ASSESSING THE THEORY OF PRESIDENTIAL DOMINANCE:
EMPIRICAL EVIDENCE OF THE RELATIONSHIP BETWEEN THE EXECUTIVE
BRANCH AND REGULATORY AGENCIES IN BRAZIL

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In my earlier contribution to this volume (Prado 2010), I argued that Latin American independent regulatory agencies (IRAs) operate within Presidential systems that differ significantly from the U.S. system. Using Brazil as a case study, I hypothesized that the Brazilian President is substantially more powerful vis-à-vis the Brazilian Congress than the White House is vis-à-vis the American Congress. As a consequence, if one used the principal-agent framework to analyze Brazilian IRAs, there are strong reasons to believe that they are controlled by the President (i.e., the President is the principal). In contrast, many American scholars subscribe to the “theory of congressional dominance” to describe congress as the branch of the government acting as the principal of these agents, IRAs. Borrowing the same terminology, I concluded that a “theory of presidential dominance” is better suited to describe the interaction between the government and the regulatory agencies in Brazil.

My earlier contribution was divided into two parts. First, I engaged in a descriptive exercise to determine which branch of the government exerts most control or influence over regulatory agencies. This is the primary question addressed by the theories of congressional and presidential dominance. In the second part, I turned to a normative debate: who should control regulatory agencies? Here, again, I identified a significant difference between the United States and Brazil. In the United States, in light of a constitution that is silent on this matter, there is a heated debate about the constitutional legitimacy of the political control of agencies. “The unitary executive” thesis suggests that, despite the fact that Congress created some agencies independent of the President, these agencies, nevertheless, should be under Presidential control. In contrast, other U.S. scholars argue that Congress has the authority to choose, and therefore it can either delegate powers to the executive branch or to independent agencies. Unlike the U.S., the Brazilian constitution explicitly places the entire bureaucracy within the Executive branch, under the control of the President. As a consequence, the normative legal-constitutional debate in Brazil is not focused on which branch of the government controls agencies, but it is instead concerned with the level of Presidential influence over agencies that is constitutionally legitimate.

Which branch of the government exerts most control or influence over regulatory agencies in Brazil? This chapter engages with this descriptive question explored in 2010, but it does so by presenting empirical evidence that concretely illustrated the problems discussed in my previous contribution. There is now data showing that presidential interference has increased and the independence of regulatory agencies has reduced overtime in Brazil (Silva 2011). The first two parts of this chapter asks how and why this has happened. As to the how question, some of the predictions of my earlier contribution to this volume have proven correct: flawed mechanisms failed to guarantee agency’s insulation from presidential influence. However, a series of other mechanisms – not identified in my previous analysis -- have been employed to further reduce the independence of these agencies. I discuss these in first part of this chapter.

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In the second part, I turn to the *why* question. Silva (2011) shows that political interference by the president in regulatory agencies has varied from sector to sector and over time. She offers an interesting hypothesis to explain this variation, based on a complex cost-benefit analysis by the President. According to this hypothesis, the President would take into account institutional constraints, his or her own preferences, and the impact on sectoral investment. While very insightful, I believe that Silva’s hypothesis fails to capture what has happened in Brazil starting in 2002, with the election of President Lula. The hypothesis is predicated on the assumption that the president wants to preserve the regulatory state but engaged in a cost benefit analysis to balance other benefits that can be obtained from reducing the independence of regulatory agencies, while trying to avoid most of its costs. However, there seems to be reasons to support that idea that since 2002 the Brazilian president is not trying to find some room for policy maneuver within the existing regulatory structure. Instead, the President’s seem to be trying to move away from a regulatory state to adopt a different model of state intervention in the economy.

In the third part of this chapter, I turn to the normative question, who *should* control regulatory agencies. My earlier contribution to this volume tried to answer the narrow question of how much power the executive branch can have over IRAs in a “regulatory state”. This chapter, in contrast, turns to the broader question of whether the president can decide to abandon the “regulatory state” in pursuit of a different model of state intervention in the economy. This broader normative question is rarely discussed in the North American literature on regulatory agencies. While this discussion may not be as relevant to countries that have a stable and long-existing regulatory state and are unlikely to abandon it in the near future (i.e. the United States), it is a pressing issue in countries that have recently adopted this model of state intervention in the economy, and may be now questioning its usefulness.

My conclusion is that in the Brazilian case regulatory agencies are controlled by the President, not by Congress (Prado 2010). Thus, their independence will be largely determined by the Presidential preferences (Silva, 2011). The scope of the potential Presidential preferences, however, cannot be considered only in light of frameworks that prevail in the Global North, or more particularly in the United States. In this particular case, a different model of state may be among the possible alternatives that may influence Presidential preferences. The long history of state interventionism in Latin America in general and Brazil in particular cannot be ignored in this regard. Thus, in line with Dubash and Morgan (2012), I argue that the scholarship analyzing the regulatory state in the global south may be enriched by considering theories generated in the global north, but they also need to make a conscious effort to be more grounded on the unique political, legal and social circumstances in which these IRAs operate.

### I. HOW DOES THE PRESIDENT CONTROL REGULATORY AGENCIES IN BRAZIL?

In contrast to the United States, the constitutional features of the Brazilian political system are such that most of the control mechanisms over IRAs are actually allocated to the President. My earlier contribution (Prado 2010) indicated how three mechanisms supported the hypothesis of presidential dominance over agencies: budget, appointments, and new legislation. While my analysis formulated a hypothesis, and presented some anecdotal evidence to support it, two of these three mechanisms were largely confirmed in an empirical analysis developed by Silva (2011), which will be discussed in detail below.
A. Empirical Evidence of Budgetary Control

To guarantee their financial autonomy, Brazilian IRAs have alternative sources of funding, which are not part of the Executive fiscal accounts. Like all the expenditures made by bodies of the Executive branch, however, the use of these funds has to be previously authorized by federal budgetary appropriations. In my earlier contribution to this volume (Prado 2010), I argued that the Brazilian President has substantial control over IRAs’ budgets.

The Brazilian President can influence the federal appropriations process through three mechanisms. First, the President has exclusive power to prepare a budget proposal. Independent agencies’ budgets are incorporated into the presidential budget that is sent for Congressional approval. The preparation of this proposal is the first moment at which the President can influence the appropriations process and hence the agencies’ budgets. Second, constitutional and statutory provisions allow for significant presidential control over the final outcome of the bill approved by Congress. On the one hand, the presidential proposal will be used as law if the Congressional statute is not enacted in a timely fashion. On the other hand, if Congress enacts a statute in a timely fashion, the President can choose to veto some of its provisions (Figueiredo & Limongi 2002:303). Finally, the President can reduce congressional appropriations (including the amounts allocated to the agencies) during the budget implementation phase at his or her own discretion. The result is that, in Brazil, there is no guarantee that the resources allocated to IRAs by Congress will be disbursed.

Regarding the last item, there are basically three mechanisms by which the President reduce the amount of money after it has been allocated by Congress to the agencies. First, the President can require some funds to be reserved for contingencies (Reserva de Contingência). Second, it can reduce the limit allocated by the congressional budgetary appropriations process by not disbursing the full amount. While the law defined the maximum amount that could be disbursed, the President has discretion to determined the actual amount to be disbursed by Presidential decree (in Portuguese, Decreto de Execução Orçamentária). Third, it can impose specific limits on spending with the public administration, such as travel budgets, for instance. “In 2003, for instance, a presidential decree limited the travel expenses of the employees of all executive branch bodies (including ministries) to 60% of the total amount spent in 2002. The agencies, as bodies of the executive branch that belong to the ministries, were also subject to these limits.” (Prado 2008a, 495).

While my earlier contribution offered anecdotal evidence of the use of these mechanisms by the President, there is now comprehensive evidence that the President has heavily used the third mechanism described above (reduction of the amount allocated by Congress) to impose budgetary cuts on IRAs. Data from 1997 to 2008 shows that the reductions are consistent and pervasive, mostly were implemented through the Reserva de Contingência, although they varied from agency to agency. “[T]he number shown represents the portion of the budget that is withheld, considering the size of the agency’s initial budget. The agency most affect by this practice is ANTAQ, where the average contingenciamento is 41.73. Conversely, the agency least affected in ANATEL, with an average contingenciamento of 2.27” (Silva 2011, p. 57).
The data shows that at least one of the mechanisms described in my earlier analysis has been actively used to reduce the amount of resources available to regulatory agencies.

B. Empirical Evidence of Control over Appointments

My earlier contribution to this volume (Prado 2010) suggested that the Brazilian president was not very constrained in his/her choice of commissioners to IRAs. First, there is no partisan balance requirement, a feature common in U.S. independent agencies. Second, there is a requirement for senatorial approval of presidential nominations but it does not seem to be very effective. In theory, Senatorial approval gives Senate veto power over the President’s nomination. The assumption is that, in order to avoid a veto of one of his nominees, the President must consider the Senate’s political preferences. Almost all constitutive statutes in Brazil require this approval for regulatory agencies. However, the Brazilian Senate rarely rejects nominees. At the time of my analysis, the vast majority of Presidential nominations for IRAs had been approved by the Senate. One hypothesis to explain this lack of vetoes is that senatorial approvals do not constrain the President’s choices for agency appointments. The other hypothesis is that it does, but the negotiation happens in the background, before nominations become public (Prado, 2008a, pp. 481-2).

While there does not seem to be any empirical analysis to test these hypotheses, there is data regarding two other mechanisms the President used to control IRAs’ commissioners in Brazil: resignations and vacancies. Silva (2011) collected data over 1997 and 2008 and found that out of 152 directors, 25 resigned before the end of the mandate. This suggests that “[a]lthough an important guarantee of independence, the lack of removal power by the President may be ineffective. The President can still find ways to “convince” commissioners to resign, leaving a vacancy that will be filled by the President’s own nominees” (Prado 2008a, p. 470). The number of resignations is relatively high (16%), and at least some of them seem related to Presidential attempts to directly influence the agency. For instance, the chairman of the telecommunications agency (Luiz Guilherme Schymura) resigned in January 2004, after a series of conflicts with President Lula (Prado 2008a, note 214). While not conclusive, this qualitative
evidence is in line with Silva’s assumption that resignations may serve as a mechanism for the President to reduce the level of independence among Brazilian agencies.

Vacancies refer to the fact that an opening in one of the seats at the board of the IRA (due to a resignation or the end of the term) is not occupied by a new commissioner, remaining vacant. As Silva (2011, p. 54) explains: “if an agency stays long without one or more directors, the functioning of the regulatory agency as a whole is undermined.” There are basically two ways in which vacancies can negatively affect the operation of regulatory agencies. First, with a reduced number of commissioners, there is a higher workload for each commissioner, what may either create delays or reduce the time available for deliberation in important decisions. In connection with this, it is important to note that an agency operating with a reduced number of commissioners is less likely to have diversity of points of view, what may not only reduce the richness of the deliberations, but may affect its independence. The second and more drastic way in which vacancies can negatively affect the operation of agencies is by not providing the minimum quorum required by law, in which case decisions inevitably need to be postponed until there is a quorum. This may happen for special decisions that require unanimity or superqualified majority, or for regular decisions, when the agency is fully paralyzed by not having the minimum amount of commissioners required by law.

As Silva (2011) shows, the numbers of vacancies in Brazilian IRAs have been significant:

<table>
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<th>AGENCY</th>
<th>N</th>
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<td>116</td>
<td>47.00</td>
<td>61.049</td>
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<tr>
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<td>128.33</td>
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<td>76</td>
<td>365</td>
<td>214.83</td>
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<td>ANEEL</td>
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<td>0</td>
<td>226</td>
<td>52.08</td>
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<tr>
<td>ANP</td>
<td>11</td>
<td>0</td>
<td>365</td>
<td>202.82</td>
<td>167.398</td>
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<tr>
<td>ANS</td>
<td>10</td>
<td>0</td>
<td>273</td>
<td>110.20</td>
<td>106.208</td>
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<tr>
<td>ANTAQ</td>
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<td>0</td>
<td>317</td>
<td>136.50</td>
<td>149.500</td>
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<tr>
<td>ANTT</td>
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<td>92.88</td>
<td>140.030</td>
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<tr>
<td>ANVISA</td>
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<td>0</td>
<td>300</td>
<td>121.90</td>
<td>110.308</td>
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(Silva 2011, Table 1, p. 55)

This data shows that there are yet other mechanisms (in addition to the ones identified in my earlier contribution to this volume) that may allow the President to influence the commissioners of IRAs and reduce the agencies’ independence.

**C. Empirical Evidence of the Threat of New Legislation**

In my earlier analysis, I argued that the Brazilian President has constitutionally entrenched legislative powers to implement structural reforms in the design of the agencies, and these powers could be used to influence regulatory outcomes. The Lula administration’s actions towards independent regulatory agencies in 2003 seem to illustrate such a threat: while pressing
IRAs in the telecommunications and electricity sectors to implement a particular level of tariffs increase, the President was supporting a bill in Congress to reduce the independence of agencies. In this episode, I suggested that the Executive branch could be using the threat of the bill to signal to IRAs that acts contrary to government policy preferences would be punished with severe structural changes. It is interesting to note, however, that the telecommunications agency (ANATEL) managed to resist such pressure, while the electricity agency (ANEEL) did not (Prado 2010).

Ironically, the ANEEL was the one eventually deprived of its ability to define the terms of concession contracts without approval from the executive branch. Indeed, in 2004, presidential decree (medida provisória) determined that concession contracts for the electricity sector would need to be approved by the ministry. This has significantly reduced the level of independence of ANEEL (Silva 2011, p. 52).

Except for this decree affecting ANEEL, however, there were no significant changes in the rules defining the regulatory powers or the internal procedures of IRAs (Silva 2011, p. 58). Thus, there does not seem to be empirical evidence showing the systematic use of this mechanism by the Brazilian President.

II. WHY DOES THE PRESIDENT CONTROL REGULATORY AGENCIES IN BRAZIL?

My earlier contribution to this volume argued for a “Theory of Presidential Dominance” over IRAs in Brazil. Silva (2011) careful empirical analysis not only finds supporting evidence in line with the hypotheses I raised, but also points towards a new set of mechanisms used by Brazilian Presidents to control IRAs’ commissioners, such as resignations and vacancies. These mechanisms were discussed in section I, supra.

This section turns to the reasons why the President would try to exercise control over regulatory agencies. Silva (2011) argues that the Presidential decision is informed by a complicated cost-benefit analysis. The factors in the President calculus would include the formal mechanisms constraining Presidential action, the President’s preferences, and the costs related to regulatory credibility, which could impact on the level of investment in the sector.

Silva presents her hypothesis as exploratory, and far from conclusive. While very plausible, there are two other possible explanations to what is being observed in Brazil. One of the possible explanations is not related to the agencies at all. The President would be taking measures that ultimately reduce the level of independence of regulatory agencies, but the reasons would be unconnected with the agencies. For instance, other policy concerns could be taking priority over the independence of the agencies, or circumstances beyond the President’s control prevent him or her from acting differently.

One possible explanation is that the President would be trying to dismantle the regulatory state. There are basically two ways in which the President can try to do that. On the one hand, s/he can do so openly, by publicly declaring his/her preference for a different model of state intervention in the economy. In such case, the calculus regarding the potential costs and benefits of preserving the independence of regulatory agencies may change radically, as the end goal is no longer to maximize the Presidential preferences within a particular set of institutional constraints. Instead, it is to modify the existing institutional arrangement permanently. On the other hand, s/he can prefer to implement such changes discretely, to avoid the resistance of relevant stakeholders and the immediate costs associated with such changes. On the surface, the
President will act as if s/he was trying to operate within the institutional framework defined by his/her predecessor, which includes both ex-ante constrains (formal guarantees of independence for IRAs) and ex-post constrains (the risks of losing credibility with private actors and thus investments). However, beneath the surface, the President would be trying to change the existing institutional framework and weaken the regulatory power of the agencies, to the benefit of a different form of state intervention in the economy. This section will argue that the hypothesis that President Lula was trying discretely to dismantle the regulatory state cannot be conclusively and safely discarded.

Both pieces that have guided the analysis in the first part of this chapter -- my earlier contribution to this volume (Prado 2010) and Silva’s (2011) empirical analysis of the Presidential influence over Brazilian IRAs -- use the principal-agent framework to analyze the relationship between the President and regulatory agencies. We both assume that “the relationship between principal and agent is contained in an institutional context, so that the wider environment has a direct impact on the ruler’s incentives structure to act opportunistically and change the rules of the game” (Silva 2011, p. 45). This section does not abandon this framework. However, the idea that the President may be trying to dismantle the regulatory state may push the framework to its limits by suggesting that a new principal may not perceive the advantages of delegating power to an agent established by its predecessor. The assumption is that a new principal may try to dismantle the terms of the principal-agent relationship as defined by the previous principal. In other words, Silva (2011) assumes that the President is trying to maximize his/her policy preferences while trying to operate within the existing principal-agent relationship. In contrast, I suggest that the President’s preference can also include a distinct form of state intervention in the economy. In this case, s/he would be trying to reduce IRAs’ independence as an attempt to redefine the terms of the existing principal-agent relationship, i.e. the regulatory state.

I will analyze how the data discussed in the first part of this chapter could support each of these three hypotheses.

A. Why Reduce the Budget of Regulatory Agencies?

It is not clear whether reducing the amount of money available to IRAs is an strategic move designed to enhance the President’s control over agencies. Some claim that it is driven by other factors. Indeed, in response to the accusation that he was trying to reduce the independence of the agencies, President Lula’s administration argued that the budget reduction was being used to generate a fiscal surplus. (Prado 2008a, note 332). The annual report of the oil and gas agency for 2003 and 2005 has also pointed to concerns with the fiscal surplus as the main reason for the budget cuts (ANP 2003, p. 30; 2005, p. 27). Along the same lines, a 2006 report produced by the association of companies directly or indirectly operating in regulated sectors (Associação Brasileira de Infra-Estrutura e Indústrias de Base, ADBID) indicates that most of the reductions happened due to the government’s attempt to generate fiscal surplus (ABDIB 2006). None of these three sources are neutral, and thus the information provided by them can be biased. In any event, the argument is that the President was not intentionally trying to influence IRAs. Instead, s/he just decided that the resources earmarked for regulation would be more useful if allocated for other purposes, e.g. fiscal surplus.
Silva’s analysis tries to explain the observed sectorial variation based on the concern with sensitivities over regulatory credibility (which vary from sector to sector and would be higher in privatized sectors). However, if the President was trying to use budgetary control to exercise influence over IRAs, one should expect some variation within the same sector, depending on whether the agencies were following or not presidential preferences. In other words, there would be budgetary cuts as punishment and budgetary increases as rewards. However, the data collected by Silva (2010) does not specify such variations (which would need to be then correlated with particular regulatory outcomes that the President was trying to push for). Thus, there is no information to assess this.

The information available only shows a significant increase in the total amount of budgetary appropriations starting with Lula’s inauguration.

The significant increase in *contingenciamentos* with the election of Lula can be potentially associated with the political agenda of the Worker’s Party (*Partido dos Trabalhadores*, PT), to which President Lula belong. PT was the opposition party and vehemently opposed the neoliberal reforms promoted by Cardoso: privatization of state-owned companies in infrastructure sectors and the creation of regulatory agencies. As a result, the election of PT in 2002 and Lula’s inauguration in January 2003 was interpreted as a potential threat to the independence of regulatory agencies (Mattos and Mueller 2004; Pacheco 2003).

While acknowledging these interpretations, Silva (2010) suggests that they translate simply into distinct Presidential preferences: unlike Cardoso, Lula does not support maintaining the independence of the regulatory agencies. However, there is another possible way to interpret Lula’s position and his decision to impose significant budgetary cuts on IRAs: a principled resistance to the regulatory state and the neoliberal agenda that promoted it. Indeed, the budgetary cuts seem to have cause reductions in monitoring activities, across the board cuts in personnel and even elimination of customer services (Exame 2005). While these could be simply aimed at making a particular agency bend over Presidential policy preferences, they could also be interpreted as an attempt to block the agency from effectively exercising its regulatory functions.
B. Why Maintain Vacancies in the Board of Regulatory Agencies?

Two mechanisms discussed in section I, supra, were resignations and vacancies. As indicated earlier, there seems to be some qualitative evidence to suggest that some of these resignations were the result of a campaign to oust commissioners that are not aligned with the political preferences of the President. However, there is no guarantee that some (if not most) of these resignations were caused by other factors, such as commissioners deciding to leave the agency for personal reasons. Unless every single case of the 25 resignations identified by Silva (2010) are analyzed, and the reasons for each are accounted for, it is difficult to exclude the hypothesis that these were not associated with an intentional attempt by the President to influence the agencies.

The vacancies are subject to the same uncertainty. While the number of vacancies has significantly increased with the election of the Workers Party to the presidency, it is not possible to determine whether these vacancies were a result of the different level of congressional support obtained by President Lula during his first terms in office; or whether such vacancies were intentional decisions pursued by him to undermine the ability of regulatory agencies to function. Silva favours the latter interpretation: “the vacancy can be politically motivated, because the nomination of a director with aligned preferences does not guarantee control of the agency’s decisions, but it undermines its decision-making capacity and certainly makes it easier to capture” (2010, p. 55). While decreasing the decision-making capacity of the agency would facilitate capture (as there is less diversity in the board and less time for deliberations) it also can be simply undermining the agency’s ability to effectively exercise its regulatory functions, i.e. it could be a Presidential attempt to empty the agencies and slowly dismantle the regulatory state.

While there is no information about what motivated these vacancies, it is interesting to note that they have significantly declined since 2006.

To the best of my knowledge, there is no analysis trying to explain the decline in vacancies after 2006.

One could speculate that despite the fact that the agencies were still governed by the same President (Lula was reelected for a new term in 2005, being inaugurated in 2006 and remaining in office until 2010), the political dynamic may have changed in his second mandate. Indeed, the political alliance of Lula’s Congressional coalition was modified from his first term to his second term in office. Indeed, while the first terms was marked by the mensalão scandal, in which the President had to provide monthly payments to guarantee the support of allies in
Congress, the second term was marked by a significant increase in the number of ministries (and thus another form of payment to Congressional allies) (Pereira, Power, and Raile, 2011). This could have facilitated or expedited nominations in Lula’s second term. One piece of evidence is the fact that an opening in ANATEL in 2007 was quickly filled in 2008 when the government needed a third vote to get a corporate acquisition approved by the telecommunications agency. At the time, two commissioners had announced they would approve the acquisition. However, the other two commissioners had announced that their approval would not be unconditional. To solve the deadlock, the President quickly nominated a fifth commissioner in September 2008, and the acquisition was approved shortly thereafter (Turner and Prado, 2009). In sum, the fact that the government could quickly fill a vacancy when it needed a third vote suggests that nominations could be done rather quickly in Lula’s second term in office, if the President so wished. However, this case could also be an exception: it is possible that Congress quickly approved the nomination because it also supported (or it was being pressed by other political actors) the corporate acquisition.

These two variations (the general decline in the total number of vacancies after 2006 and the relatively quick nomination of a commissioner to the telecommunications agency in 2008) can also be interpreted as evidence of the hypothesis that President Lula was sub-repetitiously trying to boycott the regulatory state. The general decline in the vacancies after 2006 could be then interpreted as a consequence of the fact that such strategy, which had been used quite discretely until then, became public in that year. A legislative consultant (a civil servant whose job is to provide research assistant for representatives in the lower house to support legislative action) published an article indicating that there was a statute authorizing the regulatory agencies to regulate vacancy in their boards (Bandeira, 2006). Indeed, Law 9,986/2000 (which regulates human resources in regulatory agencies) indicates in article 10 that “each agency’s regulation will determine the replacement process for counselors and commissioners when those are impeded or on leave or even in vacancy periods, before the nomination of a new person”. If there was a legislative solution readily available for agencies to deal with the vacancies problem, why were agencies not using this provision? Why aren’t they regulating vacancies? As a response, Bandeira hypothesized that regulatory agencies were afraid of the government and therefore did not want to act in a way that would signal too much independence.

While one could question whether the publication of such article alone could have had such a powerful impact, making the government more cautious about using such vacancies, it is certain that the article did not prompt agencies to use the solution offered. On the contrary, a few years after the publication of the article the problem seemed to persist. Indeed, in 2009, the Commission for Financial Oversight and Control within the lower house sent a request to the federal accounting tribunal (Tribunal de Contas da União, TCU) for an analysis of the governance of regulatory agencies (Requerimento n. 156/2009). This request demands an assessment of all the governance problems faced by Brazilian regulatory agencies that could be potentially fixed within the limits of the law. In response, the federal accounting tribunal (TCU) started an administrative process to investigate governance problems in regulatory agencies (TC 012.693/2009-9). After an internal auditing process of all regulatory agencies, TCU publicized in 2011 a detailed report of all the problems, followed by a list of potential solutions that would not require legislative change (TC 2261/2011 available at TCU, 2012). Item 9.1 of the proposed solutions determines that the agencies for oil and gas (ANP), water (ANA), electricity (ANEEL), ground transportation (ANTT), water transportation (ANTAQ) and civil aviation (ANAC) should enact regulations regulating how to deal with vacancies between nominations, according
to the terms of article 10 of Law 9,968/2000. They were given 120 days to implement the requested regulations. The telecommunications agency (ANATEL) was not included in this item because the report indicated that it had the required regulation in place.

However, before the agencies had a chance to enact regulations, the regulatory agency for ground transportation (ANTT) appealed the decision, arguing that it was *ultra vires* for the agency to publish any regulation related to the composition of its board. TCU granted an injunction suspending the effects of item 9.1 of its previous decision (TC 2261/2011), and in 2013 issued a new opinion “recommending to the President’s chief of staff to propose Presidential decrees to regulate the vacancies of the oil and gas (ANP), water (ANA), electricity (ANEEL) and civil aviation (ANAC) agencies” (TC 1312/2013). Two agencies included in the original decision were excluded (ground transportation (ANTT), water transportation (ANTAQ)) because the President had already enacted decrees authorizing the nomination of “temporary commissioners” for these agencies in 2012.

The nomination of “temporary commissioners” (in Portuguese, *diretores interinos*) seems to have become pervasive in Brazil with the increase in the number of vacancies (Exame 2015). When there is a vacancy in the regulatory agency that is preventing it from performing its regulatory functions (as most agencies have a minimum quorum to deliberate) the President has either nominated a commissioner, or has empowered the minister of the sector regulated by the agency to do so. It is important to note that “temporary commissioners” are nominated by President decree and do not require senatorial approval.

In sum, there is no conclusive evidence to determine whether the vacancies are intentional or not. And even if one is inclined to believe that they were intentional, there is nothing that allows one to determine if such vacancies were driven simply by an intention to reduce agencies’ independence or whether they meant something more profound and radical, such as an attempt to boycott IRAs, and ultimately make the regulatory state dysfunctional.

C. Why Use the Threat of New Legislation?

As described in section I *supra*, President Lula seem to have used the threat of new legislation to directly influence the decision of some regulatory agencies regarding tariff increases in 2003. In 2003, President Lula established an interministerial working group to discuss the governance of regulatory agencies. As a result of the report produced by this working group (Presidência da República 2003) a bill that was sent to Congress in 2004 (PL 3,337/2004). The bill was known as the “general law of regulatory agencies” and it tried to establish a series of changes in the powers and governance structure of regulatory agencies.

Silva (2010, p. 58 and 64) interprets the bill as a compromise: “Lula went from a position contrary to the model to a position of recognizing their role, but defending reformulations such as those seen in the project of the ‘general law of regulatory agencies’”. If one adopts this view, the bill can be seen as a retreat from the Worker’s Party initial resistance in accepting the regulatory state, and an attempt to reconcile its preferences of greater Presidential control over regulation, with the idea that IRAs would preserve some regulatory power and exercise some of the functions originally allocated to them.

It is possible, however, to interpret the bill proposed by the Executive as yet another instance of the Worker’s Party resistance in accepting the regulatory state. As I outlined at the introduction of this section, the President could explicitly voice its resistance to the regulatory state and try to openly and publicly eliminate IRAs. However, the risks possibly associated with
that (given the concerns with regulatory credibility and the negative impact that this could have on levels of investment) could be significant. In this context, the 2004 bill could have been an attempt to subtly change the system. The specific reforms proposed by this bill were so intrusive that one cannot safely discard the hypothesis that while formally maintaining their shell, they effectively amount to a series of mechanisms to remove regulatory power, and impose President control over the regulatory powers that were not removed from the agencies (Prado 2008b). Thus, the bill could be potentially interpreted as effectively dismantling the regulatory state.

The bill was subject to significant resistance from regulatory agencies themselves, their association (Brazilian Association of Regulatory Agencies, ABAR) and the association of companies directly or indirectly operating in regulated sectors (ADBID) (Silva 2011, 58). Silva uses this resistance to conclude that the threat of new legislation was not used to try to influence regulatory agencies in Brazil and thus it should not be included as a variable in her attempt to measure the de facto independence of Brazilians IRAs. In contrast, in my earlier contribution to this volume, I suggest that the President could potentially have used mere threat of new legislation to influence IRAs (Prado 2010).

But most importantly, I would argue that this event could be potentially interpreted as the first step of President Lula in trying to set up a subtle set of reforms that undermined the functioning of the regulatory state. However, given the amount of negative publicity that the bill received, and considering the level of political resistance to the proposed changes by powerful actors, the President decided that the process of dismantling the regulatory state would have to be even subtler than initially envisioned. In this case, the budgetary cuts and the vacancies could be the strategies designed to continue the attempts to dismantle the regulatory state, and these were intensified after the proposed bill has failed to receive the support it needed to be approved by Congress.

To be sure, there is a lot of uncertainty as to President’s Lula preferences vis-à-vis IRAs. A detailed analysis of newspaper articles regarding the relationship between Lula and the regulatory agencies in 2003 and 2004 shows that month by month the preferences of the President seem to change. They oscillate between the more radical discourse against regulatory independence and the regulatory state and a more moderate discourse of reconciling some of his policy preferences with the existence (and added value) of regulatory agencies (Nunes et al 2007, p. 258-262). Thus, there is a possibility that both Silva and I are correct, depending on the month that one is analyzing.

III. WHO SHOULD CONTROL REGULATORY AGENCIES IN BRAZIL?

In Brazil, IRAs are clearly placed within the executive branch, under the auspices of sectoral ministries.¹ The Brazilian Constitution defines the President as the chief of the executive branch, subordinating to him or her all offices of the public administration (1988 Brazilian Constitution, art. 84, II). Thus, in contrast to the United States, there is less room to debate whether they should be controlled by Congress or by the President from a legal-constitutional perspective (Prado 2010). Instead, the Brazilian debate focuses on how much Presidential control is legitimate given that the law guarantees IRAs some degree of autonomy.

¹ This is not the case for agencies of oversight and monitoring, such as the Tribunal de Contas da União and the Ministério Público (Public Prosecutor’s Office).
As I discuss in my earlier contribution to this volume, the legal-constitutional debates in the U.S. and in Brazil may emphasize different questions, but they can also be perceived to have something in common. Both rely on “larger competing views of regulatory politics, and can be fully understood only with reference to those broader visions” (Croley 2003:833-834). In the U.S.,

...those who see greater presidential control as benign tend to see the outcome of unsupervised agency rulemaking as itself problematic. For example, agency rulemaking in the absence of active White house oversight is undesirable because agencies are too easily captured by the regulated interests they represent. (...) Critics of expanded presidential oversight of agency rulemaking imply a more favorable view of agency and possibly even of legislative decisionmaking. Their view finds support, for example, from the traditional picture of agencies as experts whose primary function is not to deliver favorable regulation to politically powerful constituencies but rather to exercise their expertise in a rational way that promotes general welfare. (Croley 2003:834-835)

In Brazil, there are also competing visions of regulatory/democratic politics. On one hand, those who oppose high levels of Presidential control of agencies believe that such control can lead to opportunistic political decisions driven by short-term electoral concerns that will be harmful to regulated sectors. Therefore, delegation of powers to independent agencies is often interpreted as a sign of credible commitment. On the other hand, those in favor of greater Presidential control argue that democratically elected Presidents are more likely than agencies to promote the general welfare. The assumption here is that the President is just trying to do his job, and that he will only be able to successfully govern a country and implement his policies if he can coordinate the acts and decisions of many different bureaucratic entities.

The discussion outlined in the previous section of this chapter, however, is not related to diverging views about regulatory politics. President’s Lula resistance to IRAs was not driven by concerns a la “public choice theory”. Instead, the resistance was driven by the belief that the country would be better off by adopting a different form of state intervention in the economy. Since 2003, the country has been moving progressively but steadily towards increased state interventionism, which has been described as a movement towards the creation of a potentially New Developmental State (Trubek, Coutinho and Shapiro 2013).

The institutions related to development finance had been reformed in the late 1980s and early 1990s to guarantee the Brazilian state was operating within the parameters of the neoliberal agenda. This meant that there could not be unaccountable money transfers between the Central Bank, the Brazilian Development Bank and the Treasury. The institutional set related to regulatory of infrastructure sectors, in turn, was been implemented in the mid 1990s, as part of a package of neoliberal reforms to promote development. In conjunction with a massive privatization process, the government created independent regulatory agencies to foster an economic environment attractive to private investors. Interestingly, these reforms were designed to curtail common practices that supported the Brazilian Developmental state in the 1960s and 1970s. One of these practices was substantial transfer of resources from the Treasury to support economic activity in certain sectors of the economy. Another was direct political intervention in infrastructure sectors, where the regulatory framework was often used not to guarantee the viability of the sector, but to address other economic concerns (e.g. reducing the price of electricity to unsustainable levels in order to control inflation).

While the Brazilian Developmental State has been described as a hybrid form, in which state interventionism is coupled with private investment (Saad Filho and Morais 2012), we still do not have a clear picture about whether and how state activism could be possibly reconciled
with the free market and neoliberal reforms implemented in the 1990s. “IRAs’ decisions have an impact on macro-economy and other government policies. High rates for telecommunications and electricity services, for instance, may work against efforts to control inflation and may also undermine consumer protections. Should agencies be insulated from political influence when inflation and consumer protection are the reasons for the President to exert influence over IRAs? Should Brazil insulate agencies from all types of political influence or only opportunistic ones? If the latter, who decides what is opportunistic and what is not? In making this distinction, should we consider the fact that Brazil is coming out of decades of hyperinflation and the President may have a justified reason to be overly cautious about inflationary measures? Should consumer protection be considered more salient in a country, such a Brazil, with high levels of inequality?” (Prado 2010).

One could think that the new developmental state would find other sources of financing key sectors, leaving the development financing structure created in the 1990s untouched. One could also imagine that while the government would intervene in certain economic sectors, the intervention in infrastructure sectors (if any) would not challenge the regulatory framework created at the time of the privatization. Thus, it is possible that what Silva (2011) identifies as a preference to maintain the agencies operating, but with some modifications, is actually an attempt to find ways to reconcile these two models of state intervention in the economy. Alternatively, one may read the interaction of the Brazilian President with agencies as an intentional albeit subtle attempt to dismantle the regulatory state, in the aim of ultimately replacing it with a new developmental state.

In my earlier contribution to this volume, I argued that the dispute about the diverging views on regulatory politics is an empirical one. The question about which agent will act opportunistically, and which one will guarantee better regulatory outcomes can be answered with collection of data and an assessment of the impact of different arrangements on the quality of regulation. The dispute about the preferred form of state intervention in the economy can also be framed as an empirical one: which type of interaction between state and the private sector guarantees the highest levels of development outcomes. The problem is that the answer may be indeterminate, as the comparison between “liberal” and “coordinated market economies” under the label varieties of capitalism seems to suggest (Hall and Soskice 2001).

However, the dispute about the preferred form of state intervention in the economy is often framed in ideological, not empirical terms. It is not uncommon for these preferences to be also correlated with political views. If this is the case, i.e. if what is driving the choice between one particular type of institutional arrangement over the other is ideological preferences, it becomes harder to determine which of the claims is more legitimate. In sum, answering the question about whether the president should control regulatory agencies may be relatively easier than answering the question about whether the president should prefer IRAs over other forms of state intervention in the economy.

CONCLUSION

My earlier contribution started and ended by pointing to the risks of legal transplant. When immersed in a different political system, transplanted institutions diverge from their original models. This is clearly illustrated by the case of IRAs in Brazil. I also called attention to the dangers of “theoretical transplants” and ended my piece by stating that “[i]n an era in which ‘one of the most widespread institutions of modern regulatory governance is the so-called
independent regulator’ (OECD 2002), determining the most appropriate theory to describe and evaluate IRAs is of considerable importance.” (Prado 2010). Since then, the study and analysis of the regulatory state in the global south has made solid strides into the academic literature as illustrated by the publication of a special issue of the journal Regulation & Governance dedicated to this topic, and a book entitled The Rise of the Regulatory State of the South (Dubash and Morgan 2013). In direct dialogue with the issues raised by this chapter, these publications suggest that a conversation between the literature on the developmental state and debates around regulatory agencies could potentially be extremely fruitful, as “developmental state scholars … helpfully highlight the importance of exploring the ways in which pressures for redistribution are mediated with greater or less success through economic institutions. But... regulatory state scholars are particularly well placed to enrich this perspective with their knowledge of an institutional form that is growing in importance and by its very construct is designed to be insulated from these pressures – the regulatory agency. We suggest then, that more dialogue between developmental state and regulatory state scholars is a productive way forward. Since those focused on developmental considerations typically not only give more conceptual space for redistributive policy than regulatory state scholars but also stress more a more robust role for the state in steering the economy, interesting tensions seem empirically likely in Southern states that adopted neoliberal ideas about regulation in the 1990s but are now taking a turn towards the ‘new developmental’ state” (Dubash and Morgan 2013, 17). Brazil is a case in point, but it is probably not the only one.

BIBLIOGRAPHY


