance, the Secretariat for Economic Defense (*Secretaria de Defesa Econômica* - hereinafter S.D.E.) of the Ministry of Justice, as fact-finding agencies, and C.A.D.E. as the Administrative Court connected to the Ministry of Justice.

The dominant characteristic at the time was to build an environment in which dissemination and defense of competition were to take place. C.A.D.E., which until that time had played a marginal role in economic life in Brazil, took on a leadership role and became an independent custodian of the free competition principle. The agenda was marked with the purpose of consolidating the best practices and promoting an environment of competition neutrality.[53]

In this transformative scenario, it is important also to highlight other statutes like Act No. 8.158/1991,[54] which modified the tasks assigned to C.A.D.E. - as foreseen in 1962 - classifying it as a judicial agency within the structure of the Ministry of Justice. Thus, the agency began to function at the Secretariat of Economic Law, and then, with the Antitrust Act, established C.A.D.E.'s own

[51] *See* Caio Mário da Silva Pereira Neto & José Inacio Ferraz de Almeida Prado Filho, *Spaces and Interfaces Between Regulation and Competition: the Approach of CADE* 12 REVISTA DIREITO GV 13 (2016).
[52] Lei No. 8.884, de 11 de Junho de 1994, DIARIO OFICIAL DA UNIAO [D.O.U.] de 13.6.1994 (Braz.).
[53] See Vinicius Marques de Carvalho. A política de defesa da concorrência quatro anos depois: ainda em busa de melhores práticas? [The competition policy four years later: still in search of best practices?] (2015).
[54] Lei No. 8.158, de 8 de Janeiro de 1991, DIARIO OFICIAL DA UNIAO [D.O.U.] de 9.1.1991 (Braz.).

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structure and autonomy that became a federal agency, responsible for judging proceedings. In addition, based on the fact-finding by S.D.E. and on the analysis of reports, this agency also became important to decide on infractions against free competition, and as a judge to approve acts of concentration.

The creation of specialized agencies, such as C.A.D.E. and S.D.E. provided evidence that there was institutional acknowledgment about how to deal with the complexity of economic activity in the country. Now the promotion of structures to protect competition was no longer considered a nationalist discourse, but as an essential key to the economic development of Brazil.

The entire political and economic agenda of the government began to create compatibility between the values of economic efficiency and consumer well-being with acknowledgement of the principle of free competition, foreseen in paragraph IV of article 170 of the Federal Constitution. In other words, as already mentioned, it became the duty of the government to observe, control and regulate the economic environment so that companies with market power would not abuse this power to harm free competition.

In this sense, the institutionalization of a specific agency like C.A.D.E. was decisive to inaugurate a defense system. The Act attributed great discretionary power to C.A.D.E., and, over the years, the jurisprudence of the Economic Council consolidated several opinions about infractions to the economic order, ensuring a certain predictability and legal certainty that were important for the economic growth observed in Brazil in late 1990s and beginning of 2000s.

Indeed, it is interesting to find that the decisions and administrative precedents generated by C.A.D.E. become real indicators and signal of the country's political and economic agenda of the government, above all in the matter of competition policies. This signaling can be understood as the legal and economic ideas that form the bases of the competition law enforcement in Brazil, and reveals certain political and economic preferences – as already mention for certain analyses this permitted more concentration of economic

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power in the country since C.A.D.E.'s policies are aligned with neoliberal ideals.[55]

It is important to underscore that institutionally C.A.D.E. as an "administrative court" was directly influenced by the Brazilian judiciary structure and by the Ministry of Justice as a political organ, since its actions began to indicate the lines of public policies for competition.[56] In the next topic we highlight the institutional influences of C.A.D.E. during the 1990s.

3.4. CADE AS AN ADMINISTRATIVE COURT

Nowadays C.A.D.E. constantly exercises functions similar to a judicial court in Brazil on competition matters and it is institutionally surrounded by rites and solemnities like those of the Judiciary. Regarding its organization, C.A.D.E. is a collegiate body composed of six members (commissioners) and a president, all with four-year terms without the possibility of reappointment.

Some features that resemble the performance of judges that might be worth mentioning are the fact that commissioners have functional guarantees, such as judicial independence and the prohibition of taking certain positions that would potentially affect the impartiality of the court. Just like final appellate courts, commissioners also do not submit to any higher authority and have unrestricted freedom to interpret reasonably the evidence produced while forbidden to participate in politically partisan activities.

Another aspect similarly related to the Brazilian Judiciary is that C.A.D.E. watches over the technical quality of its members and opinions through a meritocratic (and not political) nomination process. The

[55] An important critique about this moment can be analyzed regarding the fact that the development of the competition in 1990s until today contributed to the production of an economic arrangement propelled by neoliberal ideals in Brazil. For instance, Brazilian scholar Iagê Miola argued according to an empirical analysis that "the data gathered from the Brazilian case illustrate that, from 1994 to 2010, economic power was in general regulated in a way to be compatible with – not contradictory to – the neoliberal understanding on how should competition occur, i.e. how big should corporations be and hence how should the economy work" (p. 680). Miola argues that C.A.D.E.'s interpretation advocates for concentration as something desirable and his data revealed that in most cases the agency decided in favor of corporations' concentration. *See* Iagê Miola, *Competition law and neoliberalism: the regulation of economic concentration in Brazil,* REVISTA DIREITO E PRÁXIS, 2016, at 643. *See also* CARLOS ALBERTO BELO, A AUTONOMIA FRUSTRADA: O CADE E O PODER ECONÔMICO [*The Thwarted Autonomy: CADE and Economic Power*] (2005).

[56] *See* Diogo R. Coutinho, *O Direito nas Políticas Públicas*, *in* CONTRATOS PÚBLICOS E DIREITO ADMINISTRATIVO (Carlos Ari Sundfeld & Guilherme Jardim Jurksaitis eds., 2015).

https://doi.org/10.6092/issn.2531-6133/7361

appointments require approval by the Federal Senate, just like some positions in the Judiciary, such as the positions of Justices in the Supreme Federal Court or in the Superior Court of Justice.

However, a major difference between the two models is the profile of the composition of the court. C.A.D.E. is not only composed by former lawyers or jurists, but also engineers, economists, and other antitrust practitioners - true experts on the grounds of mobilized technical knowledge – and in this sense the court's composition may signal a greater diversity vis-à-vis the Judiciary.[57]

The plurality in the composition can be justified in theory by the perception that the court is a collegiate body that proposes to attend different points of view. Given the functioning of the trial sessions in which the debate and the exchange of arguments between the peers exists, there is, in a certain way, a situation conducive to the common conviction that may generate the possibility of some decisions forming a guideline and representing different points of view. It is possible to systematize as follows:

Table 1. Comparative approach of Brazilian Judiciary and C.A.D.E.

	Judiciary	*CADE*
Function	Judicial	Administrative-adjucatory
Court	Deliberative Collegiate Body, except first instance (monocratic judgment)	Deliberative Collegiate
Term	Life, except for some positions	Four years, non-renewable
Guarantees	Functional and Impartial	Functional and Impartial
Composition	Single Composition (requires only the bachelor's degree in law and at least three years of legal experience before sitting for the judicial exam)	Plural Composition (Anyone holding a bachelor's degree with well-known legal or economic knowledge and unblemished reputation, may be appointed by the President of the Republic, after approval by the Federal Senate)

[57] Under the new Antitrust Act, anyone over thirty years of age with legal or economic knowledge and unblemished reputation may be a commissioner. Different is the case of the Judiciary in Brazil which admission occurs by competition of public tests and titles made only by law graduates, meeting the temporary requirement of three years of legal training.

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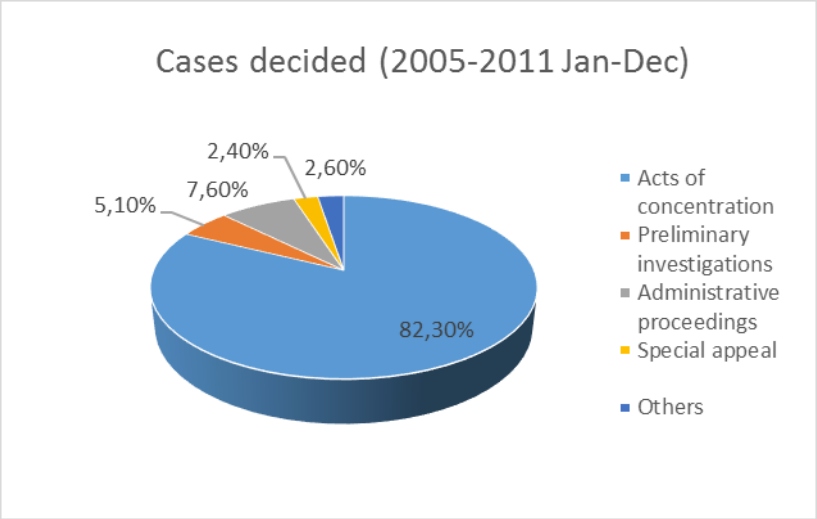
Among its duties, C.A.D.E. plays a preventive role insofar as it analyzes structural changes in the market, presented in the form of acts of concentration – market agreements considered to be harmful to free competition, and a repressive role that refers to judgments of administrative proceedings for repressing infractions and abuse against the economic order, such as: cartels, predatory pricing, exclusive contracts and others.

In the graph below, the distribution of activities during the period from January 2005 to December 2011 can be noted, in which 82.3% of the proceedings adjudicated by the C.A.D.E. plenary were acts of concentration, 7.6% preliminary investigations and 5.1% administrative proceedings.



Picture no.2: C.A.D.E. em números/Cases decided (2005-2011 Jan-Dec)

At the beginning of the twenty-first Century, the work of C.A.D.E. became more intensive and important as evidenced by the growth of fines collected due to infractions, or the untimely presentation of an act of concentration, in 2003 2.9 million reais were collected and, five years later, in 2008, more than 64 million reais.

The great number of proceedings filed and adjudicated at C.A.D.E. from the year 2000 to April 2012 can also be seen. These are significant figures that require a well-defined structure to provide a good quality response to the

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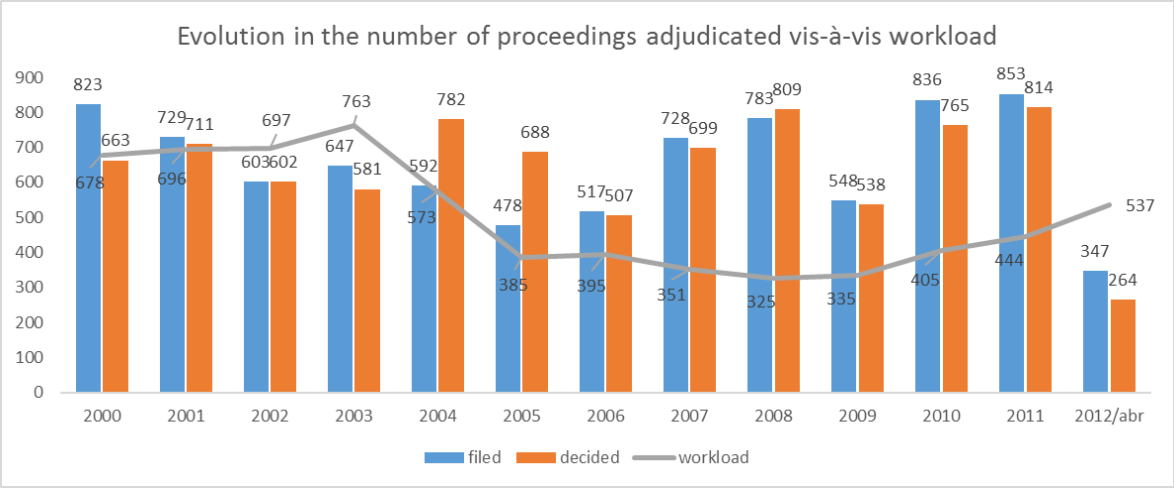
volume of the demands. It is emphasized that in 2000, 823 proceedings were filed, and in 2011, 814 proceedings.



Picture no.3: C.A.D.E. em números/Evolution in the number of proceedings adjudicated vis-à-vis workload

In this evolution of the filing and adjudication of proceedings, it is important to also consider the capacity of C.A.D.E. to reinforce its jurisprudence and care to uphold its opinions when they are reviewed by the Judiciary – a hypothesis which could be seen as a possibility of analyzing the quality of the work done by C.A.D.E. itself.[58] It is above all necessary to preserve the rationality and technical strictness of antitrust analysis, since a certain logic must be obeyed in the economic analysis of law and a synchronization of the administrative and judicial levels. Otherwise, there could be serious problems for economic activity and judicial safety itself could be reduced.

According to the Annual Management Report for 2010, the judicial defense of C.A.D.E. is still improving, and in 84% of the cases the decision by

[58] A study before the new Antitrust Act about the judicial review of C.A.D.E.'s decisions reveals that eighteen acts of concentration and twenty-one administrative proceedings were overruled because of a number of defects observed. *See* FABRÍCIO ANTONIO CARDIM DE ALMEIDA ET. AL., REVISÃO JUDICIAL DAS DECISÕES DO CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (CADE): PESQUISA EMPÍRICA E APLICADA SOBRE OS CASOS JULGADOS PELOS TRIBUNAIS REGIONAIS FEDERAIS (TRFS), SUPERIOR TRIBUNAL DE JUSTIÇA (STJ) E SUPREMO TRIBUNAL FEDERAL (STF) (2011)

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C.A.D.E. is confirmed by the Judiciary – which may also show a clear improvement of its performance.

3.5. THE NEW CADE

One of the main problems perceived with the 1994 Antitrust Act was the absence of a requirement for prior approval of acts of concentration – the prior presentation would enable C.A.D.E. to apply preventive measures, not only corrective ones, making it more effective and simple for authorities to impose restrictions.

Another important problem recognized was regarding the institutional design of S.B.D.C. It was considered extremely complex since it had different authorities (S.D.E., S.E.A.E. and C.A.D.E.), and the plenary decisions required the participation of many agents (from S.D.E., from S.E.A.E., from the C.A.D.E. Attorney's Office and from the Department of Justice). Many lawyers and economists criticized S.B.D.C. as a completely anachronistic and excessively bureaucratic multiplication of agencies. The Brazilian government and economy simply could not allow an agency like that to continue in the same form.

The outcome was that administrative proceedings were very slow and, in many cases, it was impossible to prevent adverse effects on the market due to acts of concentration, or even to implement decisions. In this sense, the implementation of a section just to enforce C.A.D.E.'s decisions was an important improvement. This was coordinated by the Attorney's Office of C.A.D.E. (Pro.C.A.D.E.)[59] created in 2009, which led to an increase of technical knowledge regarding collection, rationalizing the scarce human and material resources of the agency.

[59] The Attorney's Office to the Administrative Council for Economic Defense (ProC.A.D.E.) is a department of the Federal Attorney's Office (P.G.F. - Procuradoria Geral Federal), of the Advocate General of the Union (A.G.U. - Advocacia Geral da União) and its duties are to provide consultancy and legal advice to the Administrative Council of Economic Defense (C.A.D.E.), to represent this federal agency in court, to register its credits in active debt and collect them in a friendly or judicial manner, and also see that the determinations or the Plenary are carried out, if necessary implementing the orders based on its decisions.

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Another reform to overcome these problems happened in the beginning of the 2010s, with a new Antitrust Act No. 12.529/2011. This new act focused on the process of C.a.d.e.'s autonomy, seeking to isolate and protect the antitrust authority from the interference of other regulatory policies. There is now an important division of competencies, avoiding further disruption and contributing to cooperation between Brazilian regulatory agencies, especially the Central Bank. Among the main institutional changes was in the analysis of acts of concentration, since now any merger or structural changes in businesses with significant impacts on the market must be submitted in advance and can only be concluded after approval by C.A.D.E. In addition, the new Act also simplified the institution resulting in greater efficiency, and avoiding the slowness in coming to decisions.

The new C.A.D.E. is composed of the General Superintendency and the Department of Economic Studies, both fact-finding agencies for administrative proceedings to analyze or find out information, and the Administrative Court responsible for the trial.

All these changes were important improvements resulting from a continuous institutional learning. Today, C.A.D.E. modified national and consumer economic life. It created a safer space for business so that, because of the demands of the market itself and of public interests, all economic transactions can be performed without problems.

Recent data indicates that C.A.D.E. can decide the administrative proceedings and concentration acts more rapidly the before. In 2015 for instance, C.A.D.E. decided 384 concentration acts and fifty-two administrative proceedings cases. There have been convictions in thirty-nine cases, and fines totaled approximately 524 million Brazilian reais.

(See Table in the next page)

https://doi.org/10.6092/issn.2531-6133/7361

Table 2. Total of Fine Collected per year by C.A.D.E.

Year	Amount Collected
2011	**R$ 25.361.528,07**
2012	**R$ 31.518.649,02**
2013	**R$ 45.692.670,28**
2014	**R$ 91.857.098,46**
2015	**R$ 169.098.785,48**
2016	**R$ 523.954.270,69**

Also, C.A.D.E. started to foster international cooperation and establishing international agreements. In this sense, thirty-one cases were investigated in cooperation with other antitrust agencies in 2015, whether for the fight against international cartels or for the control of transnational mergers. Due to its recent positive results, C.A.D.E. received national and international recognitions.[60]

Lastly, the new C.A.D.E. truly incorporated institutional learning processes in its structures, defining and implementing a strategic benchmark each year. The strategic benchmark is also aligned to Brazil's four-year governmental plan (Plano Plurianual). The main initiatives for the institution in the period of 2016-2019 are: strengthening of the cartel combat policy; the systematization of C.A.D.E.'s case law and the dissemination of the competition culture in Brazil.

[60] The agency won the title of antitrust agency of the Americas in 2014, awarded by the journal *Global Competition Review* and has maintained the four-star ranking in the journal annual ranking. In the national scenario, the agency was awarded the third Competition of Good Practices, promoted by the Federal Comptroller's Office, in the category of Promotion of Active and / or Passive Transparency, by the public research module on administrative processes developed.

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4. FINAL REMARKS

During the last decades economic analysis and institutions of control were redifined in Brazil. One might say, today, that the use of legislation for competition defense is not out of tune with the best international practices, but C.A.D.E. also found its own way, creating its best practices. This is a conclusive finding on reports from the Organization for Economic Cooperation and Development and C.A.D.E. is very responsible for the actual scenario.

C.A.D.E. is a unique institution in the Brazilian legal system. It is the result of a transformation that occurred over Brazilian antitrust history – as pointed out in four different moments. During this paper, we mention the different structures of C.A.D.E.: the Malaia law C.A.D.E.; the 1962 C.A.D.E. – the collegiate agency of the Ministry of Justice; the 1994 C.A.D.E. – a federal agency - and the C.A.D.E. according to the new Antitrust Act. These different structures represent the change from a protectionist model to a greater emphasis on flexibility between the market and government, even though the competition discourse still omits the historical asymmetries of the Brazilian society and the power of the experts.

CF/88 was also decisive because of its protection of free competition as a legal principle of the economic order and, for this reason allowed coordination to be made via the market with restrictions by the government with competition and regulation norms. In this scenario, the new C.A.D.E. become stronger with a prominent position in the S.B.D.C., and as the main controller of the merge of private economic agents in the country.

We also underscore that the implementation of a policy and a structure to defend competition did not occur as a mere endowment of factors in Brazil. Rather it was part of a history of successes and failures of models and interests. The transformations analyzed support the notion that institutional performance depends on a certain ability of the institutions to learn lessons from the past in order to assimilate changes, in a process of permanent reconstruction of the institutional space and in relation with other institutions.

Since the learning process is a continuous and ongoing activity, C.A.D.E. will face new challenges and adversities. Already some positive achievements

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of C.A.D.E. are being threatened by budgetary issues. Since the new Antitrust Act, C.A.D.E.'s budget has not been extended in proportion to the increase in its duties, which generates the dependence on the assignment and requisition of public servants for its operation.[61]

In the same sense, C.A.D.E. cannot be said to be in danger of becoming a "SuperC.A.D.E." – concentrating all the political economy decisions into its jurisdiction. This is because C.A.D.E. is part of a complex system of competition defense – its attributions are limited, and above all, it is controlled by the executive branch and via judicial review.[62]

In addition, we must still highlight that one of the main problems that the new C.A.D.E. does not tackle is the over-centralization of its headquarters in Brasília, Brazil's federal capital. Given the increase in work and the many regional features of competition infringements, it would be more suitable for the implementation of best practices, education and training[63] and – foremost - effectiveness of the S.B.D.C. to decentralize C.A.D.E.'s functions to local offices, with at least one in each of the five regions of Brazil.

Finally, since 2013, many protests have taken place on the streets of Brazil. Many of them had a common cause: dissatisfaction with the political system and the wave of corruption scandals involving private companies, the executive branch and legislature that were revealed by the judiciary. The biggest case is "Operação Lava Jato"—the country's biggest corruption and money laundering case involving the state-controlled oil company Petrobras. In this context, it must be highlighted that C.A.D.E. has been playing an important role to help recover Brazil's economy from a severe recession since

[61] According to C.A.D.E.'s last annual report, the restructuring promoted in 2012 has raised C.A.D.E. expenses, but there has been no corresponding increase in the budget, which has limited investment in training and information technology, threatening to carry out search and seizure operations and the proper functioning of the agency. In 2015, this scenario worsened, with a nominal reduction of 5.75% compared to the budget approved in 2014, in addition to the limitation of budget execution.

[62] Celso Campilongo. Supercade e a nova Lei do CADE, *supra* note 2.

[63] The actual main goals of the S.B.D.C. program are to expanded new learning mechanisms, like the School of Defense of Competition with a system of distant education and new laboratories for analysis and investigation of cartels. The School should be guarantee at least one laboratory in each region of the country in order to review the norms for proceedings to make them shorter, improving obedience to the constitutional principles of the adversarial system, legal defense and reasonable duration of administrative proceedings and to review the programs of leniency and compliance, encouraging the economic agents to join these programs aiming are more effective prevention and repression of violations of the economic order.

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the outbreak of the corruption scandal. C.A.D.E. is currently conducting thirty investigations of cartels formed by companies involved in "Operação Lava Jato" and its actions are truly transforming Brazil's political economy practices for a more accountable, safer and transparent business environment.

In contrast to a notion of development as transplantable, it is important to consider it as a learning process of adjustments. C.A.D.E.'s case revealed that in Brazil the construction of the competition system occurred in an embedded context, coping with the market and the government interests. A further analysis would seek to understand if this institution transformed the asymmetrical discourse of competition law in Brazil vis-à-vis global governance.