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The Challenges and Risks of Creating Independent Regulatory Agencies

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The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil

Mariana Mota Prado*

ABSTRACT

Between 1996 and 2002, the Brazilian government established independent regulatory agencies (IRAs) for electricity, telecommunications, oil, gas, and other infrastructure sectors as part of a very ambitious privatization program. Following the formulas advocated internationally, Brazilian IRAs have institutional guarantees of independence, such as fixed and staggered terms of office for commissioners, congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy. This Article analyzes the design of IRAs in Brazil and asks whether their institutional guarantees of independence were effective in insulating them from the political sphere. The Author's general conclusion is that these guarantees—typical of developed countries, especially the United States—failed to insulate Brazilian agencies. The Article indicates a number of episodes of political influence over agencies, and it applies detailed institutional analysis to explain what went wrong. The Brazilian experience illuminates the difficulties that many

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developing countries face in trying to realize the ideal of regulatory independence and the benefits that would supposedly flow from this. Thus, it might serve as a cautionary tale for policymakers and for developing countries contemplating similar reforms.

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I. INTRODUCTION

Intuitively, it always seems better to have more options than fewer. There are many circumstances, however, in which this intuition is wrong. In Homer's *Odyssey*, for instance, Ulysses chose

to tie himself to the mast of his boat, and to seal his seamen's ears with wax, so as not to succumb to the temptation of luring his boat to destruction by hearing the Sirens sing. Without tying himself, Ulysses would have had two options: succumb to the song of the Sirens and destroy his boat, or resist the temptation and sail safely to his destination. Ulysses knew that sailors on previous trips had not been able to resist the temptation and was afraid that he would meet the same fate. So, he chose to tie himself. For Ulysses, eliminating one of his options was the best strategy to reach his destination safely.¹

During the privatization process, Latin American countries have encountered a situation very similar to the one faced by Ulysses. After a decade of negligible levels of economic growth and enormous fiscal deficits, Latin American countries were advised to sell their state-owned companies, especially those in infrastructure sectors.² Selling these companies would reduce spending of fiscal resources, increase efficiency in the delivery of infrastructure services, and attract much-needed private investments to these sectors and to the country as a whole.³ Privatization of key infrastructure sectors would be an easy way out of the trap that Latin American countries found themselves in at the end of the 1980s, except for one important detail: private investors were not willing to sink large investments in fixed, unmovable infrastructure assets without having some guarantees that they would not be expropriated by opportunistic governments.⁴

1. For the use of this metaphor in the context of pre-commitment or self-binding, see JOHN ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979). Since then, Elster has revised his original analysis twice in *Ulysses and the Sirens* (1984) and more recently in *Ulysses Unbound* (2000). JOHN ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (2d ed. 1984); JOHN ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000).

2. See generally *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed., 1990) (examining the major policy instruments that should be used to urge Latin American debtor nations to make fundamental changes in their economic policies).

3. The most influential development doctrine in Latin America in the 1990s, which became known as the Washington Consensus, advocated for an economic policy based on fiscal austerity, free trade, and privatization. The expression "Washington Consensus" was coined by John Williamson. John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7, 7-20 (John Williamson ed., 1990). For a discussion of its current meaning, see John Williamson, *What Should the World Bank Think About the Washington Consensus*, 15 *WORLD BANK RES. OBSERVER* 251(2000).

4. In Eastern Europe and Russia, privatization was often accomplished through "shock therapy" that divested state assets with little concern for the creation of strong legal and regulatory structures. As a result of the weaknesses of these efforts, the specialized literature has converged on the claim that the sale of state-owned companies should be preceded by an institutional and regulatory framework to guarantee competition and protect investors from state opportunism. For a brief

Thus, a successful privatization would be more likely to attract private investment to infrastructure sectors if governments were willing to tie themselves to the mast of their boats. The most important self-binding strategy for Latin American countries was to delegate their regulatory powers to independent regulatory agencies (IRAs).⁵ The assumption was that IRAs⁶ enjoy “autonomy” from elected politicians, thereby reducing the risks of expropriation, political manipulation, or short-term considerations related to the electoral cycle that could adversely affect private investment incentives in relevant sectors.⁷ As a result, the creation of IRAs became one of the central institutional issues in the context of privatization reforms.⁸

This Article argues that this self-binding strategy has not worked. The Brazilian experience with IRAs shows that despite delegating regulatory powers to independent agencies, the government was still able to influence agency decisions.⁹ Institutional guarantees that characterize IRAs in developed countries, especially the United States, were not enough to insulate Brazilian IRAs from the political sphere.¹⁰ Based on a detailed institutional analysis, the Article explains why this happened and discusses the lessons that can be learned from the Brazilian experience.

review of this debate, see Scott Wallsten, *Does Sequencing Matter?: Regulation and Privatization in Telecommunications Reforms 2-7* (World Bank Policy Research, Working Paper No. 2817, 2002).

5. The analogy between delegation of power to independent entities and Ulysses' strategy was originally made by Jon Elster. Jon Elster, *Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact?*, E. EUROPEAN CONST. REV., Summer 1994, at 66, 67. Brazilian scholars have used the analogy to refer to IRAs. See, e.g., Marcus André Melo, *A Política da Ação Regulatória: Responsabilização, Credibilidade e Delegação* [The Politics of Regulation: Responsibility, Credibility and Delegation], 16 REVISTA BRASILEIRA DE CIENCIAS SOCIAIS 55, 55-68 (2001); Regina Pacheco, *El Control de las Agencias Reguladoras en Brasil: ¿Ulises y las Sirenas o Narciso?* [The Control of Regulatory Agencies in Brazil: Ulysses or Narcissus?], in LA RESPONSABILIZACIÓN EN EL ESTADO: ASPECTOS TEÓRICOS Y EPISTEMOLÓGICOS 215 (2005).

6. The terms IRAs, agencies, and regulatory agencies will be used interchangeably in this Article.

7. Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 139, 152-55 (1997).

8. See generally Jacint Jordana & David Levi-Faur, *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 102 (2005) (analyzing the “restructuring of the state in Latin America and the consequent institutionalization of a new regulatory order”)

9. See *infra* Parts III-V (discussing presidential influence on regulatory agencies and the institutional design of independent agencies).

10. *Id.*

These lessons are relevant because Brazil was not alone in believing that IRAs were the solution.¹¹ The World Bank and the Organization for Economic Cooperation and Development (OECD) recommended that countries promoting regulatory reforms and privatizations should create IRAs.¹² Advocates of these reforms believed that IRAs would create credible regulatory commitments,¹³ thereby increasing the value of the state-owned companies to investors and attracting more private investment.¹⁴ During the 1990s, U.S.-style IRAs were adopted in many European and Latin American countries,¹⁵ becoming one of the primary means of regulatory governance worldwide.¹⁶ In sum, despite this Article's

11. See, e.g., ORG. FOR ECON. COOPERATION & DEV. [OECD], THE OECD REPORT ON REGULATORY REFORM: SYNTHESIS (1997) (recommending regulatory reform and setting forth the reasons for this solution).

12. OECD, THE OECD REPORT ON REGULATORY REFORM: VOLUME II: THEMATIC STUDIES (1997); OECD, REGULATORY POLICIES IN OECD COUNTRIES: FROM INTERVENTIONISM TO REGULATORY GOVERNANCE (2002); WORLD BANK, WORLD BANK TECHNICAL PAPERS NO. 399, CONCESSION FOR INFRASTRUCTURE: A GUIDE TO THEIR DESIGN AND AWARD (1998), available at http://rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf; WORLD BANK, THE WORLD'S BANK ROLE IN THE ELECTRIC POWER SECTOR: WORLD BANK POLICY PAPER (1993), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101911183588/Rendered/PDF/multi_page.pdf; OECD, *Independent Regulators in South East European Countries* (2003), available at <http://www.investmentcompact.org/pdf/9thPTMtIndependentRegulators.pdf>; World Bank, How to Strengthen Regulatory Framework/Agencies, Document presented at the Water Forum (2002), available at http://siteresources.worldbank.org/EXTWSS/Resources/337301-1147283821774/0508_framework.pdf; World Bank, Regulatory Governance Background Note presented at the African Forum for Utility Regulation (2002). At quite an early stage in the debate, the idea was also supported by WTO. World Trade Organization [WTO], Negotiating Group on Basic Telecommunications: Reference Paper (Apr. 1996), available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

13. For an exploration of the idea of regulatory commitment, see DAVID NEWBERY, PRIVATIZATION, RESTRUCTURING, AND REGULATION OF NETWORK UTILITIES 62 (2001); REGULATIONS, INSTITUTIONS AND COMMITMENT: COMPARATIVE STUDIES OF TELECOMMUNICATIONS (Brian Levy & Pablo T. Spiller eds., 1998); Pablo T. Spiller, *Institutions and Regulatory Commitment in Utilities' Privatization*, 2 INDUS. & CORP. CHANGE 317 (1993); Pablo T. Spiller, *A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law or Regulatory Specificity?*, 69 S. CAL. L. REV. 477 (1996).

14. Joseph E. Stiglitz, Promoting Competition in Telecommunications (Centro de Estudios Economicos de la Regulacion, Working Paper Series: Buenos Aires, 1999); see also Newbery, *supra* note 13, at 73 (noting that the "costs [of private ownership] may take the form of a high rate of return required to reward investors for the high perceived regulatory risk.").

15. JACINT JORDANA & DAVID LEVI-FAUR, HACIA UN ESTADO REGULADOR LATINOAMERICANO? LA DIFUSIÓN DE AGENCIAS REGULADORAS AUTÓNOMAS POR PAÍSES Y SECTORES [Towards a Latin American Regulatory State? The Diffusion of Independent Agencies in Countries and Sectors] (2005); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994).

16. See OECD, REGULATORY POLICIES IN OECD COUNTRIES: FROM INTERVENTIONISM TO REGULATORY GOVERNANCE, *supra* note 12 ("One of the most

focus on Brazil, the conclusions presented here should be relevant to policymakers and reforming countries around the globe.

Between 1996 and 2002, the Brazilian government established IRAs for electricity, telecommunications, oil, gas, transportation, and other infrastructure sectors.¹⁷ These agencies were implemented as part of a very ambitious privatization program, in which the government was not only able to attract private investment, but was also able to sell state-owned companies for relatively high prices.¹⁸ One could ascribe this successful outcome to the Brazilian government's credible commitment not to act opportunistically once investments had been made. In fact, many have claimed that the independence of Brazilian agencies has boosted investors' confidence.¹⁹ Against this claim, the Author argues that the Brazilian IRAs are not as insulated from electoral cycles and the political sphere as they are perceived or expected to be.

Following the formulas advocated internationally, Brazilian IRAs were designed to have fixed terms of office for commissioners, Congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy.²⁰ These and

widespread institutions of modern regulatory governance is the so-called independent regulator . . .").

17. In this period, nine regulatory agencies were implemented in Brazil: Agência Nacional de Energia Elétrica—ANEEL (Electricity); Agência Nacional do Petróleo—ANP (Oil and Gas); Agência Nacional de Telecomunicações—ANATEL (Telecommunications); Agência Nacional de Vigilância Sanitária—ANVISA (Sanitary Vigilance/ Health Inspectors); Agência Nacional de Saúde Suplementar—ANS (Private Health Care Services); Agência Nacional de Águas—ANA (Water); Agência Nacional de Transportes Aquaviários—ANTAQ (Water Transportation); Agência Nacional de Transportes Terrestres—ANTT (Ground Transportation); Agência Nacional do Cinema—ANCINE (Cinema).

18. Francisco Anuatti-Neto et al., *Costs and Benefits of Privatization: Evidence from Brazil* 3 (Inter-Am. Dev. Bank Research Network Working Paper No. R-455, 2003); see also Armando Castelar Pinheiro, *Privatização no Brasil: Por Quê? Até Onde? Até Quando?* [Privatization in Brazil: Why? How Far? Until When?], in, A ECONOMIA BRASILEIRA NOS ANOS 90, 178 (Fabio Giambiagi & Mauricio Moreira eds., 1999).

19. See, e.g., Lee J. Alston et al., *Political Institutions, Policymaking Processes and Policy Outcomes in Brazil* 38 (Inter-Am. Dev. Bank Working Paper No. R-509, 2004) ("[T]he most important means by which the government signaled a credible commitment to not act opportunistically was by designing the agencies so as to give them a high degree of independence."); Luiz Carlos Mendonça de Barros, *As Agências Reguladoras e a Terceirização do Governo* [Regulatory Agencies and Contracting Out Governmental Functions], FOLHA DE SÃO PAULO, Mar. 7, 14, & 21, 2003 (series of three articles). In addition, an inter-ministerial group published a report in favor of independence as guaranteed by the current institutional design of the agencies. RELATÓRIO DO GRUPO DE TRABALHO INTERMINISTERIAL, CASA CIVIL (CÂMARA DE INFRA ESTRUTURA—CÂMARA DE POLÍTICA ECONÔMICA), ANÁLISE E AVALIAÇÃO DO PAPEL DAS AGÊNCIAS REGULADORAS NO ATUAL ARRANJO INSTITUCIONAL BRASILEIRO [Analysis and Assessment of the Role of Regulatory Agencies in the Brazilian Institutional Scenario] (Sept. 2003).

20. See Warrick Smith, *Utility Regulators—The Independence Debate*, PUB. POL'Y FOR PRIVATE SECTOR, at 3 (World Bank Group, Note No. 127, Oct. 1, 1997),

other institutional features were implemented to guarantee that these agencies were not subordinated to the President's directive authority or to any other branch of government.²¹ These features aimed to provide a high level of independence to Brazilian agencies.²² This Article demonstrates that the aim went unfulfilled.

Because the Brazilian IRAs' design was inspired by the American experience, this Article will compare the effectiveness of IRA guarantees of independence in Brazil and in the United States.²³ In particular, the Article suggests that IRAs are not very independent in Brazil for three reasons. First, some institutional features of U.S. agencies were not implemented or fully transplanted to Brazil.²⁴ Second, some successful institutional features of the U.S. political and legal system were unsuccessful in Brazil.²⁵ Finally, some problematic features of the U.S. system were transplanted to Brazil, replicating many of the problems that have long existed in the United States.²⁶

The Brazilian experience illuminates the difficulties that many developing countries face in trying to realize the ideal of regulatory independence and the benefits that would supposedly flow from this. Also, it replicates many of the challenges and obstacles in implementing development reforms around the world. First, the Brazilian case shows that political economy is often an impediment to institutional reforms in developing countries. Second, it illustrates

available at <http://rru.worldbank.org/documents/publicpolicyjournal/127smith.pdf> (providing a summary of the "strong consensus on the formal safeguards required [by independent agencies]").

21. This was the first time that bodies of the Brazilian public administration were not subject to the direct authority of the President. Although some bodies (*autarquias*) were supposed to have a higher degree of autonomy even before the reform, they are not equivalent to the IRAs and will not be included in the analysis developed here.

22. See GESNER OLIVEIRA, DESENHO REGULATÓRIO E COMPETITIVIDADE: EFEITOS SOBRE OS SETORES DE INFRA-ESTRUTURA [Regulatory Design and Competition: Impact on Infrastructural Sectors] (2005), available at http://www.eaesf.fgvsp.br/AppData/GVPesquisa/P00338_1.pdf (designing an index to measure the independence of agencies, and indicating that Brazil has one of the highest levels of independence in the world).

23. This is not to say that Brazil modeled its IRAs after the American regulatory agencies. The process of diffusion of these agencies is looser and highly influenced by other countries in the region and in Europe that were conducting similar reforms. In fact, the design of regulatory agencies in Brazil, both for the telecommunications and electricity sectors, resemble the ones adopted in other countries, such as the United Kingdom, Argentina, and Chile. See JORDANA & LEVIFAUR, *supra* note 15. When the reforms started, however, the American agencies were the models available and their pioneerism and long existence guaranteed their status as a model throughout the whole process.

24. See *infra* Part V.

25. *Id.*

26. *Id.*

the need to adapt legal transplants to the local conditions and particularities of the reforming country. Finally, it highlights the dangers of adopting an overly idealized view of the way the transplanted legal system operates in the country of origin.

The Article concludes that before starting the quest for an institutional design suited to the Brazilian context, the Brazilian government should ask if these agencies should, in fact, have high levels of independence. Brazil, and many other reforming countries, have yet to engage in a meaningful discussion about bureaucratic independence, its goals, and its limits.²⁷ Some of the cases discussed in this Article suggest that bureaucratic independence might increase investors' protection against opportunism, but that such independence might also impair the government's ability to control inflation or to protect legitimate consumer interests. Advocates of agency independence emphasize one single goal—investors' protection—and ignore the fact that some types of political interference with regulation might be guided by legitimate and justifiable goals. The assumption that all political interference with the regulation of infrastructure sectors will be opportunistic is the basic assumption behind all these reforms. This simplistic view of institutional reforms needs to be replaced with a more comprehensive analysis of the full-scale consequences of the institutional options third world countries can pursue.

The Article proceeds in five Parts. Part II shows that regulatory commitment was the main rationale behind the creation of IRAs in Brazil, and that insulation from Presidential influence was the main concern in providing such commitment to investors. Part III presents examples of Presidential influence over agencies. This evidence indicates that regulatory agencies in Brazil may not be as independent as their structure might suggest. Within this context, Parts IV and V investigate how this could have happened by analyzing the institutional design of regulatory agencies in Brazil. Part IV develops a historical analysis and shows that despite having a common rationale (investors' protection), circumstantial factors led to different institutional designs for the IRAs in the telecommunications and electricity sectors. The different designs of these agencies will be explored in detail in Part V, which develops an

27. See Jordana & Levi-Faur, *supra* note 8, at 119 (concluding that the rise of a new regulatory capitalism in Latin America is clearly occurring and that while it can be explained by a process of "social learning," the authors "could not confidently cite evidence of 'learning' in the sense that followers' observations took into account the effects of change in the structure of the state on growth and foreign and private investment"). For a brief discussion of the tension between investment and development goals, see Anton Eberhard, Regulation of Electricity Services in Africa: An Assessment of Current Challenges and an Exploration of New Regulatory Models 14–22 (paper prepared for World Bank Conference, June 2005), available at <http://www.gsb.uct.ac.za/gsbwebb/mir/documents/InfrastructureRegulationinAfrica.pdf>.

analysis of the agencies' institutional guarantees of independence and shows that IRAs in Brazil are not as independent as generally perceived or expected. Specifically, the Author argues that the electricity agency has fewer guarantees of independence than the telecommunications agency. Part VI draws some policy lessons from the Brazilian experience. The general conclusion is that IRAs are not a strong mechanism to secure regulatory commitment in Brazil, especially in the electricity sector, but it is not clear whether reforms to make these agencies more independent would be advisable given the range of policy goals pursued by the government.

II. THE CREATION OF INDEPENDENT REGULATORY AGENCIES IN BRAZIL

In Brazil, the creation of regulatory agencies for the telecommunications and electricity sectors was largely informed by an interest in signaling the government's commitment to a stable, existing regulatory framework (also known as "regulatory commitment").²⁸ The assumption was that political opportunism and concerns associated with electoral cycles may affect the application of the regulatory framework and the interpretation of statutes and contracts, thus undermining investors' confidence.²⁹ The agencies'

28. For a list of sources helpful in exploring further the idea of regulatory commitment, see *supra* note 8.

29. Interview with Carlos Ari Sunfeld, Former Legal Advisor to the Cardoso Administration on the Privatization of Telecommunication Companies, and Member of the Commission that Designed the Regulatory Agency (Jan. 2006) (on file with author); Interview with Renato Guerreiro, Former Secretary of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006) (on file with author). Representatives in Congress shared the idea. For instance, representative José Carlos Aleluia stated the following during a speech made at the House of Representatives to justify increasing the level of independence of the electricity sector agency: "We are establishing an agency (ANEEL) which represents the modernity of the Brazilian state and creates conditions for investors—who will see a country with stable rules and clear interpretations of these rules—to come and invest in the expansion of the electricity sector." José Carlos Aleluia, Braz. Cong. Representative, Speech before the House of Representatives (July 9, 1996), in *DIÁRIO DA CÂMARA DOS DEPUTADOS*, Oct. 17, 1996, at 19649, available at <http://www2.camara.gov.br/publicacoes> (Follow "Publicações Oficiais de Câmara dos Deputados"; fill in "17/10/1996" in Data field and "19649" in Página Inicial field). The same idea was expressed in the Senate for both the electricity and the telecommunications agencies. José Fogaça, Braz. Senator, Speech before the Senate (Oct. 17, 1996), in *DIÁRIO DO SENADO FEDERAL*, Oct. 18, 1996, at 17196, available at <http://www.senado.gov.br/sf/atividade/Pronunciamento/Detailhes.asp?d=197830>; José Fogaça, Braz. Senator, Speech before the Senate (Nov. 27, 1996), in *DIÁRIO DO SENADO FEDERAL*, Nov. 28, 1996, at 19140, available at <http://www.senado.gov.br/sf/atividade/Pronunciamento/Detailhes.asp?d=195867>. It is important to note, however, that in the case of the electricity sector in Brazil, where the privatization was not completed, the remaining state-owned companies also

independence would reduce this risk by insulating the regulatory framework from the political sphere.³⁰

The Executive branch was the main proponent of IRAs in Brazil. It is not completely clear where the proposal to implement IRAs in Brazil actually came from, or even whether the proposal came from one single source or from different sources in the executive branch.³¹ Despite its unclear origin, many people involved in the process of creating IRAs in Brazil frequently point to international influences.³² Following the international discourse, the proponents of IRAs in Brazil believed that a decision by the Executive branch to create self-imposed limits on its regulatory powers by delegating them to IRAs would be interpreted as a signal of commitment and would attract investors.³³ Following this discourse, the executive branch sent bills to Congress proposing the creation of IRAs.³⁴

There are at least three possible reasons why the Brazilian government decided to follow the international discourse and why governments around the world are increasingly relying on IRAs.³⁵ First, politicians are willing to improve the credibility of their policies

became a powerful interest group. In this case, their interests could also affect the regulatory framework, although they would not do so because their political interests are connected with electoral cycles

30. See *supra* note 29.

31. One of the first documents that refers to regulatory agencies in Brazil was a memo prepared by Renato Navarro Guerreiro in 1994. The memo set up an agenda of reforms for the telecommunications sector, including the creation of an independent regulatory agency, in which regulators appointed by the President and approved by Senate would take collegiate decisions. The memo was later published by ANATEL, entitled *Comunicações: Infraestrutura para a Revolução da Informação* [Communications: Infrastructure for an Information Revolution]. For an historical overview of the process in the telecommunications sector, including the reference to Guerreiro's memo, see José Prata et al., SÉRGIO MOTTA: O TRATOR EM AÇÃO [Sérgio Motta: A Strong Person in Action] 70–71 (1999).

32. Luiz Moreira, Braz. Cong. Representative, Speech at the House of Representatives (Nov. 6, 1996), in DIÁRIO DA CÂMARA DOS DEPUTADOS, Nov. 7, 1997, at 35763; see also José Carlos Aleluia, Braz. Cong. Representative, Speech at the House of Representatives (July 9, 1996), in DIÁRIO DA CÂMARA DOS DEPUTADOS, July 10, 1996, at 19648; Telephone Interview with Renato Navarro Guerreiro, Former Secretary of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006); Interview with Luiz Antônio Ramos Veras, Member of the Permanent Staff of ANEEL (July 2003) (on file with author).

33. Melo, *supra* note 5, at 63–64; see also Bernardo Mueller & Carlos Pereira, *Credibility and the Design of Regulatory Agencies in Brazil*, BRAZ. J. POL. ECON., July–Sept. 2003, at 65, 66–69.

34. See *infra* Part IV for a discussion of the details of this process.

35. See Fabrizio Gilardi, *Spurious Change in Regulatory Policies: Regulation through Independent Agencies and the Three New Institutionalisms*, in THE POLITICS OF REGULATION: EXAMINING REGULATORY INSTITUTIONS AND INSTRUMENTS IN THE AGE OF GOVERNANCE 67, 67–69 (Jacint Jordana & David Levi-Faur eds., 2004) (calling these three reasons rational choice, sociological reasons, and historic institutionalism, respectively).

and solve the problem of political uncertainty in order to guarantee the success of privatization reforms.³⁶ Second, regulatory agencies have now been taken for granted as the appropriate form for regulation, and politicians are just following the trend without asking whether there are any concrete benefits in doing so.³⁷ Third, there are network effects of implementing such institutions once a number of countries have implemented them.³⁸ That is, the shift to IRAs can be seen as an attempt to capture the gains of “positive feedback” or “increasing returns” created by the presence of IRAs in other countries.³⁹ It is not clear which of these three motivations, if any, prevailed in Brazil, but there is no reason to rule any of them out as plausible explanations of the creation of IRAs by the Cardoso administration.

The fact that the executive branch was the main proponent of IRAs in Brazil and was the entity conducting the reforms, shifts the focus of our attention to the President.⁴⁰ In the United States, the prevalent theoretical approach to regulatory agencies is to model a principal-agent relationship between the regulatory agency (agent) and the entity that delegates its power (principal).⁴¹ In the American scenario, the principal is Congress, but in the case of Brazil it is the President.⁴²

One could argue that this Presidential-dominance model does not necessarily rule out some sort of influence by Congress on IRA decisions; however, this is not the case in Brazil. In the United States, Congress can influence IRAs by changing (or threatening to change) the enabling act or statute, by limiting the agency’s discretion through legislation, by monitoring agencies through oversight committees, and by imposing controls on the agency’s

36. *Id.*; see also Giandomenico Majone, Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions (European Univ. Inst., Working Paper No. 96/57, 1996).

37. Gilardi, *supra* note 35; see also JORDANA & LEVI-FAUR, *supra* note 15.

38. Gilardi, *supra* note 35.

39. *Id.*

40. The word President is used here to refer to the executive branch in general; it thus includes the President himself and any of the political appointees who can be dismissed at will, such as Ministers.

41. For a discussion of the principal-agent relationship between regulatory agencies and the entity that delegates its power, see Mariana Mota Prado, *Towards a Theory of Presidential Dominance: An Analysis of the Relationship between Government and Regulatory Agencies in Brazil*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO (forthcoming).

42. For an exploration of this idea in greater detail, see *id.* For an earlier version of this article, see Mariana Mota Prado, Institutional Reforms, Legal Transplants, and Political Systems (unpublished paper presented at the SELA Conference, Yale Law School, June 12–15, 2007), available at http://www.law.yale.edu/documents/pdf/sela/MarianaMotaPrado_English_.pdf.

budget.⁴³ The Congress, however, is not as strong in Brazil, where the Brazilian President has more control over the legislative process, thus reducing the Congressional power to change the enabling statute of agencies or to limit Presidential discretion through statutes.⁴⁴ In addition, the Brazilian Congress has no oversight power over the heads of independent agencies and has very few controls on IRA budgets.⁴⁵

In sum, the Brazilian Congress has very little power to exert influence over independent agencies, whereas the President has significant powers to do so. Thus, in contrast with the United States, once agencies have been established, the biggest threat to their independence comes from the President, who can influence IRAs in many ways, including the imposition of controls on IRA budgets.⁴⁶

The President not only has power to influence regulatory agencies, but may also have incentives to do so. If the President will be held electorally responsible for what the agencies are doing, for instance, the President has strong incentives to try to influence them to implement popular policies. For example, the President could try to make the agencies reduce the electricity rates for residential consumers, given that electricity rates have been historically determined by the executive branch and are likely to be perceived as the President's responsibility even after privatization.⁴⁷

Also, the President might feel the need to avoid conflicts between regulatory policies implemented by sectoral regulators and other policies that are being implemented by the Executive branch. Thus, even if the President is not acting opportunistically, he may have strong motivation to interfere in some regulatory decisions in order to ensure that they will not conflict with the Executive branch's social or macroeconomic policies. For instance, the President might find a need to reduce telecommunications and electricity rates to control

43. See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456–59 (2003) (discussing the ways in which Congress controls delegations to agencies).

44. See, e.g., Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT'L L.J. 29, 41–42 (2003) (noting that Brazil has historically adopted constitutions “reserving the president extensive legislative prerogatives”).

45. See *infra* Part V.F. for a detailed discussion of this lack of oversight power and controls on IRA budgets.

46. See discussion *infra* Part V.

47. Lula might have tried to claim responsibility for popular policies implemented by independent agencies and to avoid responsibility for unpopular policies. This hypothesis seems to explain the controversial and somewhat contradictory position of the Lula Administration regarding independent agencies. For an exploration this idea in greater length, see Mariana Mota Prado, *Accountability Mismatch: As Agências Reguladoras Independentes e o Governo Lula*. [Independent Regulatory Agencies and the Lula Administration], in AGÊNCIAS REGULADORAS E DEMOCRACIA (Gustavo Binenbojm ed., 2005).

inflation. Because there are many different situations where the regulation of the infrastructure sector can affect or overlap with other governmental policies, it seems reasonable to assume that the President will often have incentives to try to influence the agencies.

Finally, the Brazilian bureaucracy may facilitate Presidential influence over agencies. Before privatization, the regulations for telecom and electricity were under the Executive branch's jurisdiction (through Ministries).⁴⁸ After privatization, people inside the Ministry who previously worked under the former regulatory framework could continue to operate under the assumption that the new regulatory agencies are subordinated to the Executive branch. Institutional memory will not disappear overnight, and this may distort the way bureaucrats interact with the new agency. This phenomenon may be aggravated if the agency's staff is composed of people who used to work for the Ministry or for the former regulator before the privatization, as was the case in the electricity sector.⁴⁹

In sum, the Executive branch's institutional powers, the Brazilian bureaucracy's traditions and habits, and the incentives that may affect presidential behavior, combine to make the President the most significant threat to the independence of agencies and the stability of the regulatory framework. Hence, an analysis of the actual level of independence of the Brazilian regulatory agencies should focus on the relation between these agencies and the President.

III. PRESIDENTIAL INFLUENCE ON INDEPENDENT REGULATORY AGENCIES

To set the stage for the analysis in the rest of the Article, Part III presents several concrete situations in which there are signs of varying degrees of presidential influence over regulatory outcomes.⁵⁰

48. This is not to say that the functions of both regulators were exactly the same. Before the privatization process, the regulator of the electricity sector was a body within the Ministry of Mines and Energy called National Bureau of Waters and Electricity (*Departamento Nacional de Águas e Energia Elétrica*—DNAEE). The new regulatory agency for the electricity sector (ANEEL) was actually implemented as a replacement of DNAEE, but according to the letter of the statutes, ANEEL has much broader powers than DNAEE ever had. The same applies to the telecommunications sector.

49. In fact, three of the directors of the former regulatory body, DNAEE, eventually became directors of ANEEL. See *infra* note 161. The lower staff of DNAEE also became staff of ANEEL. Interview with Luiz Antônio Ramos Veras, *supra* note 32.

50. More conclusive evidence could be gathered through a quantitative analysis assessing over a certain period of time whether changes in presidential administration are associated with changes in regulatory outcomes. At this point, however, the Brazilian experience with regulatory agencies is too short to indicate major trends.

Only cases in which presidential preferences (or Executive-branch preferences) were publicly known are discussed.⁵¹ By contrasting the final regulatory outcome with publicly announced Presidential preferences, Part III will identify when these preferences were implemented by the relevant agency. An interesting aspect of the cases is that often the agency initially manifested a preference contrary to the Presidential preferences, but that the final outcome was closer to the Presidential preferences than to the agencies' preferences.⁵²

Part III makes two points. First, concrete cases demonstrate that there is presidential influence on regulatory outcomes in Brazil. Second, these cases suggest that the telecommunications agency *Agência Nacional de Telecomunicações* (ANATEL) is more independent than the electricity agency *Agência Nacional de Energia Elétrica* (ANEEL). However, these interagency differences may be declining over time.

The cases illustrate the most important efforts by President Luís Inácio Lula da Silva's first administration (2003-2006) to influence the behavior of the electricity and telecommunications agencies. The Article will discuss two cases related to increases in the telecommunications and electricity rates and two cases regarding regulation in general. With one exception,⁵³ the publicly announced presidential preferences were implemented by the agencies.

A. *Increases in Electricity Rates*

At the time of President Lula's inauguration in January 2003, representatives of the new administration publicly stated their intention to halt electricity rate increases.⁵⁴ However, to avoid a decrease in investors' confidence in the sector, the newly elected

Agencies have been operating in Brazil for only ten years. During this period, there was only one major shift in presidential administration (the election of Lula), and some might argue that Lula's administration, which started in 2003, was not very different from the previous one. See Larry Rohter, *Departing President Leaves a Stable Brazil*, N.Y. TIMES, Dec. 29, 2002 (reporting that President Cardoso remained in office for eight years, stepping down in 2003, and that President Lula took office in 2003 after winning the presidential election). Although the Author does not fully agree with this assumption (in many instances, Cardoso and Lula's administrations had opposite views, especially with respect to the importance of agencies and the necessities of regulated markets), one might not be able to identify major shifts in regulatory outcomes from one administration to the next in the same way as one can do in the United States.

51. This selection avoids the complexities of assessing the presidential preferences.

52. See *infra* Part III.B.

53. See *infra* Part III.B (showing the rate increase for the telecommunications sector, when ANATEL decided to implement a regulation different from the one "suggested" by the Ministry of Telecommunications).

government sought to halt increases without changing legislation or contracts.⁵⁵ In this context, the strategy chosen by the government was to influence the electricity sector agency (ANEEL), which was in charge of interpreting and applying the statutory and contractual provisions related to electricity rate increases.⁵⁶

Following the government's announcements, ANEEL's first decision regarding electricity rates was to limit the level of the increases to which utility companies were entitled in that particular year.⁵⁷ To comprehend ANEEL's action, one must first understand the difference between electricity rate adjustments and rate increases. Distribution companies are entitled to annual rate increases composed of inflationary and non-inflationary adjustments.⁵⁸ These annual increases are called rate adjustment (*reajuste tarifário*).⁵⁹ Every four years, electricity distribution companies are entitled to a re-evaluation of the rate structure; during the re-evaluation, ANEEL considers the factors that comprise the

54. In her inauguration speech, Dilma Rousseff, the Minister of Mines and Energy, said that one of the challenges of the Ministry was to "halt the ever rising increases of electricity rates and fuel prices." *Mesmo Independente, Agência Leva em conta Posições de Lula na Revisão* [Despite Being Independent, Agency Takes Presidential Preferences into Account], FOLHA DE SÃO PAULO, Feb. 18, 2003, at B1. Also, in the very first week of Lula's government, the executive secretary of the Ministry declared in an interview that "the role of the agencies is to oversee and execute the government's directives . . . the electricity rates adjustment will be made by ANEEL according the orientation provided by the Ministry." *Agências Devem Perder seu Poder* [Agencies Are Likely To Lose Their Power], FOLHA DE SÃO PAULO, Jan. 7, 2003, at B5.

55. Ronaldo D'Ercole, *Dirceu Quer Rever Modelo de Reajuste das Tarifas de Energia e Telefone* [President's Chief of Staff Wants To Revise Electricity and Telecommunications Tariffs], O GLOBO (São Paulo), Mar. 8, 2003, available at <http://infoener.iee.usp.br/infoener/hemeroteca/imagens/70618.htm>.

56. Actually, the Ministry of Mines and Energy developed three different proposals to halt rate increases. Humberto Medina, *Governo que Reajustes Menores para Conter Inflação* [Government Wants To Halt Increases to Avoid Inflationary Pressures], FOLHA DE SÃO PAULO, Mar. 9, 2003. Two of them were implemented unilaterally by executive decree and therefore are not relevant to our analysis here. *Id.* One was related to subsidies and the other was related to compensations for currency devaluation. *Id.*

57. Humberto Medina, *Aneel Limita Aumento das Contas de Luz* [Agency Limits Tariff Increases], FOLHA DE SÃO PAULO, Feb. 18, 2003, at B1.

58. Brazil has adopted a price-cap regulation for the electricity sector. According to this system, the regulatory agency defines the maximum rate that utility companies can charge (price-cap) and grants an annual increase to adjust for inflation in manageable costs (X) and to transfer non-manageable costs (Y) to consumers. The electricity rate increase equals X times (price index minus productivity factor) plus Y, divided by the total annual revenue of the previous year. Lei no 8.987, de 13 de fevereiro de 1995 (Brazil).

59. For more details, see AGENCIA NACIONAL DE ENERGIA ELECTRICA [ANEEL], CADERNOS TEMÁTICOS ANEEL, N. 4 TARIFAS DE FORNECIMENTO DE ENERGIA ELÉTRICA [Tariffs for Electricity Distribution Services] (2005), available at <http://www.aneel.gov.br/arquivos/pdf/caderno4capa.pdf>.

rate and determine the inflationary and non-inflationary adjustments.⁶⁰ This special increase is called rate review (*revisão tarifária*).⁶¹ The system of rate increases was supposed to work as follows: after the rate review, distribution companies would continue to have yearly rate adjustments for four years until the next review.⁶² Since the processes used to determine rate increases in adjustments and in reviews are different, normally the levels of increases also differ.⁶³ For some companies, the rate review would imply much higher increases than those that would occur if the government were merely making an adjustment.⁶⁴

ANEEL decided to limit the rate increases by adopting whatever procedure (adjustment or review) that would bring the lowest increase.⁶⁵ More specifically, ANEEL limited reviews to a level of increase equivalent to a rate adjustment if the former was higher than the latter.⁶⁶ Whenever the rate reviews would yield increases greater than adjustments, ANEEL would grant an adjustment, not a review.⁶⁷ In contrast, in the case of utilities that would have a higher increase with the adjustment, ANEEL would only grant them the review.⁶⁸

ANEEL normally submits the proposed methodology for rate review to the public for notice and comment (*audiência pública*) before implementing it.⁶⁹ In the case of this particular decision to limit increases, however, ANEEL did not submit the methodology to the public.⁷⁰ Instead, the decision was first announced in February

60. *Id.* at 21–22.

61. *Id.* at 23.

62. ANEEL, PERGUNTAS E REPOSTAS SOBRE TARIFAS DE ENERGIA ELÉTRICA [Q&A on Electricity Distribution Rates] 6 (2007) available at http://www.aneel.gov.br/biblioteca/Perguntas_e_Repostas.pdf.

63. *Id.*

64. Medina, *supra* note 57 (citing the example of Enersul, in the state of Mato Grosso do sul. In 2003, Enersul's review would grant a 42.64% increase in the rates whereas in an adjustment the increase would be reduced to 28.55%).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. The process of public notice and comment works as follows: the proposal of the agency is publicized, and anyone (consumers, companies, or non-profit organizations) can submit written comments to the proposal. Lei no. 9.427 de 26 de Dezembro de 1995, art. 4, § 3, Decreto no. 2.335 de 06 de outubro de 1997, art. 21, and Resolução ANEEL no. 233 de 14 de Julho de 1998, Norma de Organização ANEEL-001, art. 13. See also Agência Nacional de Energia Elétrica [ANEEL], Considerações Gerais, <http://www.aneel.gov.br/area.cfm?idArea=401> (last visited Feb. 19, 2008). Then, ANEEL holds an open meeting for public discussion of the proposal and the comments. *Id.* After the meeting, ANEEL enacts its final decision. *Id.* ANEEL follows the same process before taking a final decision on the rate review of each individual company. *Id.*

70. See Medina, *supra* note 57 (reporting ANEEL's decision to limit rate increases and announcing the methodology that would be used in the rate review).

2003, when ANEEL submitted to public notice and comment the proposed rate increase of four out of seventeen electricity distribution companies (most of them privatized companies) scheduled for a rate review in 2003.⁷¹ Despite the companies' complaints, ANEEL used the same criteria to propose four other companies' increases in March.⁷² At least two companies had their increases actually limited by the agency.⁷³

ANEEL stated that it was not refusing to grant the full increase as determined by the rate review process; instead, it was implementing a rollover.⁷⁴ The company would be entitled to recover the lost revenue (calculated as the revenue that would be obtained with the difference between the percentage of the increase in the rate adjustment and in the review adjusted to inflation) in the next three increases.⁷⁵ Enersul, for instance, was entitled to increase its electricity rates by 42.64% in 2003, but instead received an increase of 32.59%.⁷⁶ From 2004 to 2007, Enersul would have a rate adjustment plus an additional increase each year, which would grant a rate of return equivalent to the one the company should have had in 2003.⁷⁷

71. ANEEL's proposed increase for each one of the other four companies was: 28.55% for Enersul, a distribution company (disco) in the state of Mato Grosso do Sul; 18.77% for CPFL, a disco in the state of São Paulo; 27.49% for Cemig, a disco in the state of Minas Gerais; and 24.99% for Cemat, a disco in the state of Mato Grosso. ANEEL, *BOLETIM ENERGIA*, No. 65 (Feb. 19–26, 2003), http://www.aneel.gov.br/arquivos/PDF/BOLETIM_ENERGIA_065_3.htm (last visited Feb. 16, 2008) [hereinafter ANEEL Boletim 65]. CPFL complained that ANEEL was defining the rate reviews according to criteria that did not go through the notice-and-comment process and had never been used before. *Id.*; see also Medina, *supra* note 57 (reporting the methodology established for the rate reviews).

72. See ANEEL, *BOLETIM ENERGIA*, No. 67 (Mar. 12–18, 2003), http://www.aneel.gov.br/arquivos/PDF/BOLETIM_ENERGIA_067.htm (last visited Feb. 16, 2008) (stating that ANEEL submitted to notice and comment the rate increases for four companies in the Northeast region - Coelce (27.65%), Cosern (12.06%), Energipe (28.4%) and Coelba (27.19%)); see also *Luz Vai Subir até 28,4% no Nordeste* [Electricity Will Increase in 28.4% in the Northeast], *FOLHA DE SÃO PAULO*, Mar. 12, 2003, at B4.

73. See *Conta de Luz Sobe até 31,29% para 8,261 Milhões de Consumidores* [Electricity Prices Increase up to 31.29% for 8.261 Million Consumers], *FOLHA DE SÃO PAULO*, Apr. 18, 2003, at B3 (stating that Energipe and Coelba had their increases limited. Energipe was entitled to a 35.47% increase, but was granted only 29.71%; Coelba was entitled to a 31.49% increase, but was granted 28.61% instead).

74. ANEEL, Res. 167/03 (April 7, 2003), available at <http://www.aneel.gov.br/cedoc/res2003167.pdf> [hereinafter ANEEL Res. 167/03].

75. *Id.*

76. *Id.*; see also Humberto Medina, *Governo Quer Reajustes Menores para Conter Inflação* [Government Wants To Halt Increases To Contain Inflation], *FOLHA DE SÃO PAULO*, Apr. 9, 2003, at B3.

77. ANEEL Res. 167/03, *supra* note 77, art. 3.

The central question here is whether or not the Lula administration influenced ANEEL's decision to limit the electricity rate increases. Aside from never holding a notice-and-comment process to discuss its decision, ANEEL did very little to justify the limitation, stating only that the limits on the increases were imposed to reduce the impact of the increases on consumers.⁷⁸ This argument, however, was challenged by one of the most active consumer protection entities in Brazil, IDEC, which claimed that the additional increases to compensate companies for loss of revenue would hurt consumers in the long term.⁷⁹

Another potential reason for the decision is related to inflation. As mentioned earlier, the Lula administration was planning to halt rate increases, and this decision has often been reported in the newspapers as an attempt to control inflation.⁸⁰ It is debatable, however, whether levels of inflation are within the scope of the regulatory agency's mission. ANEEL's self-declared mission is to promote favorable conditions for the development of the electricity market while balancing the interests of companies and society.⁸¹ In addition, statutory provisions define the tasks under the agency's jurisdiction.⁸² These statutory provisions do not mention inflation or any macroeconomic issues.⁸³ In fact, the Brazilian Central Bank and the Ministry of Finance are the entities in charge of this and other macroeconomic issues.⁸⁴ Thus, ANEEL was not justified in limiting the increases on these grounds.⁸⁵ In contrast, Lula's administration

78. ANEEL Boletim 65, *supra* note 71.

79. See, e.g., Letter from Marilena Lazzarini, Coordenadora Executiva, Instituto Brasileiro de Defesa do Consumidor, to José Mário Miranda Abdo, Diretor Geral da Agência Nacional de Energia Elétrica (Mar. 24, 2003), available at http://www.idec.org.br/files/carta_enersul.doc (asking ANEEL to limit the increase for Enersul).

80. See, e.g., *Luz Vai Subir até 28,4% no Nordeste* [Electricity Prices Will Increase up to 28.4% in the Northeast], FOLHA DE SÃO PAULO, Mar. 12, 2003, at B4; Humberto Medina, *Conta de Luz Vai Subir Mais que a Inflação* [Electricity Increases More Than Inflation], FOLHA DE SÃO PAULO, Apr. 7, 2004.

81. ANEEL, *Missão da ANEEL*, <http://www.aneel.gov.br/areaPerfil.cfm?idPerfil=9> (last visited Feb. 16, 2008).

82. Lei No. 9.427, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil).

83. The regulatory agencies' mission is defined in Article Three of Statute 9,427/96 and includes only microeconomic decisions. *Id.* art. 3.

84. Lei No. 4.595, de 31 de Dezembro de 1964, D.O.U. 31/12/1964 (Brazil); Decreto-Lei No. 200, de 25 de fevereiro de 1967, art. 189, D.O.U. 27/02/1967 (Brazil); Decreto-Lei No. 278, de 28 de Fevereiro de 1967, art. 1.

85. Although it seems counterintuitive to allow a regulatory agency to set up rates that may impact inflation without taking inflation into consideration, this is what actually happened in Brazil. The advantage of this system is that it reduces the discretion of the regulatory agency, which protects the investors. The disadvantage is that it creates problems of intra-governmental coordination, since the agency may be impairing Central Bank efforts to control inflation levels.

had strong reasons to halt rate increases and, as the initial declarations show, intended to do so.⁸⁶

Although it is not possible to cite concrete evidence of presidential influence in the general decision of ANEEL to limit rate increases, there is at least one other episode that also suggests the existence of Presidential influence over regulatory outcomes. This episode involved a company called Centrais Elétricas de Pernambuco (Celpe), the electricity distribution company for the state of Pernambuco. In March 2005, Celpe asked for a 56.78% increase in its rates.⁸⁷ Celpe alleged that its costs had increased due to a power purchase agreement signed in 2005.⁸⁸ According to this contract, Celpe stopped buying electricity from hydropower plants for 62.8 *reais* (R\$62.8) per mega-watt hour (MWh) and started buying electricity for R\$137.3 per MWh from a thermal power generator (Termopernambuco)⁸⁹ that belongs to the same corporate group that controls Celpe (Neoenergia), and that started to operate in 2004.⁹⁰ Although Celpe's expenses had increased by R\$254.5 million a year, that money turned into profit for the new thermal power generator, thereby staying within the same entity and in the pockets of Neoenergia shareholders.⁹¹ Thus, an increase in rates to cover Celpe expenses would yield higher profits to Neoenergia, the group that owns Celpe and the thermal power plant.⁹²

86. The hypothesis that Lula's administration was trying to control infrastructure rates due to macroeconomic concerns would also explain why the attempts to influence independent agencies were mostly centered on electricity and telecommunications. The rates in these two infrastructure sectors have a high impact on inflation levels and also on other macroeconomic policies. Humberto Medina, *Governo Não Sabe Como "Regular" as Agências* [Government Does Not Know How to "Regulate" the Agencies], FOLHA DE SÃO PAULO, Mar. 24, 2003, at B5.

87. ANEEL, *Aneel Apresenta Revisão Tarifária da Celpe (PE) em Audiência Pública* [ANEEL Submits Celpé Tariff Review To Notice and Comments] (Mar. 13, 2005), available at http://www.aneel.gov.br/aplicacoes/noticias/Output_Noticias.cfm?Identidade=1403&id_area=90.

88. *Id.*

89. ANEEL, *Proposta de Revisão Tarifária da Celpe Vai à Audiência Pública* [Celpe's Tariff Review Is Available for Notice and Comments], BOLETIM ENERGIA, No. 165 (Mar. 31–Apr. 6, 2005), <http://www.aneel.gov.br/arquivos/PDF/boletim165.htm> (last visited Feb. 16, 2008) [hereinafter ANEEL Boletim No. 165].

90. Leila Coimbra, *Aneel Deve Mudar o Atual Modelo de Revisão Tarifária* [ANEEL Must Change the Current Model of Tariff Revision], VALOR ECONÔMICO (São Paulo), Mar. 11, 2005.

91. *Id.*

92. This type of transaction (called self-dealing) is now forbidden in the Brazilian system, but at the time the prohibition was enacted, the government decided not to make it retroactive. See Coimbra, *supra* note 90 (noting that these self-dealing contracts "were banned in the new model of the electric industry" but that "the contracts already signed could not be broken"). Thus, the pre-existing contracts, like this one, remained valid.

President Lula and the Minister of Energy tried to convince the agency to reject Celpe's request.⁹³ Public servants, who prefer to remain anonymous, said that the government asked ANEEL not to grant an increase of more than 25% to Celpe.⁹⁴ ANEEL declared that without the expenses incurred pursuant to the power purchase agreement, Celpe would be entitled to an increase of 21.05%.⁹⁵ In the end, ANEEL decided to (1) limit it to an increase of 24.43% in 2005 and (2) grant an additional increase of 12.5% in the next three years as a rollover of the adjustment to which it was entitled in 2005.⁹⁶ The first part of the decision is in line with governmental preferences, but it is unclear whether the second part could also be. If the government was merely concerned about meeting inflation targets in 2005, it might well be the case that it is. If the government did not want to reward a self-dealing arrangement, then the second portion of the decision would be contrary to governmental preferences.

Given the special circumstances of Celpe's review, it is unclear if the outcome was determined by presidential influence over the agency, or whether the agency came to this decision on its own. In this regard, the sources' anonymity makes it hard to evaluate if the information is reliable. In fact, contrary to the information provided by the anonymous sources, the government has denied any involvement.⁹⁷ The chairman of ANEEL, in contrast, has indicated that the "administration has certain concerns as regards the levels of increase of regulated prices," but he has also denied that the Executive branch interfered with matters under ANEEL's jurisdiction.⁹⁸

All these examples suggest that there might be Executive influence over ANEEL. To be sure, there is a fine line between determinant influence over the agency to implement Executive preferences, and an autonomous decision on the part of the agency to

93. *Mercado Aberto—Reajuste em PE Inquieta Setor Elétrico* [Price Adjustment in Pernambuco Upsets the Electricity Sector], FOLHA DE SÃO PAULO, May 2, 2005.

94. Coimbra, *supra* note 90.

95. ANEEL Boletim No. 165, *supra* note 89.

96. ANEEL, Res. 112/05 (Nov. 24, 2004).

97. Coimbra, *supra* note 90. The Executive Secretary of the Ministry of Mines and Energy denied any governmental interference in the process, and stated that the rate review was within the competence of the regulatory agency. *Id.*

98. See Coimbra, *supra* note 90 (reporting these statements made by the director-general of ANEEL). Edvaldo A. Santana (director of ANEEL) called the Author's attention to the fact that the government was certainly concerned with inflation, but that there are more interests at stake than the ones portrayed in the newspapers reports: the public prosecutors office (*Ministério Público Federal de Pernambuco*) is suing the regulatory agency for approving the contract between *Celpe* and *Termonopernambuco* (by July 20, 2006 there was no final decision yet although ANEEL had won some appeals). According to Mr. Santana, the fact that there was a judicial action in progress at the time raised more speculation about this decision. Besides, ANEEL's decision in this case was not unanimous (it was 4–1). E-mail interview with Edvaldo A. Santana, Dir., ANEEL (June 26, 2006).

consider the government's preferences before enacting new regulation. The variables considered here do not allow a firm conclusion as to which side of the line ANEEL falls, but its position is in sharp contrast with the one taken by ANATEL, the telecommunications agency. ANATEL's reaction to the same proposal of halting rate increases is discussed below; it shows resistance on the side of the agency to cooperate with the Lula administration.

B. *Increases in Telecommunications Rates*

Similar to the declarations in the electricity sector, in April 2003 Lula's chief of staff (*Chefe da Casa Civil*), José Dirceu, declared that the government wanted to negotiate with telecommunications companies, settling on a reduced increase in their rates that would not violate contractual and statutory provisions.⁹⁹

One month later, the Minister of Telecommunications, Miro Teixeira, formulated a proposal that would modify the inflation index used to adjust telecommunication rates.¹⁰⁰ The adjustment would be according to a consumer price index (IPCA) instead of a general price index (IGP-DI).¹⁰¹ This change would generate a lower level of increase in telecommunications rates.¹⁰² In fact, at the time the proposal was made, the consumer price index indicated inflation of 17%, while the general price index was indicating a rate of 32%.¹⁰³ The proposal, however, encountered fierce resistance even inside the

99. D'Ercole, *supra* note 55.

100. See World Dialogue on Regulation for Network Economies, *Brazil: Operators Agree To Delay Price Increases*, July 7, 2004, <http://www.regulateonline.org/2003/intelecon/2004/July/A-Brazil-040707.htm> (noting the dispute between Miro Teixeira at the Ministry of Communications and Anatel over rate changes).

101. The IPCA (*índice de preços ao consumidor amplo*) measures the variation of prices of products consumed by families that have a certain level of monthly income (one to forty times the minimum wage) and is calculated by IBGE. Instituto Brasileiro de Geografia e Estatística, Índice Nacional de Preços ao Consumidor Amplo—IPCA e Índice Nacional de Preços ao Consumidor, http://www.ibge.gov.br/home/estatistica/indicadores/precos/inpc_ipca/defaultinpc.shtm (last visited Feb. 19, 2008). The general price index (IGP-DI) measures the variation of the prices that directly affect the economic activity in the country and is calculated by FGV. Fundação Getúlio Vargas, Índices Gerais de Preços, http://www.fgv.br/dgd/asp/dsp_Janela.asp?conteudo=dsp_IGP_DI_10_M.asp Both are important indexes to measure levels of inflation. (last visited Feb 19, 2008).

102. Editoriais, *Guerra das Tarifas* [Tariffs War], FOLHA DE S.PAULO, July 7, 2004.

103. Patricia Zimmerman, *Governo quer que reajuste de telefones agora não supere 17,24%* [The Government Wants Price Increases to be Capped at 17.24%], FOLHA ONLINE, BRASÍLIA, June 23, 2003; Patricia Zimmerman, *Teles participam de reunião sobre tarifas com ministros* [Telecommunication Companies Meet with Ministers to Discuss Rates], FOLHA ONLINE, BRASÍLIA, June 10, 2003.

government because some believed that it would imply breaching statutory provisions and concession contracts.¹⁰⁴

The President then presented a new proposal limiting the 2003 increases to 17% and rolling over the remaining percentage to the next three years.¹⁰⁵ In other words, the government's proposal was similar to the policy adopted by ANEEL in the electricity sector.¹⁰⁶ ANATEL, however, did not accept the government's proposal.¹⁰⁷ In contrast to the case of the electricity sector, the final regulatory outcome was not the one proposed by the government. ANATEL granted rate increases by adjusting rates to inflation according to the general price index (IGP-DI).¹⁰⁸ As a result of this decision, telecommunications rates experienced an average increase of 28.7%, and some services had increases of up to 41.75%.¹⁰⁹

Why did ANATEL resist the government proposal while ANEEL did not? On the one hand, these different reactions might be a result of two independent decisions by ANEEL and ANATEL to interact with the government in a cooperative and confrontational way, respectively. On the other hand, they can also be interpreted as a sign that ANATEL was better able than ANEEL to resist governmental pressure given its stronger guarantees of independence. Below, Parts IV and V argue that ANATEL has stronger institutional guarantees of independence and that this may have contributed to its differing reaction.

C. More Recent Instances of Presidential Influence on Regulation

The rate-increase cases suggest that the level of presidential influence over ANEEL and ANATEL is different, but this is not to say that the President has a weak influence on ANATEL. In fact, there are instances in which Lula's administration successfully interfered with a regulation's content in both the telecommunications and the electricity sectors. One such case in each sector will be analyzed below.

104. Kennedy Alencar & Humberto Medina, *Reajuste de Teles Opõe Miro a Dirceu e Palocci* [Increase in Telecommunications Rates Is Disputed by Ministers], FOLHA DE SÃO PAULO, Mar. 31, 2003, at B15.

105. *Anatel Ignora Pedido de Lula e dá Aumento de 28,75% a Telefônicas* [Anatel Ignores Presidential Request and Increases Telephone Tariffs to 28.75%], O ESTADO DE SÃO PAULO, June 27, 2003, at 1, B1, B3.

106. See *supra* Part III.A.

107. *Anatel Ignora Pedido de Lula e dá Aumento de 28,75% a Telefônicas*, *supra* note 105, at 1, B1, B3.

108. *Id.* at 1, B3.

109. *Id.* at 1, B1, B3; *Fracassa Acordo Sobre Tarifa de Telefone até 41,75%* [Negotiated Compromise Fails and Telephone Service Tariffs Increase up to 41.75%], FOLHA DE SÃO PAULO, June 26, 2003, at 1, B1, B2.

In 2005, the Lula administration began implementing a new system of public bids for the sale of “new electricity,” or electricity produced by new power plants.¹¹⁰ Before the public bids, ANEEL was in charge of issuing new regulations to specify some details of the deals.¹¹¹ One aspect of these regulations concerned unforeseeable costs.¹¹² For instance, the costs of hydroelectric power plants would significantly increase if, during the construction of a dam, archeological artifacts or endangered species of plants were found in an area that was supposed to be inundated and, as a consequence, the environmental regulator (or any other governmental body) revised the terms of the license to build the dam.¹¹³ This would delay the construction schedule and significantly increase the investment’s costs.¹¹⁴ In its original draft for the regulation (*minuta do edital da licitação*), ANEEL decided that, in these cases, unforeseeable costs could be transferred into the final rate (once they had been audited and approved), thus being ultimately transferred to consumers.¹¹⁵

One day after the regulation’s draft was publicized, the Ministry of Mines and Energy enacted a decree officially instructing ANEEL to modify the regulation’s term.¹¹⁶ The directors¹¹⁷ of ANEEL decided to follow the guidelines given by the Ministry and revised the regulation’s draft.¹¹⁸ Under the new regulation, the investors will bear the risks and unforeseeable costs of these new projects.¹¹⁹

The questions that remain open are whether the government had the right to set up these guidelines, and more importantly, whether ANEEL had to follow them. Under the relevant statutory provisions, ANEEL has the jurisdiction to regulate public bids for new projects, but it should do so according to the guidelines defined by the Ministry.¹²⁰ The challenge here is to define what is legitimate or

110. Daniel Rittner, *Divergências entre Governo e Aneel Prejudicam Leilão* [Disagreements Between the Government and Aneel Harm Auction], VALOR ECONÔMICO (São Paulo), Dec. 16, 2005. This system of public bids replaced the original privatization plan, and was designed to attract more investments to the generation sector.

111. *Id.*

112. *Id.*

113. Portaria Res. No. 515, Gabinete do Ministro (Oct. 26, 2005).

114. *Id.*

115. Rittner, *supra* note 110.

116. Portaria Res. No. 515, Gabinete do Ministro (Oct. 26, 2005).

117. This Article will use the word director to refer to the agencies’ primary decision makers because this is the term used in Brazil (*diretor*).

118. Rittner, *supra* note 110.

119. ANEEL, Edital de Leilão No. 002/2005, Anexo 2, art. 8, item II (2005).

120. See Lei No. 9.427, art.2, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (stating that ANEEL will regulate the electricity sector according to the policies and guidelines defined by the Federal administration); *id.* at art. 3 (stating that ANEEL should promote public bids according to the plans and guidelines of the Federal administration). It is important to note that Article Three was actually an

illegitimate political interference in an agency that is supposed to be independent, but operates under such a provision.

ANATEL faced a similar situation in 2006. For some time, consumers have requested minute rates for telephone calls, instead of pulse rates.¹²¹ The main reason for the request was that minute rate telephone bills would discriminate in more detail between the number of calls and their duration, increasing the bills' transparency and the consumers' knowledge about their own consumption habits.¹²² In 2003, President Lula enacted a decree to implement this change starting in 2006.¹²³

In connection with the Presidential decree, in 2005 ANATEL enacted a regulation determining the details of the shift and declaring a rate increase in the new system.¹²⁴ The minute rate would not simply be a division of the current rate by the number of minutes included in a pulse.¹²⁵ In the old system, each pulse was four minutes (240 seconds), and consumers would pay the same amount regardless of the length of their call (one or four minutes).¹²⁶ In the new system, the consumer would pay less than he would have in the old system for a call that takes anything from one second to three minutes. For conversations longer than four minutes, however, the consumer would pay more than she would have in the old system. The telecommunications agency based the rate increase on an empirical study analyzing two hundred million phone calls in Brazil.¹²⁷ The study shows that most of the local phone calls are shorter than three minutes.¹²⁸ According to the agency, this study

amendment to the original statutory provision implemented by Statute 10,848/04, Article 9. See Lei No. 10.848/04, art. 2, para. 11, available at <http://www6.senado.gov.br/legislacao/ListaPublicacoes.action?id=238459>.

121. See Assessoria de Imprensa da Secretaria da Justiça e da Defesa da Cidadania, *Procon-SP Discute Telefonia* [Procon-SP Discusses Telephony], Apr. 5, 2005, <http://www.procon.sp.gov.br/noticia.asp?id=69> (last visited Feb. 16, 2008) (noting that ANATEL's change from charging per pulse to charging per minute was so that the consumers were heard).

122. *Id.*; IDEC, *Adiamento da conversão do pulso para minuto: o que o Idec acha disso?*, TELEFONIA E TELECOMUNICAÇÕES [Telephony and Telecommunications], Feb. 22, 2006, <http://www.idec.org.br/emacao.asp?id=1093> (last visited Feb. 16, 2008).

123. Decreto No. 4.733, de 10 de junho DE 2003, D.O.U. de 10.6.2003. (Brazil).

124. Agência Nacional de Telecomunicações, Res. No. 423, de 6 de dezembro de 2005 (Brazil).

125. *Id.*

126. The system was more complicated than that, since the division of pulses was defined randomly. Thus, a two minute phone call could be charged two pulses if the call started at the last minute of one pulse, and ended in the first minute of the next pulse. IDEC, *Telefonia fixa: mudança de pulso para minuto torna cobrança mais transparente, mas vem acompanhada de aumento de tarifa*, TELEFONIA E TELECOMUNICAÇÕES, December 8, 2005, <http://www.idec.org.br/emacao.asp?id=1056#> (last visited Feb. 19, 2008).

127. IDEC, *Adiamento da conversão do pulso para minuto: o que o Idec acha disso?*, *supra* note 122.

128. *Id.*

showed that the new system (with the rate increase) benefits most Brazilian consumers.¹²⁹ However, it is hard to evaluate the grounds for the decision because ANATEL did not make available the empirical study upon which the rate increase is based.

The consumers requested that the shift from pulse rates to minute rates be implemented without the rate increase proposed by ANATEL.¹³⁰ According to them, the new rate for a fifteen minute phone call would represent an increase of 144% over the old rate.¹³¹

In February 2006, the Lula administration decided to postpone for one year the implementation of the shift from pulses to minutes.¹³² In the press conference, government representatives announced that they were concerned by the fact that consumers with dial-up Internet connections would pay much more under the new system, which would conflict with the government's digital inclusion policies.¹³³

ANATEL had initially supported the shift, and even conducted a study to provide an empirical basis for its implementation.¹³⁴ Despite the initial support, however, the agency did not resist the governmental decision to postpone its implementation.¹³⁵ One hypothesis to explain this lack of reaction is that the agency later realized that a substantial number of consumers would be affected by the new system and the rate increase (especially dial-up Internet users, who might not have been considered in ANATEL's empirical

129. Ana Paula Ribeiro, *Ligação curta fica mais barata e telefonemas longos mais caros em 2006* [Short phone calls become cheaper and long ones more expensive in 2006], FOLHA ONLINE, BRASÍLIA, December 7, 2005; Patrícia Zimmerman, *Conversão pulso para minuto é vantajosa para 28% dos usuários* [Shift from pulse rates to minute rates is beneficial to 28% of consumers], FOLHA ONLINE, BRASÍLIA, Mar. 14, 2007. According to ANATEL, 48.64% of consumers will see no difference and only 23% might lose.

130. Assessoria de Imprensa da Secretaria da Justiça e da Defesa da Cidadania, *supra* note 121; IDEC, *Adiamento da conversão do pulso para minuto: o que o Idec acha disso?*, *supra* note 122.

131. IDEC, *Adiamento da conversão do pulso para minuto: o que o Idec acha disso?*, *supra* note 122; see also IDEC, *Telefonia fixa: mudança de pulso para minuto torna cobrança mais transparente, mas vem acompanhada de aumento de tarifa*, *supra* note 126 (providing a detailed analysis of the increases and their impact on consumers).

132. Carlos Eduardo Zanatta, *Suspensão da Conversão Pulso-Minuto Coloca Política em Xeque* [Transition Between Pulse-Minute System Puts Politics Under Strain], TELETIME NEWS, Feb. 22, 2006, available at http://www.fndc.org.br/internas.php?p=noticias&cont_key=18493.

133. *Id.*

134. See IDEC, *Adiamento da conversão do pulso para minuto: o que o Idec acha disso?*, *supra* note 122; see also text accompanying *supra* note 127.

135. In a meeting, the Minister of Telecommunications and the President's Chief of Staff (*Chefe da Casa Civil*) informed three directors of ANATEL, including the president of the agency, of the decision to postpone the implementation of the policy without eliciting any reaction. Zanatta, *supra* note 132.

study). Thus, the agency could have by itself reached the conclusion that it was in fact better to postpone the policy's implementation.

Another plausible hypothesis is that the agency is no longer independent from the government. This hypothesis can be supported by a number of factors. First, Lula appointed two of the three directors who participated in the meeting where the decision was made.¹³⁶ Second, the government was one of the stakeholders most interested in postponing the policy's implementation. In fact, in addition to the concern with digital inclusion policies, the government could have been concerned with the impact of this rate increase on inflation.¹³⁷ Whereas the government had at least two reasons to postpone the policy's implementation, the consumers remained in favor of the shift (although opposed to the rate increase), and some companies had already spent substantial amounts of money since 2003 to make the necessary changes to the new system.¹³⁸ Thus, except for the government, there were many stakeholders who wanted the shift.

Also, there is at least one piece of evidence in favor of the hypothesis that ANATEL is no longer independent: in April 2006, two months after the decision to postpone the shift, ANATEL proposed an alternative solution that would create a transitional period that would spare Internet users.¹³⁹ The proposal, however, did not come

136. The following directors attended the meeting: Plínio de Aguiar, Pedro Jaime Ziller, and Luiz Alberto da Silva. The first two were appointed by Lula in 2004; the latter was appointed by Cardoso in 2002. See Decretos de 4 de Novembro de 2004, D.O.U. de 5.11.2004. (Brazil) (appointing Plínio de Aguiar to Anatel); Decretos de 6 de Janeiro de 2004, D.O.U. de 6.1.2004. (Brazil) (appointing Pedro Jaime Ziller de Araújo to Anatel); Decretos de 16 de Abril de 2002, D.O.U. de 16.4.2002. (Brazil) (appointing Luiz Alberto da Silva to Anatel).

137. *But see Suspensão de Regras para Nova Conta do Telefone não é Quebra de Contrato, diz Hélio Costa* [Suspension of Rules for New Account of the Phone Is Not Breach of Contract, Says Hélio Costa], VALOR ONLINE, Feb. 22, 2006, <http://noticias.uol.com.br/economia/ultnot/valor/2006/02/22/ult1913u46665.jhtm> (last visited Feb. 20, 2008) (reporting that in response to a question in the press conference, the minister of telecommunications also said that the decision to postpone was not related to concerns with inflation, despite the fact that days before the announcement, the Minister of Finance met with a group of representatives from research institutes that calculate inflation indexes in order to evaluate the impact of the rate increase).

138. The President of one of the biggest groups in the telecommunications sector in Brazil (Telefônica) advocated for the implementation of the policy only a few hours after the Minister announced the governmental decision to postpone it. *Fernando Xavier Defende Cobrança por Minuto* [Fernando Xavier Defends Charges per Minute], REUTERS, Feb. 22, 2006.

139. Patrícia Zimmermann, *Anatel Aprova Plano para não Encarecer Internet Com fim dos Pulsos* [Anatel Approves Proposal That Will Not Increase Costs for Internet Users], FOLHA DE SÃO PAULO ONLINE, Apr. 19, 2006, <http://www1.folha.uol.com.br/folha/dinheiro/ult91u106993.shtml>.

from the agency.¹⁴⁰ Instead, it was a public policy defined by the government.¹⁴¹

D. Investors' Perceptions of Presidential Influence on IRAs

In sum, there are reasons to believe that there is increasing presidential influence on regulatory agencies in Brazil in both the electricity and telecommunications sectors. This view is supported by investor perceptions. Recall that IRAs were implemented in Brazil to create a safer environment for investors.¹⁴² Thus, it is worth asking if investors' perception of the independence of regulatory agencies coincide with the case-study evidence. Two research reports by the American Chamber of Commerce in Brazil (Amcham - SP) indicate that in 2004 and 2005 at least half of the investors in the electricity sector perceived the regulatory agency (ANEEL) to be excessively or highly influenced by the Executive branch.¹⁴³ The same result appeared in the research report for the telecommunications sector.¹⁴⁴

Amcham's reports on ANEEL¹⁴⁵ describe survey responses of investors, consumers, and electric sector associations.¹⁴⁶ One of the

140. *Id.*

141. *Id.*

142. See *supra* Part II for a more detailed analysis.

143. The 2003 report did not address the governmental interference in the agency and for this reason will not be explored here. See CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA—ANEEL [REPORT ON THE ELECTRICITY AGENCY] (2003).

144. See CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE TELECOMUNICAÇÕES—ANATEL [REPORT ON THE TELECOMMUNICATIONS AGENCY] (2005) [hereinafter AMCHAM TELECOMMUNICATIONS AGENCY REPORT 2005]; CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE TELECOMUNICAÇÕES—ANATEL [REPORT ON THE TELECOMMUNICATIONS AGENCY] (2004) [hereinafter AMCHAM TELECOMMUNICATIONS AGENCY REPORT 2004].

145. Amcham has published reports on ANEEL for 2004, 2005, and 2006. See *infra* note 146.

146. See CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA—ANEEL [REPORT ON THE ELECTRICITY AGENCY] (2006) [hereinafter AMCHAM ENERGY AGENCY REPORT 2006], available at http://www.amcham.com.br/update/2007/update2007-02-05a_dtml.pdf; CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA—ANEEL [REPORT ON THE ELECTRICITY AGENCY] (2005) [hereinafter AMCHAM ENERGY AGENCY REPORT 2005]; CÂMARA AMERICANA DE COMÉRCIO DE SÃO PAULO—AMCHAM-SP, RELATÓRIO SOBRE A AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA—ANEEL [REPORT ON THE ELECTRICITY AGENCY] (2004) [hereinafter AMCHAM ENERGY AGENCY REPORT 2004]. The consumers comprised only industrial consumers, not residential consumers. In 2004, there were seventeen companies that responded to the questionnaires. These companies represent 65% of all distribution companies, 55% of all transmission companies, and 40% of all generation companies. See AMCHAM ENERGY AGENCY REPORT 2006; AMCHAM ENERGY AGENCY REPORT 2004.

questions was: “[w]hat is the level of interference of the administration, through the Ministries, in the regulatory decisions and actions, as well as in the oversight functions of ANEEL?”¹⁴⁷ The possible responses were: excessive, high, medium, low, and minimum.¹⁴⁸ In 2004, 50% of the participants considered the interference “excessive” or “high,” whereas the other 50% considered it “medium” or “low.”¹⁴⁹ Nobody (0%) said “minimum.”¹⁵⁰ In 2005, 65.4% of the respondents said that the interference was either “excessive” or “high,” and 34.6% said it was “medium.” Nobody (0%) chose “low” or “minimum.”¹⁵¹ In sum, the responses indicate a year-to-year strengthening in the perception that the administration was interfering with ANEEL’s regulatory functions.

There was only one report, in 2005, addressing the issue of political influence over the telecommunications agency.¹⁵² The question in the questionnaire read: “[i]n your opinion, has ANATEL suffered from political interferences?”¹⁵³ There were four options for the answer: always, often, seldom, and never.¹⁵⁴ In 2005, 45.45% of the respondents indicated “always,” whereas 40.91% indicated “often.”¹⁵⁵

Thus, investor perceptions are in line with what the Author’s analysis of the cases suggests: ANATEL and ANEEL are subject to significant presidential influence. The results, however, do not indicate whether ANATEL is generally regarded as more independent than ANEEL, since the respondents were investors and companies operating in each sector.

E. Conclusions

Now that both the existence of presidential influence and its perception by investors have been documented, it is important to consider how this level of influence was achieved. Given that Brazilian IRAs share many of the structural characteristics of IRAs in developed countries, why were they not more independent? Parts IV and V suggest that the details of the agencies’ institutional design

147. AMCHAM ENERGY AGENCY REPORT 2005, *supra* note 146, at 40; AMCHAM ENERGY AGENCY REPORT 2004, *supra* note 146, at 32.

148. AMCHAM ENERGY AGENCY REPORT 2005, *supra* note 146, at 40; AMCHAM ENERGY AGENCY REPORT 2004, *supra* note 146, at 32.

149. AMCHAM ENERGY AGENCY REPORT 2004, *supra* note 146, at 54.

150. The responses were excessive (33.33%), high (16.67%), medium (33.33%), and low (16.67%). None of the respondents said the interference qualified as minimum. *Id.* at 54.

151. *Id.* at 57.

152. AMCHAM ENERGY AGENCY REPORT 2005, *supra* note 146.

153. *Id.* at 49.

154. *Id.* at 49.

155. *Id.* at 80.

are a plausible explanation for the behavior analyzed in these concrete episodes. The case study evidence presented above is consistent with the institutional analysis developed in the remainder of the Article. Moreover, the institutional analysis also helps explain why, in the Brazilian context, ANEEL and ANATEL have different levels of independence.¹⁵⁶

IV. THE POLITICAL ECONOMY OF THE CREATION OF INDEPENDENT REGULATORY AGENCIES

The institutional designs of Brazilian IRAs vary, especially in the telecommunications and electricity sectors, despite the fact that creating a secure environment for private investment was the predominant reason why Brazil implemented IRAs in both sectors. Part IV demonstrates that circumstantial factors caused the design of these two agencies to be quite different. The different institutional designs will serve as a basis for the analysis developed in the following Part of the Article (Part V).

In line with the international discourse and trends, President Cardoso (1995-2002) announced a plan to replace the existing bureaucratic structure with an independent regulatory structure.¹⁵⁷ The ministry of each sector was then assigned the task of formulating the new regulatory agency's structure for that particular sector.¹⁵⁸ This assignment was made without an overarching plan, a more detailed discussion about what should be achieved, or even a clear idea of the general principles that should guide the creation of these IRAs.¹⁵⁹ This was especially true for the electricity sector.¹⁶⁰

156. To be sure, more work needs to be done to reach firm conclusions. The concrete examples discussed in this Part do not eliminate the possibility that, broadly speaking, the policy outcomes might have been products of factors other than executive influence. However, the Author's analysis suggests that this is not the case.

157. Sérgio H. Abranches, *Reforma Regulatória: Conceitos, Experiências e Recomendações* [Regulatory Reform: Concepts, Experiences, and Recommendations], *REVISTA DO SERVIÇO PÚBLICO*, Apr.–June 1999, at 19–51.

158. *Id.*

159. *See id.* (pointing to the fact that a plan was lacking not only for the agencies, but also for the regulatory framework in general); Edson Nunes et al., *Agências Reguladoras no Brasil* [Regulatory Agencies in Brazil], in LUCIA AVELAR AND ANTONIO O. CINTRA, *SISTEMA POLÍTICO BRASILEIRO: UMA INTRODUÇÃO* 189 (2007) (supporting this with a series of interviews with officials involved in the process); Interview with Luis Antonio Ramos Veras, *supra* note 32.

160. João Lizardo de Araújo, *The Case of Brazil: Reform by Trial and Error?, in* *ELECTRICITY MARKET REFORM: AN INTERNATIONAL PERSPECTIVE* 565–94 (Fereidoon P. Sioshansi & Wolfgang Pffanberger eds., 2006); *see also* Abranches, *supra* note 157, at 35.

In each of the sectoral ministries, the specialized bureaucrats managed the process of creating IRAs differently, leading to distinct outcomes in telecommunications and electricity. In the electricity sector, bureaucrats in charge of designing the agency rejected any external advice,¹⁶¹ and the bill prepared by them did not include measures to secure the new regulatory agency's independence.¹⁶² Instead, the bill would replace the existing regulatory body (*Departamento Nacional de Águas e Energia Elétrica* or DNAEE) with another non-independent entity.¹⁶³

The President did not want to implement a non-independent body, but instead of having a confrontation with the specialized bureaucracy, he decided to transfer the debate to Congress,¹⁶⁴ sending them a bill that included no guarantees of independence.¹⁶⁵ Before that, however, the President negotiated the bill's revision with party leaders and assembled a coalition in Congress to implement the changes that would make the regulatory agency independent.¹⁶⁶ Thus, the Congressional changes in the bill were actually a Presidential initiative.¹⁶⁷ The bill was enacted as Statute 9,427/96,

161. Despite the fact that external consultants were involved, they were not able to influence the proposed design, and the bureaucracy retained the final word in the process. For instance, the consulting firm Coopers and Lybrand was formally involved in the process, and it highlighted its disagreement with the institutional design proposed by the Ministry but was not able to implement changes. Interview with Edvaldo Alves de Santana, Dir., ANEEL (Feb. 3 & July 20, 2006) (on file with author). Also, some independent consultants were invited to discuss the proposal informally, but again, their suggestions were not taken into consideration. *Id.* The most influential players in this process were the bureaucrats of the previous regulatory body, DNAEE. Three of them (José Mario Miranda Abdo, Luciano Pacheco, and Eduardo Henrique Ellery Filho) became the first directors of ANEEL. *Id.* Other people who were very influential in the process were José Said Brito (former director of DNAEE, before Abdo), Peter Greiner (National Secretary of Energy), and Reginaldo Medeiros (Chief of Staff of Greiner). *Id.*

162. Representative Aleluia declared that the original bill proposed by the executive branch was "timid" in guaranteeing independence. Nunes et al., *supra* note 159, at 192.

163. It would be an *autarquia*. Different from DNAEE, this new body would be located outside of the Minister, but would not necessarily have institutional guarantees of independence to avoid political influence.

164. Interview with Sergio Abranches (Nov. 2005) (on file with author).

165. Projeto de Lei No. 1.669/96 (Mensagem n. 234/96).

166. See Interview with Sergio Abranches, *supra* note 164 (reporting a private conversation with Fernando Henrique Cardoso in 1996).

167. Representative José Carlos Aleluia, from one of the parties of the governing coalition, drafted the new version that would guarantee the agency's independence. The reports of the discussions in the House of Representatives show that the author of the reforms, Representative Aleluia, was in close consultation with the Cardoso Administration. DIÁRIO DA CÂMARA DOS DEPUTADOS, July 25, 1996, at 21155-61, available at <http://www2.camara.gov.br/publicacoes>; see also José Carlos Aleluia, Speech at the House of Representatives, July 9, 1996, in DIÁRIO DA CÂMARA DOS DEPUTADOS, July 10, 1996, at 19647; José Carlos Aleluia, Speech at the House of Representatives, July 24, 1996, in DIÁRIO DA CÂMARA DOS DEPUTADOS, July 25, 1996, at 21177, 21185, available at <http://www2.camara.gov.br/publicacoes>.

creating the *Agência Nacional de Energia Elétrica* (ANEEL) that regulated the electricity sector.

In contrast with electricity, the telecommunications bill submitted to Congress already guaranteed a very high level of independence for the regulatory agency.¹⁶⁸ Two circumstantial conditions largely contributed to this. First, the telecommunications Minister took a strong leadership position in promoting the reforms.¹⁶⁹ Second, the telecommunications bureaucracy was more open to international trends and to external advice.¹⁷⁰ In fact, the bureaucracy's leadership was actually supportive of the privatization reforms and advocated for an IRA in the sector.¹⁷¹

The telecommunications bill also underwent a different approval process in Congress. A permanent congressional commission evaluated the electricity agency bill; a special commission evaluated the telecommunications agency bill.¹⁷² Whereas the special commissions are nominated by the major parties (those in the governmental coalition), the permanent commissions are not.¹⁷³ Accordingly, while the electricity agency bill was subject to a number of amendments in Congress, the bill creating a telecommunications agency was approved without many modifications to the original version prepared by the Executive.¹⁷⁴ Thus, although the electricity agency was designed in a piecemeal process that did not necessarily contribute to the overall integration of all institutional guarantees of independence, the institutional design implemented in the telecommunications sector was much more coherent.

168. The bill proposed by the executive branch was PL 2,648/96, which was incorporated into an existing legislative proposal (PL 821/96) and later became Statute 9,472/97. Interview with Carlos Ari Sundfeld, *supra* note 29.

169. Roger Marinzoli et al., *Lessons of Telebras: The Leadership of Sergio Motta* (on file with author); see also Prata et al., *supra* note 31.

170. Interview with Renato Guerreiro, *supra* note 29.

171. Interview with Carlos Ari Sundfeld, *supra* note 29; Interview with Renato Guerreiro, *supra* note 29. Guerreiro himself is the clearest example of that because he was supportive of privatization reforms. See *supra* note 22 and accompanying text. In the telecommunications sector, the bureaucrats not only had a lot of contact with international institutions and were aware of international trends in the sector, but they also knew that a process of privatization would not threaten their jobs. Interview with Sergio Abranches, *supra* note 164. This was not necessarily the same in the electricity sector. Privatization brought the threat of a potential shift from hydro generation to thermo generation, a technology that was not the expertise of the specialized bureaucracy. Also, in the pre-privatization period, these bureaucrats, who alternated between periods in government offices and periods in state-owned companies, dominated the regulatory bodies. *Id.* Many resisted privatization and independent agencies because both would cause them to lose power in the sector. *Id.* The Author is grateful to Sergio H. Abranches for calling her attention to this point.

172. Nunes et al., *supra* note 159, at 191.

173. *Id.*

174. *Id.* at 194–95.

Why did the process leading to the approval of the telecommunications bill in Congress differ so much from that of the electricity bill? For one, Telecommunications Minister Sergio Motta used a very effective strategy to get the bill approved: he designed a coherent and comprehensive regulatory framework for the sector¹⁷⁵ and backed up the bill with strong political support so that it could resist the different (and often conflicting) demands of interest groups in Congress.

In the case of electricity, in contrast, the regulatory agency was created before the regulatory framework was established.¹⁷⁶ While Sergio Motta was able to argue that the telecommunications bill was a “package” in which every single provision regarding the agency’s design was essential for the sector’s functioning, in the electricity sector there was no indication of why a certain aspect of the agency’s design could not be modified.¹⁷⁷

In addition, the Telecommunications Minister was regarded as the second most powerful person in the government, after President Cardoso.¹⁷⁸ Thus, despite the fact that different interest groups made conflicting demands regarding the regulatory agency’s design, the Minister was able to impose what he thought was the best option for the sector or what the specialized bureaucracy and consultants proposed as such. In contrast, the process was not centralized in the case of ANEEL.¹⁷⁹ In fact, there were two different Ministers of Energy between 1995 and 1998, and neither of them had expertise in the electricity sector or had any influence over the specialized bureaucracy.¹⁸⁰ Consequently, the regulatory agency’s design was a compromise between the interests of two groups—the politicians and the bureaucracy.¹⁸¹

175. The regulatory agency for telecommunications was part of a broader bill, which had a complete design of the regulatory framework for the whole sector. The bill that created the telecommunications agency was later named the General Telecommunications Law since it included the most important regulatory provisions of the sector as a whole.

176. The regulatory framework for the electricity sector was enacted in May 1998. Lei No. 9.648, de 27 de Maio de 1998, D.O.U. de 27.5.1998. (Brazil).

177. Interview with Edvaldo Alves de Santana, Dir., ANEEL, to Author (June 26, 2006).

178. Prata et al, *supra* note 31, at 83, 96, 102; *see also* Telephone interview with Guerreiro, *supra* note 32.

179. Decentralization means that there is a bargaining process such that that no one member of the groups is able to impose his preferences (as Motta did in the telecommunications sector), which in turn results in a compromise design. In a centralized process, the political group conducting the process is powerful enough to overshadow the divergences. Interview with Edvaldo Alves de Santana, *supra* note 177.

180. Raimundo Brito (Jan. 1995 to Dec. 1998) and Rodolpho Tourinho Neto (Jan. 1999 to Feb. 2001). *Id.*

181. Of the politicians, the most active player was representative Aleluia, who was the leader of the government coalition in Congress and had some expertise in the

Although the creation processes for the agencies in each of these sectors differed substantially from each other, both processes were guided by a concern for attracting investment.¹⁸² Thus, IRAs were conceived as a mechanism to secure so-called regulatory commitment and attract investment in Brazil, but circumstantial factors caused the electricity and telecommunications sectors to give effect to this concern in different ways. This explains many of the institutional differences that exist between the agencies for these sectors, discussed in greater detail in Part V.

V. THE INSTITUTIONAL DESIGN OF INDEPENDENT REGULATORY AGENCIES

Regulatory agencies are considered independent when they have certain institutional features that insulate their decision-making process from political actors (especially the President, as discussed in Part II above).

Lack of removal power (the President or another executive official is deprived of the power to remove these agencies' directors once they are appointed)¹⁸³ is a central institutional guarantee of independence.¹⁸⁴ The removal power is a threat to agencies' decision-making freedom. If a President has this power, he can remove those

electricity sector. *Id.* Of the bureaucracy, the main players were the members of the former regulatory body, especially those who later became directors of the regulatory agency. See Interview with Edvaldo Alves de Santana, *supra* note 177; see also *supra* note 161 and accompanying text.

182. See *supra* note 27 and accompanying text.

183. Normally, the expression used in statutes is removal only for "cause" because the President lacks power to remove directors at will, but the directors can still be removed through an administrative or judicial process for misconduct. For instance, the telecommunications agency in Brazil was originally governed by the following provision: "The members of the Board of Directors will only lose their office by virtue of resignation, of final judicial decision or of administrative disciplinary proceedings." Lei No. 9.472, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil). The Article uses the expression "lack of removal power" because of its primary concern with the President.

184. Often the lack of removal power by the President is considered the most important institutional criterion to evaluate independence. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2000) (defining independent agencies as agencies whose heads the President may not remove at will); Geoffrey Miller, *The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 216 ("The distinguishing feature of [independent] agencies is that their principal officers are protected against presidential removal at will."); Alan B. Morrison, *How Independent Are Independent Agencies?*, 1988 DUKE L.J. 252, 252 ("There is no official definition of an independent agency . . . but for me an independent agency is one whose members may not be removed by the President except for cause."). To consider it the most important criterion, however, suggests that there is a clear-cut choice between making an agency independent or not, and falsely simplifies the process of making that choice.

who might make decisions that displease him. This possibility of dismissal can be an incentive for the directors of agencies to act in accordance with presidential preferences. Therefore, the removal power can function as a directive or a coercive influence over agencies.

There are other ways to limit presidential influence.¹⁸⁵ For instance, it is easier to influence one director than it is to influence a commission that makes collegial decisions. It is even harder to influence this commission if the current President did not appoint any of its members. Because of this, agencies can be equipped with institutional features that help to enhance their independence, such as collegiate decision-making and staggered and predefined terms of office.¹⁸⁶

Another example of the President's coercive powers relates to financial autonomy. If the Executive branch can control the agency's budget, the President may control the agency. The power to undermine an agency's financial stability and viability might be analogous to the power to dismiss the agency's directors. Thus, one of the institutional guarantees of independence is alternative sources of income versus fiscal resources controlled by the Executive.

Each institutional feature is important, but by itself it could not completely insulate regulatory agencies from presidential politics. Collectively, however, the features work together to increase the degree of independence in regulatory agencies. As a result, the more institutional guarantees an agency has, the higher its degree of independence will be.

These institutional features help to insulate regulatory agencies from the political sphere. Yet, it is not only the *existence* of these features that affects the degree of independence of agencies: the ways in which these guarantees of independence are *designed* and work in practice are also important.

As to the *design*, the specifics of the organizational structure of an agency could be constructed in such a way as to either mitigate or augment presidential power. Take, for instance, the length of the terms of office for regulatory agencies' directors. One cannot consider agencies that have two-year terms of office and those that have lifetime appointments as equally independent. Longer terms of office should guarantee a higher degree of independence because the directors have fewer incentives to follow presidential preferences.

185. Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 600 (1989); Dan Wood & Richard Waterman, *The Dynamics of Political Control of Bureaucracy*, 85 AM. POL. SCI. REV. 801, 801 (1991).

186. For example of many U.S. authors who have recognize this, see Miller, *supra* note 184; Morrison, *supra* note 184; and Shane, *supra* note 185.

In addition to the design, these guarantees need to have *effectiveness*. The existence of an institutional guarantee of independence does not ensure that it will, in fact, insulate the agency from presidential influence.¹⁸⁷ In some cases, the President can find ways to weaken these guarantees. A clear example is the financial autonomy of agencies, which is guaranteed by alternative sources of income. This guarantee might become ineffective if the alternative sources of income are distributed through an appropriations process that is controlled by the Executive branch. In this case, the guarantee exists and is designed to ensure independence, but it is not completely effective because it is not adjusted to other features of the political and legal system.¹⁸⁸

In sum, regulatory agencies' degrees of independence can be determined by three factors: the existence of different institutional guarantees of independence, the guarantees' design, and the guarantees' effectiveness.¹⁸⁹ Based on this threefold framework, the following Subparts will analyze the following guarantees of independence in the Brazilian scenario: appointment process and removal power (Subpart A), chairman's appointment (Subpart B), senatorial approval and partisan balance (Subpart C), the structure of the council of directors (Subparts D and E), and financial autonomy (Subpart F).

In analyzing each of these institutional features, the Article provides a brief comparison with leading IRAs in the United States, namely the Federal Communications Commission (FCC), Federal Maritime Commission (FMC), National Labor Relations Board (NLRB), Nuclear Regulatory Commission (NRC), Federal Energy Regulatory Commission (FERC), and Securities and Exchange Commission (SEC). Although they do not perform the same functions as the Brazilian agencies (not all American IRAs considered here deal with economic regulation or infrastructure sectors), they have institutional features to guarantee independence that were also implemented in Brazil. By virtue of the institutional similarities with the Brazilian IRAs, they provide an interesting point of

187. For a study that highlights similar concerns in Europe and Africa, see Katja Sander Johannsen, *Regulatory Independence in Theory and Practice: A Survey of Independent Energy Regulators in Eight European Countries* 60 (Pub. Util. Research Ctr., 2003), available at <http://www.regulationbodyofknowledge.org/documents/031.pdf>. See also Eberhard, *supra* note 27, at 22–23.

188. Eberhard, *supra* note 27, at 29; Johannsen, *supra* note 187, at 27.

189. Fabrizio Gilardi, *Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis*, 9 J. EUROPEAN PUB. POL'Y 873, 873–93 (2002); Mark Thatcher, *Regulation After Delegation: Independent Regulatory Agencies in Europe*, 9 J. EUROPEAN PUB. POL'Y 954, 954–72 (2002).

comparison.¹⁹⁰ This comparison will show that: (1) some institutional guarantees of independence simply *do not exist* in Brazil; (2) some guarantees of independence do exist, but were *not designed* in a way that guarantees a high degree of insulation from the President; and (3) some features were appropriately imported from the American institutional design, but the design is *not effective*.

A. Appointment Process and Removal Power

One of the most important and influential aspects of the organizational structure of IRAs relates to directors¹⁹¹ who are at the top of the agencies' decision making chain and are normally responsible for making final decisions on policies and principles that will be adopted and enforced by the agencies. In particular, lack of executive removal power is viewed as a central guarantee of independence. If there are no restrictions on the dismissal of directors (i.e. dismissal is at will), it is unlikely that the directors will make decisions that contradict the entity with removal power. All American IRAs indicated above have protected directors against dismissal at will.¹⁹² and Brazilian agencies have also adopted this feature.¹⁹³

Although 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. In fact, the "throwing in the towel" phenomenon seems to recur in the United

190. It makes little sense to compare the Brazilian IRAs with their equivalents in the United States for the purposes of this Article given that the conditions under which these agencies were implemented were completely different. One of the most striking differences is the fact that IRAs were not implemented in the United States with the primary purpose of protecting private investment (at least not officially). Another important difference is that Congress promoted their implementation in the U.S., whereas in Brazil the executive branch was in charge of the process. *See supra* note 41 and accompanying text.

191. *See supra* notes 183–84 and accompanying text.

192. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 101 (1999).

193. In Brazil, there are very few constrained situations under which directors can be dismissed before the end of their terms of office: resignation, judicial conviction, or conviction in a disciplinary administrative process. Lei No. 9.986, de 18 de Julho de 2000, D.O.U. de 19.7.2000. (Brazil). This statute was enacted in 2000. From 1997 (when it was implemented) to 2000, the President could remove ANEEL's directors at will in the first four months of their terms of office. Lei no. 9.427, de 26 de Dezembro de 1996, art. 8, D.O.U. de 27 de Dezembro de 1996. (Brazil). (This article was revoked by Lei No. 9.986, art. 5, de 18 de Julho de 2000, D.O.U. de 17.7.2000. (Brazil)). Because of this design, ANEEL's directors were less protected than ANATEL's. Since 2000, this general law regulates removal power of the President in many agencies, including ANEEL and ANATEL. Lei No. 9.986, art. 5, de 18 de Julho de 2000, D.O.U. de 17.7.2000. (Brazil).

States.¹⁹⁴ Also, in some cases the President may be able to convince appointees from previous government to adopt his political preferences. Research on the political context in the United States reveals political drift might occur when there is an electoral defeat and a new political coalition assumes the government.¹⁹⁵ However, this risk has been significantly reduced in the United States since 1946, when the Administrative Procedure Act was implemented.¹⁹⁶ The Act minimizes the risk of political drift by reducing administrative discretion, increasing transaction costs to change policies, and granting courts power to interpret agency statutes, which limits the ability of new appointees to announce new interpretation of statutes.¹⁹⁷

These two phenomena (“throwing in the towel” and “political drift”) became concrete risks in Brazil when Lula was elected President. Lula’s predecessor, President Cardoso, set up regulatory agencies in Brazil and nominated all the directors. Thus, when Lula

194. See Charles T. Goodsell & Ceferina C. Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291, 300–02 (1971) (discussing resignation behavior); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (analyzing presidential control over agency rulemaking, particularly through ex parte communications); David Nixon & Thomas Grayson, *Chairmen and the Independence of Independent Regulatory Commissions 10–11* (Ga. State Univ. American Politics Working Paper Series, 2004) (on file with author) (showing that the resignations of chairmen became more frequent after the 1950s reforms, when the President acquired the power to remove commissioners from their chairmanships). *But see* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 350 (1981) (discussing factors that deter active supervision and removal of independent agency commissioners).

195. Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497 (1993). *But see* Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clear Air Enforcements*, 82 AM. J. POL. SCI. 213 (1988) (analyzing the case of the Environmental Protection Agency during the Reagan Administration in order to show that the influence of elected institutions is limited when an agency has substantial bureaucratic resources and a zeal for their use).

196. See generally Mathew McCubbins, Roger Noll, & Barry Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999) (noting that the Administrative Procedure Act helped overcome New Deal Democrats’ desire to “hard wire” the policies of the New Deal against an expected Republican, anti-New Deal political tide in the late 1940s).

197. See *id.* (discussing, in detail, the impact of the Administrative Procedure Act). Since 1984, however, the standard of judicial reference to agencies’ interpretation of statutes was defined by the two step test set up by the Supreme Court, which states:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

began his administration, directors from the opposition party headed all the agencies. In this context, two phenomena seem to have occurred. First, there were resignations of IRA directors at the beginning of Lula's mandate.¹⁹⁸ Second, at least one of the directors nominated by the previous President (Cardoso) was re-appointed by the new President (Lula).¹⁹⁹

These episodes suggest that there are reasons to doubt whether the lack of removal power in Brazil is an effective guarantee of independence. By adopting U.S.-style terms of office for directors, with lack of removal power by the President, Brazil seems to have similarly imported the problems of effectiveness that were linked to this guarantee in the United States.

B. Chairmen

One of the directors of an independent regulatory agency is typically appointed to serve as the agency's chairman.²⁰⁰ Depending on the powers conferred on the chairman, he can be significantly more influential within the agency than any other director. When the President chooses the chairman, the powers conferred on the chairman largely define the indirect influence the President can have over the agency.²⁰¹

In the United States, the design of independent regulatory agencies underwent major reforms in the 1950s.²⁰² Since then, the chairman's power increased significantly. It now includes, for instance, the power to select and supervise personnel, to distribute workload among these personnel, and to determine the use and expenditure of funds.²⁰³ In addition, the 1950 reforms also instituted the presidential appointment of the chairman, after which the President began to have more influence over independent agencies.²⁰⁴

Brazil has followed the post-1950s model of the United States in two aspects: chairmen have significant powers within the agency and

198. See *infra* notes 216–17 and accompanying text.

199. See *infra* notes 218–20 and accompanying text.

200. In Portuguese, *Diretor Geral* or *Diretor-Presidente*.

201. The President can influence the agency through the chairman in a number of different ways. The chairman can, for instance, influence the decision-making process within the commission if he has the institutional authority to set the agenda for discussions and to assign the majority opinion. In addition, he could have influence over the other directors if he has privileged access over the staff and controls the budget of the agency. Nixon & Grayson, *supra* note 194.

202. The reforms were based on the recommendations in a report by the Commission on Organization of the Executive Branch of the Government. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, INDEPENDENT REGULATORY COMMISSIONS: A REPORT TO THE CONGRESS (Mar. 1949).

203. Nixon & Grayson, *supra* note 194.

204. *Id.*

are appointed by the President from the ranks of directors.²⁰⁵ The most significant difference is that, in some U.S. agencies, the chairman serves at the President's will and can be dismissed from the position (of chairman) at any time.²⁰⁶ In contrast, in Brazil, the chairman has a fixed term of office and thus cannot be dismissed at will.²⁰⁷ The consequence is that in the United States, a President can appoint a new chairman at the beginning of his Presidential mandate, while in Brazil this is not allowed.

Despite being more protective than the U.S. system, the Brazilian approach still leaves some room open for Presidential influence. For ANATEL and other agencies, the position of chairman has a fixed term of office, but the length of this term is left to presidential discretion (without being longer than the period in which the chairman will be serving as director).²⁰⁸ Under this system, the President can use the length of the term of office as a system of incentives to influence chairmen, creating short terms of office during his presidential mandate so that the chairman is likely to act in accordance with the President's preferences. The President can also grant longer terms of office for chairmen at the end of the presidential mandate to ensure that they will remain in their positions even if he loses the next presidential election. President Lula seems to have used the first strategy of short term appointments at the beginning of his administration.²⁰⁹ What remains to be seen is whether Lula will

205. For the appointment generally, see Lei No. 9.986, art. 5, parágrafo único de 18 de Julho de 2000, D.O.U. de 17.7.2000. (Brazil). For the powers within the agency, see for instance, Lei No. 9.472, art. 32, de 16 de Julho de 1997, D.O.U. de 17.7.1997 (Brazil).

206. Nixon & Grayson, *supra* note 194.

207. Lei No. 9.986, art. 5, de 18 de Julho de 2000, D.O.U. de 17.7.2000 (Brazil).

208. There have been two systems of fixed terms of office for chairmen in Brazil. Before 2000, most of the Brazilian agencies had a fixed term of office for chairman defined by a statutory provision. At ANATEL, for instance, the chairman would have a three-year term of office as chairman (while as director the term of office is five years). Lei No. 9.472, art. 31, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil). In 2000, the Brazilian Congress enacted a general statute to regulate the internal structure of all regulatory agencies, establishing a new system of fixed terms of office for chairmen.

209. In ANATEL, for instance, Lula appointed his first chairman for a one-year term starting in January 2004. Following the same pattern, the chairman of the national waters agency (ANA) was appointed in January 2005 for a one-year term of office. See Decretos de 6 de Janeiro de 2004, D.O.U. de 6.1.2004. (Brazil) (appointing Pedro Jaime Ziller de Araújo to ANATEL in 2004). In ANA, José Machado was appointed chairman of the ANA. Assessoria de Comunicação—ANA, *Plenário do Senado Aprova Kelman para ANEEL e Machado para a ANA* [Plenary of the Senate Approves Kelman to ANEEL and Machado for the ANA], Dec. 22, 2004, available at <http://www.ana.gov.br/Destaque/destaque229.asp>.

extend the length of the terms of office for chairmen at the end of the presidential mandate.²¹⁰

The only exception to this new system is the electricity agency. While all other statutes governing the agencies state that the chairman will be chosen among one of the existing directors, ANEEL's statute creates a special position called chairman-director (*diretor-geral*).²¹¹ Therefore, within ANEEL, one of the appointments is pre-defined as a chairman, and the director who occupies that position will perform the functions of chairman during his whole term of office.²¹²

Although ANEEL's fixed terms of office can be considered a higher guarantee of independence for the chairman than the flexible terms of office at the other IRAs, this guarantee generally seems to be ineffective in Brazil.²¹³ The main reason for this inefficacy is that the fixed terms are compromised by the two problems described above: "throwing in the towel" and "political drift." The former seems to have occurred in the case of ANATEL's chairman, Luiz Guilherme Schymura.²¹⁴ Two other resignations during Lula's government

210. This incentive exists in Brazil because the chairman cannot be removed by the new President. See *supra* note 208 and accompanying text. On July 7, 2006, Lula appointed Plínio de Aguiar as temporary chairman of ANATEL, granting him a mandate until December 31, 2006 or until a permanent chairman was appointed. At the time of the appointment, Lula was in the last year of his presidential mandate and was running for re-election. If Lula was defeated, he would be able to nominate a permanent chairman before leaving the Presidency, and this new chairman could not be removed by the new President. But in November 2006, Lula was re-elected. The electoral outcome eliminated his incentives to rush with the nomination and to grant a long term office to the new chairman. Thus, it will be interesting to see how long the mandate of the chairman will be if Lula is defeated in the next Presidential election in 2010.

211. Lei No. 9.427, art. 5, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil).

212. *Id.* Complying with this provision, on January 2005, President Lula appointed Jerson Kelman to be chairman of the electricity agency for four years. Ministério de Minas e Energia, Decreto de 12 de Janeiro de 2005 (Jan. 12, 2005), available at <http://www.aneel.gov.br/arquivos/PDF/decreto.pdf>.

213. See *infra* Part V.A

214. Shymura confronted the Minister of Telecommunications in Lula's government in June and December 2003. Guilherme Barros & Humberto Medina, *Atrito Começou No ano Passado* [Conflict Started Last Year], FOLHA DE SÃO PAULO, Jan. 7, 2004, at B8. In June 2003, there were divergences about the rates increases. *Id.* In December 2003, the disagreement was related to the sale of one of the biggest telecommunications companies in Brazil, *Embratel*. Guilherme Barros & Fátima Fernandes, *Ofertas pela Embratel dividem o governo* [Bids for Embratel Divide the Government], FOLHA DE SÃO PAULO, Jan. 14, 2004, at A1. In January 2004, President Lula called the chairman for a meeting and asked him to resign from the chairmanship. In response to the presidential request, Schymura said that he was resigning from both the chairmanship and the commission. Humberto Medina & Julianna Sofia, *Schymura Diz que Lula Pediu Sua Saida em Dezembro* [Schymura Reveals That Lula Asked Him To Leave the Agency in December], FOLHA DE SÃO PAULO, Jan. 8, 2004, at B3; *Lula Decide Substituir o Presidente da Anatel* [Lula Decides to Replace Anatel President], FOLHA DE SÃO PAULO, Jan. 7, 2004, at A1.

deserve a more detailed investigation and could also be evidence of this phenomenon.²¹⁵

“Political drift” might have occurred in the cases of ANEEL and the *Agência Nacional de Águas* (ANA), in which Lula considered appointees from the previous administration as possible candidates for positions. First, José Mario Abdo, former chairman of ANEEL and initially appointed by President Fernando Henrique Cardoso, was a potential Lula appointee for the oil and gas agency’s (*Agência Nacional de Petróleo* or ANP) chairmanship.²¹⁶ Second, Lula appointed Jerson Kelman, who had previously held important and sensitive positions in Cardoso’s administration, including chairman of ANA,²¹⁷ as the new chairman of ANEEL.²¹⁸

Why might cooperation with Lula’s administration be a plausible explanation for these episodes, in particular the nomination of Kelman as chairman of ANEEL? In Brazil, as in other developing countries, appointed bureaucrats are encouraged to advance the particular interests of their appointers as opposed to fostering agency goals.²¹⁹ New bureaucratic agencies are constantly evolving as they are implemented and extinguished from one Presidential mandate to the other.²²⁰ As a consequence, high-level bureaucrats tend to invest more in their personal careers than in building the bureaucratic

215. These are the resignations of the director of ANP and a director of ANTT. Primeira Leitura, *Diretor da ANP Renuncia e abre Caminho para que Lula Tenha Controle da Agência* [Resignation of the ANP Director Opens Room for Presidential Control Over Agency], EDIÇÃO, Jan. 15, 2004; Humberto Medina, *Governo Irá Obter Maioria em Agências em Fevereiro* [Government Will Have Appointed the Majority of Commissioners by February], FOLHA DE SÃO PAULO, Jan. 11, 2004, at B3.

216. Patricia Zimmerman, *Diretor da Aneel Quer Acelerar Projetos* [Director of Aneel Wants to Speed Up Projects], FOLHA DE SÃO PAULO, Jan. 1 2005, at B4.

217. Before becoming chairman of ANA, Jerson Kelman was a member of the Chamber to Manage the Electricity Crisis in 2001 and President of a Commission in charge of investigating the reasons of the electricity rationing. Interview with Edvaldo Alves de Santana, *supra* note 177. This was one of the most relevant crises during Cardoso’s administration and Kelman performed very sensitive functions in these positions. Thus, it is worth noting that Kelman was regarded as a highly trusted and extremely competent professional by Cardoso. In fact, he is considered one of the most important Brazilian experts on hydroelectric systems. *Id.*

218. *Kelman, Acima de Simpatias Políticas* [Kelman, Beyond Political Disputes], O ESTADO DE SÃO PAULO, Jan. 5, 2005, available at <http://www.ana.gov.br/Destaque/destaque235.asp>.

219. See BARBARA GEDDES, *THE POLITICIAN’S DILEMMA: BUILDING STATE CAPACITY IN LATIN AMERICA* 56 (1994) (noting that in developing countries, legislators customarily used bureaucracy appointments as a way to reward those who “formed the cogs and wheels of their political machines” and will do what is best for the legislators’ constituents).

220. GEDDES, *supra* note 219, at 48; BEN ROSS SCHNEIDER, *POLITICS WITHIN THE STATE: ELITE BUREAUCRATS AND INDUSTRIAL POLICY IN AUTHORITARIAN BRAZIL* (Univ. of Pittsburgh Press, 1991).

agencies in which they are working.²²¹ By building a network of political contacts based on loyalty and exchanges of personal favors, these bureaucrats are able to migrate from agency to agency and secure high-level bureaucratic positions despite the lack of institutional protection in the bureaucracy.²²² All this suggests that in Brazil, directors might be more inclined to favor political parties in their decisions and to protect their networks of personal contacts, which creates a considerable space for partisan interests within the IRAs.²²³

This hypothesis of political drift, however, is not conclusive. A second possible explanation is that President Lula decided to nominate well-known experts in these areas, as opposed to political appointees. His nominees, in this regard, coincided with those chosen by Cardoso, who was known for his “technical” (as opposed to “political”) appointments to the regulatory agencies.²²⁴ Nominating well-known experts could be Lula’s strategy to gain senatorial approval of his nominations since, unlike Cardoso, his coalition did not have a majority in the Senate.²²⁵

This second explanation, however, does not tell us how these “technical” appointees would behave in circumstances in which there was room for political decisions. Would they side with the preferences of the President who appointed them? The case of Schymura seems to indicate that if they did not, they could be pressured to leave the agency.²²⁶ Also, the Brazilian bureaucracy’s structure described above indicates that they would have strong incentives to side with the current President. Thus, even if the “technical” nature of the appointment is what prevailed in Lula’s decision, it seems realistic to expect some drift from these appointees.²²⁷

221. GEDDES, *supra* note 219, at 48.

222. *Id.*

223. On the one hand, it seems reasonable to assume that IRA directors who don’t have political affiliations and want to continue working for the government have strong incentives to adjust to presidential preferences, so that they can keep their appointments throughout different administrations. On the other hand, there are institutional tools that allow for presidential influence over the agencies. Lula has been able, for instance, to keep the electricity agency under close control due to budgetary restrictions—and this might have affected ANEEL’s independence during José Mario Abdo’s chairmanship, as will be discussed in more detail below. It is hard to determine the relative importance of each of these factors, and which of them, if any, prevails.

224. Most of the nominees in Cardoso’s administration were not affiliated with any political party. See *infra* note 240. In addition, some of these appointees were well known in academia and in the specialized bureaucracy for their technical expertise.

225. The Author would like to thank Edvaldo Alves Santana for calling her attention to this hypothesis.

226. See *supra* note 214 and accompanying text.

227. A third hypothesis to explain the fact that Lula appointed nominees from the previous government to the agencies is not political drift on the side of the agencies’

All these episodes suggest that the lack of removal power for chairmen, although formally guaranteed, may not be effective. Despite having fixed terms of office established in the statutes, the chairmen seem to succumb to political pressure either through resignation or through political drift. Furthermore, the problem of political drift can be aggravated in Brazil by the instability of the bureaucratic structures.

The experience in the United States shows that not involving the President in the chairmanship appointment process could reduce the possibility of the President imposing his preferences upon the agency through its chairmen. Before the 1950s reforms in the United States, chairmen were selected through internal elections or annual rotations.²²⁸ Presidential influence over the agencies was much smaller in this regime.²²⁹ The power to appoint and remove the chairmen increased the President's removal power because demoted chairmen tend to resign from the commission, and not only from the chairmanship.²³⁰ These resignations reduce the time that the President needs to appoint the board's majority, especially if the agency has a feature called partisan balance,²³¹ a concept that will be discussed in more detail below.

Despite not limiting the Presidential power to appoint chairmen, Brazil has constrained presidential power to appoint directors in a series of ways. The mechanisms of constraint, their designs, and their effectiveness will be discussed in more detail below (Parts V.C and V.D).

C. Approval by the Senate and Partisan Balance

In addition to influencing the chairman, the President may have a strong influence over agencies through nominations. The President's nominees are likely to be oriented towards his political preferences. In this regard, the U.S. IRAs' institutional design

directors, but political drift on the side of the President. In other words, one could consider that Lula's policies were not significantly different from the ones implemented by the Cardoso Administration. Although this seems to be accurate for most macroeconomic policies, this was not the case in the telecommunications and electricity sectors. See discussion *supra* Part III.

228. See, e.g., Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 873 (2005) (describing the Federal Trade Commission's procedure for selecting a commissioner prior to 1950 and how this procedure changed after 1950).

229. See McCubbins, Noll & Weingast, *supra* note 196, at 186 (explaining that the Administrative Procedure Act's formalized procedures increase the influence of the legislative and judicial branches at the expense of the executive)

230. Moe, *supra* note 195, at 200; Nixon & Grayson, *supra* note 194, at 12.

231. Nixon & Grayson, *supra* note 194, at 11.

mentioned above has two features that may decrease the chances of having appointees who are strongly aligned with presidential preferences: approval by the Senate and partisan balance.²³²

Requiring senatorial approval of presidential nominees constrains the President's choices because the Senate has veto power over his nomination.²³³ In order to avoid a veto of one of his nominees, the President must consider the Senate's preferences. Following the U.S. design, almost all constitutive statutes in Brazil require this approval.²³⁴

It is curious to observe, however, that the Senate rarely rejects nominees. In Brazil, there have only been two vetoes of presidential nominations by the Senate—for two directors of the oil and gas agency (ANP) in 2003 and 2005.²³⁵ In the case of ANATEL, senatorial approval of presidential nominations has been almost unanimous.²³⁶ Similarly, in the United States, approvals follow the

232. David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 439 (2004).

233. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .”); Note, *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, 75 MICH. L. REV. 627, 637–38 (1977) (“Commentators and case law interpret [the Appointments Clause] to mean that the Senate possesses a ‘veto’ power . . .”) (footnotes omitted). The range of legislation that impinges on the presidential power of appointment includes all of the additional requirements that must be fulfilled by the potential nominees, such as personal qualifications and backgrounds. Other factors that may reduce the range of potential candidates are salaries for public servants as defined by Congress and limitations to post-termination economic activities of the directors. See *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, *supra*, at 640 (stating that it is “beyond dispute” that the establishment of qualifications for holding federal office is a prerogative of Congress).

234. See Lei No. 9.472, art. 23, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (establishing ANATEL); Lei No. 9.427, art. 5, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (establishing ANEEL); Lei No. 9.478, art. 11, de 6 de agosto de 1997, D.O.U. de 7.8.1997. (Brazil) (establishing ANP); Lei No. 9.782, art. 10, de 26 de janeiro de 1999, D.O.U. de 27.1.1999. (Brazil) (establishing ANVISA); Lei No. 9.961, art. 6, de 28 de janeiro de 2000. (Brazil) (establishing ANS); Lei No. 10.233, art. 53, de 5 de junho de 2001, D.O.U. de 6.6.2001. (Brazil) (establishing ANTAO and ANTT); Medida Provisória No. 2.228-1, art. 8, de 6 de setembro de 2001, D.O.U. de 10.9.2001. (Brazil) (establishing ANCINE). The only exception is ANA. See Lei No. 9.984, de 17 de julho de 2000, D.O.U. de 18.7.2000. (Brazil).

235. The appointees vetoed were Luiz Alfredo Salomão and José Fantine. *Senado rejeita indicação de novo diretor-geral da ANP*, UOL, April 12, 2005 (on file with author); Ricardo Rego Monteiro, *Veto a Salomão Alerta Governo para Reformas* [The Veto of Solomão Alerts the Government to Reform], JORNAL DO BRASIL, June 26, 2003; *Veto Foi Visto com Surpresa por Atual Diretor* [Veto Surprises Agency's Director], FOLHA DE SÃO PAULO, June 26, 2003.

236. See *Guerreiro Vai Presidir Anatel por Três Anos* [Guerreiro Is the President of ANATEL for the Next Three Years], FOLHA DE SÃO PAULO, Oct. 23, 1997, at 2–3 (stating that the Brazilian Senate approved the nominee for the telecommunications agency on October 22, 1997, with fifty-nine votes in favor and two against). Lula's nominee for the telecommunications agency was approved with fifty-seven votes in

same pattern.²³⁷ This lack of rejections can be interpreted in two ways: (1) the President controls nominations and the Senate is unlikely to oppose appointees, especially on ideological grounds,²³⁸ or (2) the President is forced to anticipate the Senate's preferences in order to avoid vetoes.²³⁹

It is hard to determine which hypothesis better explains the Brazilian case. There are at least two facts that could support the hypothesis that senatorial approvals do not restrain the President's choices for agency appointments. First, President Lula was able to obtain senatorial approval of a number of political appointees, many of whom were members of the President's workers' party.²⁴⁰ Second, the two vetoes exercised by Congress were not due to the political affiliation, policy preferences, or personal qualifications of the candidates.²⁴¹ Instead, the vetoes were ascribed to personal revenge²⁴² and political retaliation.²⁴³

favor and five against. *IGP-DI Reajustará Telefonía, Afirma Ziller* [Tariffs Increases Will Be Determined by IGP-DI], FOLHA DE SÃO PAULO, Jan. 25, 2004, at B12.

237. See Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J. THEORETICAL POL. 91, 92 (2000), available at <http://jtp.sagepub.com/cgi/content/abstract/12/1/91> (stating that the few approvals that have recorded votes show an overwhelming approval).

238. Cf. Terry Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, in 2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 236, 251 (Karen Orren & Stephen Skowronek eds., 1987) (stating that, for various reasons, "senators of all ideological stripes are strongly disposed to vote affirmatively on virtually every presidential nominee" to the National Labor Relations Board).

239. See Nixon, *supra* note 232, at 439 (identifying authors who support this argument).

240. Three of Lula's appointees were politicians defeated in the 2002 elections. Miriam Leitão, *Erro Perigoso* [A Dangerous Mistake], O GLOBO, Jan. 19, 2005. In 2003, Lula appointed Haroldo Lima, a former representative of the Communist Party in Congress to the oil & gas agency (ANP). *Id.* Lima was defeated in the 2002 election for Congress, and eventually became chairman of ANP. *Id.* In 2005, José Airton Cirilo, a member of the worker's party, was appointed director of the ground transportation agency (ANTT) after being defeated in the elections for governor of the state of Ceara in 2002. *Id.* Additionally, in 2005, José Machado, also a member of the workers' party, was nominated as director of the waters agency (ANA) after being defeated in the reelection campaign for mayor of the city of Piracicaba in the state of São Paulo. *Id.*; João Domingos, *Lula Começa Reforma Pelas Bordas e Partidariza Agências Reguladoras* [Lula Initiates Piecemeal Reforms and Politicizes Agencies], O ESTADO DE SÃO PAULO, Jan. 18, 2005.

241. See, e.g., Monteiro, *supra* note 235 (noting that a senator claimed the disapproval of Salomão to the ANP was for personal reasons alone); *Senado rejeita indicação de novo diretor-geral da ANP*, *supra* note 235.

242. Monteiro, *supra* note 235. The nominee had led an investigation of corruption against one of the parties with a majority in Congress, and the veto (as articulated by the leader of this party in Congress) was regarded as revenge. *Id.*

243. The second veto was seen as retaliation against the Lula Administration for refusing to give an important position in the state bureaucracy to one of the parties in the governmental coalition rather than a veto related to the appointee himself. *Senado rejeita indicação de novo diretor-geral da ANP*, *supra* note 235.

However, there are also reasons to believe that the second hypothesis (namely, that senatorial preferences have an impact on the choice of the appointees) may explain the Brazilian case. Lula does not have the majority in the Senate, and for this reason, his choices are much more restricted than Cardoso's.²⁴⁴ In fact, the Brazilian Senate vetoed two of Lula's nominations, and none of Cardoso's.²⁴⁵ In addition, some of Lula's nominations that were approved by the Senate were previous Cardoso appointees.²⁴⁶ As mentioned earlier, Lula may have made these choices in order to avoid resistance in the Senate.²⁴⁷

If we assume that senatorial approvals do not restrain the President's choices for agency appointments, implementing this feature is not a very effective way of guaranteeing the independence of regulatory agencies. If we consider the contrary hypothesis (that senatorial approvals do restrain Presidential choices), the question remains whether the Senate imposes an ideological restraint in Brazil. The two vetoes that occurred in Brazil suggest that parochial interests and patronage shaped the restraint. If this is the case, senatorial approval of nominations can be regarded as a guarantee of independence that does not function in Brazil in the same way that it does in the United States. There is, however, no conclusive evidence that either of these hypotheses is correct.

The second American constraint on presidential nominations is partisan balance. Some of the American IRAs, such as the FERC, the FCC, and the FMC, require that no more than three out of the total five commissioners belong to the same political party.²⁴⁸ This ensures a constant level of plurality in the agency's opinions (at least two out of five commissioners are not from the President's party), reducing Presidential influence.²⁴⁹ Brazil has not adopted such a feature, so all directors of a Brazilian agency can be affiliated with the same party.

Exploiting the lack of a partisan balance requirement, President Cardoso distributed the seats in the IRAs among the parties of his

244. The Author would like to thank Edvaldo Alves Santana for calling her attention to this hypothesis.

245. See *supra* notes 242–43 and accompanying text.

246. See *supra* notes 213–15

247. See *supra* notes 233–34 and accompanying text.

248. See 16 U.S.C.A. § 792 (West 2008) (setting the composition of the FERC); 47 U.S.C.A. § 154(b)(5) (West 2008) (setting the composition of the FCC); 46 C.F.R. § 501.2(b) (2007) (setting the composition of the FMC).

249. The requirement does not say that three members should be two Democrats and a Republican, or the other way around. Thus, in theory, a Republican President could appoint a Democrat and an independent, or two independents. In fact, in 2003, George W. Bush appointed an independent commissioner to the Federal Trade Commission (FTC), Pamela Jones Harbour. However, this was a confirmation of a nomination previously made by the Democrats in 2002, when they had control over Congress. Jaret Seiberg, *Rules of R.I.P.*, DAILY DEAL, Nov. 16, 2002.

political coalition. During the Cardoso administration, two parties nominated respectively all the directors of ANATEL and ANEEL.²⁵⁰ This not only reduces these IRAs' independence, but also corrupts the process of nomination, since the positions serve as bargaining chips for political support and coalition building in Congress.²⁵¹

Implementing a partisan balance requirement in Brazil could reduce the possibility of exchanging nominations for political support, thereby increasing the level of agency independence. There is one important obstacle to this proposal, however. Brazil has a multi-party presidential system.²⁵² In fact, in February 2005, ten political parties were represented in the Brazilian Senate.²⁵³ It would not be as easy to implement a partisan requirement in the Brazilian multi-party system as it would be in a two-party presidential system, such as the United States. Consequently, U.S. IRAs cannot serve as a model for a partisan balance requirement in the Brazilian case.

An alternative to implementing a partisan balance requirement in Brazil would be to delegate the appointments to different groups in Congress. The appointments would be made by party coalitions. Agencies could be composed of an equal number of appointees from the governing coalition and the opposing coalition, with a tie-breaking chairman appointed by both coalitions.²⁵⁴ Thus, the Senate leader of

250. The parties were *Partido da Social Democracia Brasileira* (PSDB) and *Partido da Frente Liberal* (PFL). Cardoso granted four of the five seats in ANATEL to PSDB and all of the seats in ANEEL to PFL. Raymundo Costa & Asdrúbal Figueiró, *FHC Loteia Agências de Infra-Estrutura* [FHC delegates the nomination of agencies' directors to political allies], *FOLHA DE SÃO PAULO*, Dec. 7, 1997. Although the nominations came from these parties, the nominees were not necessarily party members and did not necessarily have any party affiliation with PSDB and PFL. Interview with Omar Abud, Chief of Staff, ANEEL (2003) (on file with author).

251. This could explain the high rate of senatorial approval of presidential nominations. See Nokken & Sala, *supra* note 237, at 93, 96. However, it is not completely clear whether Lula had been using this strategy at all in his administration. As mentioned earlier, Lula nominated mostly politicians affiliated with his party who lost elections or appointees from Cardoso's administration. This seems to indicate that Lula is not distributing seats in exchange for the political support of other parties (at least not in IRAs). Because he did not have a majority in the Senate, it seems harder for Lula to use these positions as bargaining chips as Cardoso did. Interview with Edvaldo Alves Santana, Independent Consultant for the Privatization Process and Current Dir., ANEEL (July 26, 2006) (on file with author).

252. CONSTITUIÇÃO FEDERAL arts. 45, 76–77 (Braz.).

253. The parties were the following: *Partido Democrático Trabalhista* (PDT), *Partido da Frente Liberal* (PFL), *Partido Liberal* (PL), *Partido do Movimento Democrático Brasileiro* (PMDB), *Partido Popular Socialista* (PPS), *Partido Socialista Brasileiro* (PSB), *Partido da Social Democracia Brasileira* (PSDB), *Partido Socialismo e Liberdade* (PSOL), *Partido dos Trabalhadores* (PT), and *Partido Trabalhista Brasileiro* (PTB). Senado Federal—Senadores em exercício, [http://www.senado.gov.br/sf/senadores/senadores_atual.asp?o=2&u=*&p=*](http://www.senado.gov.br/sf/senadores/senadores_atual.asp?o=2&u=*&p=) (last visited Feb. 7, 2005).

254. This proposal is inspired by the design of legislative redistricting commissions in the United States. See Christopher C. Confer, *To Be About the People's*

the governing coalition (*líder do Governo no Congresso*) and the Senate leader of the opposition parties (*líder da oposição no Congresso*) would each be responsible for half of the appointments.

This alternative option, however, has a downside: it excludes the President from the appointment process and might generate rivalry between agencies and ministries, which would, in turn, jeopardize the executive branch's functioning as a whole.²⁵⁵ To avoid such an occurrence, Brazil could instead keep half of its appointments in the President's hands and give the other half to the leader of the opposition parties in the Senate. This model has been followed in other political systems such as in Bulgaria, where the Parliament, the President, and sometimes the Council of Ministers appoint the directors of agencies.²⁵⁶ Thus, it would not be impossible to create a partisan balance requirement in Brazil, but it is unclear which particular design best fits the country's needs.²⁵⁷

D. *The Commission and Its Structure: Design*

In addition to senatorial approval and partisan balance, the American IRAs have other guarantees of independence: a board or commission of five or seven members heads them and makes collegial decisions (as opposed to an agency headed by one sole director). Collegial decisions reduce the possibility of Presidential influence over agencies because each individual member might be subject to different incentives.²⁵⁸ Like the American agencies, most of the IRAs' rule-making power in Brazil is exercised through collegial decisions,

Business: An Examination of the Utility of Nonpolitical/ Bipartisan Legislative Redistricting Commissions, 13 KA. J.L. & PUB. POL'Y 115, 119–20 (2003–2004).

255. Nick Manning & Yasuhiko Matsuda, *Difficulties with Autonomous Agencies*, July 27, 2000, <http://web.worldbank.org/> (search "All" for "Difficulties with Autonomous Agencies"; then follow the first hyperlink in the results of the search).

256. This is the case of the Council of Electronic Media and the Communications Regulation Commission. The former has a board of nine commissioners, five of whom are elected by the parliament and four of whom are appointed by the President. The latter has five commissioners; one (the chairman) is appointed and dismissed by decision of the Council of Ministers, another three (the vice-chairman and two others) are elected and dismissed by the Parliament, and one member is appointed and dismissed by the President. OECD, *REGULATORY POLICIES IN OECD COUNTRIES: FROM INTERVENTIONISM TO REGULATORY GOVERNANCE*, *supra* note 12, at 49.

257. It is beyond the scope of this article to develop a concrete proposal, which would necessarily involve a complex normative analysis of the optimal level of independence of the Brazilian IRAs. The latter remains a largely unexplored topic both in Brazil and in most of the literature on IRAs.

258. See Paul L. Joskow, *Regulatory Priorities for Reforming Infrastructure Sectors in Developing Countries*, at 30–31 (paper prepared for the Annual World Bank Conference on Dev. Econ., Wash., D.C., Apr. 20–21, 1998), available at <http://siteresources.worldbank.org/INTABCDEWASHINGTON1998/Resources/joskow.pdf> ("There is necessarily a tradeoff between the ability of a single regulator to make reasonably quick decisions and the potential that the single regulator will abuse the authority that he or she has been given.").

in which each director has an equal vote and a majority vote determines the final outcome.²⁵⁹

The basic assumption to implement a collegial decision-making process is that it is easier for the President to influence an agency headed by one sole director than an agency headed by a commission.²⁶⁰ Going one step further, the number of directors in a commission with a collegial structure is another important institutional guarantee of independence. When there are fewer directors, the President needs fewer nominations to constitute the board of directors' majority. Unlike the United States, however, Brazilian IRAs have between three and five directors.²⁶¹ Both ANATEL and ANEEL, which will be discussed in more detail below, have five directors.²⁶² Five directors assure more independence than three or four, but less than seven. Thus, ANATEL and ANEEL are less independent than the American IRAs with seven commissioners.

Agency independence is affected not only by the existence of a commission that makes collegial decisions and the number of directors, but also by the structure of this commission. In light of this, three aspects seem to be particularly relevant: length of the directors' terms of office, existence of staggered terms, and the interval between each nomination. With respect to these three aspects, the Brazilian IRAs are not only distinct from their American counterparts, but they also differ among themselves.

259. Lei No. 9.472, art. 20, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (establishing ANATEL); Lei No. 9.427, art. 4, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (establishing ANEEL); Lei No. 9.478, art. 11, de 6 de agosto de 1997, D.O.U. de 7.8.1997. (Brazil) (establishing ANP); Lei No. 9.961, art. 6, de 28 de janeiro de 2000, D.O.U. de 29.1.2000. (Brazil) (establishing ANS); Lei No. 9.782, art. 9, de 26 de janeiro de 1999, D.O.U. de 27.1.1999. (Brazil) (establishing ANVISA); Lei No. 10.233, arts. 52, 67, de 5 de junho de 2001, D.O.U. de 6.6.2001. (Brazil) (establishing ANTAQ and ANTT respectively); Lei No. 9.984, arts. 9, 12, de 17 de julho de 2000, D.O.U. de 18.7.2000. (Brazil) (establishing ANA); Medida Provisória No. 2.228-1, art. 8, de 6 de setembro de 2001, D.O.U. de 10.9.2001. (Brazil) (establishing ANCINE).

260. But there are other risks. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000) (commenting on the impact of group polarization); Cass R. Sunstein, *The Law of Group Polarization* (Univ. of Chi. Law Sch., John M. Olin Law & Econ., Working Paper No. 91, 1999) (analyzing the group polarization phenomenon); see also Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 314 (2004) (showing how Republican appointees show far more conservative voting patterns when sitting with two other Republican appointees and that Democratic appointees show far more liberal voting patterns when sitting with two other Democratic appointees).

261. See, e.g., Lei No. 9.427, art. 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (ANEEL has five directors); Lei No. 9.961, art. 10, de 28 de janeiro de 2000, D.O.U. de 29.1.2000. (Brazil) (ANS has three directors).

262. Lei No. 9.427, art. 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (ANEEL); Lei No. 9.472, art. 20, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (ANATEL).

The longer the directors' terms of office, the more independence that will be guaranteed. The term of office in the United States varies from five to nine years, while in Brazil it ranges from three to five.²⁶³ In fact, the majority of Brazilian IRAs have terms of four years.²⁶⁴ ANATEL (the telecommunications agency) is the only agency that differs, having a five-year term of office.²⁶⁵ Thus, ANATEL not only has the longest terms of office among Brazilian IRAs, but the directors' terms of office are longer than the President's. Similar to the United States, the presidents of Brazil have a four-year term of office with the possibility of being re-elected for one additional term.²⁶⁶ As a result, at least one ANATEL director is in office longer than the presidential mandate. This term structure is one safeguard against the total domination of the agency by the nominees of a single President.²⁶⁷ Consequently, the four-year term of most Brazilian agencies is less effective than the five-year term adopted by ANATEL.

In addition to the length of the term, another important feature is the interval between nominations. Nominations may coincide or be staggered. Staggered nominations mean that within one agency the terms of office of directors will not overlap. A system of staggered terms guarantees a higher degree of independence if it reduces or eliminates altogether overlapping nominations. For this purpose,

263. See, e.g., About the FCC, <http://www.fcc.gov/aboutus.html> (last visited Feb. 17, 2008) (stating that Commissioners of the Federal Communications Commission serve five-year terms); see *infra* note 265 and accompanying text.

264. Two of the nine federal IRAs implemented in the Brazilian system have three-year mandates for directors (ANS and ANVISA). Lei No. 9.961, art. 6, de 28 de janeiro de 2000, D.O.U. de 29.1.2000. (Brazil) (ANS); Lei No. 9.782, art. 10, de 26 de janeiro de 1999, D.O.U. de 27.1.1999. (Brazil) (ANVISA). One has a five-year mandate for the directors (ANATEL). Lei No. 9.472, art. 24, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil). The remaining six have four-year mandates (ANEEL, ANP, ANA, ANTAQ, ANTT, and ANCINE). Lei No. 9.427, art. 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (ANEEL); Lei No. 9.478, art. 11, de 6 de agosto de 1997, D.O.U. de 7.8.1997. (Brazil) (ANP); Lei No. 10.233, art. 54, de 5 de junho de 2001, D.O.U. de 6.6.2001. (Brazil) (ANTAQ and ANTT); Lei No. 9.984, art. 9, de 17 de julho de 2000, D.O.U. de 18.7.2000. (Brazil) (ANA); Medida Provisória No. 2.228-1, art. 8, de 6 de setembro de 2001, D.O.U. de 10.9.2001. (Brazil) (ANCINE).

265. See *supra* note 263 and accompanying text.

266. Constitutional Amendment 16/97 implemented the change. CONSTITUIÇÃO FEDERAL amend. 16 (Braz.). The original provision of the 1988 Constitution modified by the Amendment established that the presidential term was five years with no reelection. See *id.* art. 82, amended by amend. 16.

267. A very convincing outlier (a person who is not like-minded) might be able to shift the other commissioners away from their original tendencies. See Sunstein, *The Law of Group Polarization*, *supra* note 260, at 180. To be sure, there is also the contrary risk. Studies about judicial voting on federal courts of appeals have demonstrated that the majority pressures can be powerful. See Sunstein, Schkade & Ellman, *supra* note 260, at 305–10 (demonstrating, among other phenomena, that Democratic appointees in the judiciary produce quite conservative voting patterns when sitting with two Republican appointees, and that when sitting with two Democratic appointees, Republican appointees are fairly liberal).

intervals should distribute the nominations along the period of the presidential mandate in such a way that the beginning of one director's term will not coincide with the beginning of another directors'; as a consequence, the end of their respective terms will not overlap. These intervals will also define the distribution of nominations within the presidential term of office.

This is especially important in agencies without a partisan balance requirement, such as those in Brazil, because if all directors are nominated by the President at the beginning of the presidential mandate, it is more likely that the agency will follow the presidential orientation than if it were composed of appointees of the opposing political coalition or previous administrations. Thus, a system of staggered terms for directors addresses this concern, allowing for a pluralistic composition. Within this system, the President has to negotiate with an agency that is headed (at least partially) by nominees of previous administrations.

The American agencies have adopted a staggered system in which there is one nomination per year if all commissioners serve their full terms.²⁶⁸ Agencies such as the NLRB and SEC, for instance, have no overlapping nominations, and every year there should be a new presidential appointment.²⁶⁹ Similar to the American agencies, the Brazilian IRAs have staggered terms.²⁷⁰ However, eight of the nine agencies have at least one overlapping nomination, i.e. the beginning of one director's term will coincide with the beginning of another director. The only exception is ANATEL.

In ANATEL, the President nominates one director per year, so that each President can nominate four ANATEL directors during his mandate (as noted above, ANATEL has a commission with five directors and each director has a five-year term of office).²⁷¹ If all directors complete their terms of office regularly, the government will never be able to have five appointments at ANATEL.²⁷² Thus, among the systems implemented in Brazil, ANATEL's seems to be the best method of staggering nominations: one nomination per year and no overlapping nominations.

In contrast with ANATEL, ANEEL has the highest number of overlapping nominations in Brazil. Out of five directors (each

268. See, e.g., Securities Exchange Act of 1934, 15 U.S.C.A. § 78d(a) (West 2008) (establishing that the Securities and Exchange Commission shall consist of five members who serve five-year terms); National Labor Relations Act, 29 U.S.C.A. § 153(a) (West 2008) (establishing that the National Labor Relations Board shall consist of five members who serve five-year terms).

269. See 15 U.S.C.A. § 78d(a); 29 U.S.C.A. § 153(a).

270. See, e.g., Lei No. 9.472, art. 24, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (staggering the tenure of the five commissioners of ANATEL).

271. See *supra* notes 262, 265–67 and accompanying text.

272. The possibility of re-nomination is not being considered.

appointed for a period of four years), three are nominated in the first year of the presidential mandate, and the other two in the following year.²⁷³ Therefore, by the second year of the presidential mandate, the agency's directors will all be the President's nominees. As a result, ANEEL's system of staggered appointments does not provide a secure guarantee of independence.²⁷⁴

The conclusion here is that the interval between nominations should be spread out as evenly as possible, with the nominations coinciding as little as possible. For agencies with five directors in a system with four-year presidential mandates, the five-year term of office for directors seems to be a stronger guarantee of independence for agencies than other terms implemented in Brazil.

Even the five-year mandates with modulated staggered terms, however, have an important weakness. In the case of the Brazilian agencies, a President's reelection would make all agencies equally vulnerable to presidential influence. As of the first year of the second presidential mandate, the President would have only his appointees in the agency. Therefore, if we consider the possibility of reelection, even the ANATEL system (five-year mandate for agency directors with modulated staggered terms) is not ideal. In addition, even if reelection does occur, independence will be impaired if a candidate of the same party is elected.²⁷⁵ Thus, without partisan balance, the length of the directors' mandates might not be an effective guarantee of independence, even with a five-year mandate.

E. *The Commission and Its Structure: Effectiveness*

The previous Parts have discussed how the system of staggered terms adopted in Brazil might affect the level of independence of IRAs. However, the system defined by the statutes was not fully implemented in Brazil. Take, for instance, the staggered system of nominations guaranteeing a higher level of independence that was adopted by the Brazilian telecommunications agency ANATEL. ANATEL is supposed to have five directors, each serving a five-year term of office with no coinciding nominations (one appointment per

273. Lei No. 9.427, arts. 5, 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil).

274. ANEEL's system of staggered nominations could be designed to have one nomination per year. In the Brazilian system, some agencies with four-year terms have implemented this system. When they have five directors, like ANEEL, these systems will necessarily have one year with two coinciding nominations. This is the case of ANP and ANTT. In these cases, it is important to note that the later in the presidential term this coinciding appointment occurs, the less the agency's independence will be affected.

275. It is reasonable to assume that the directors appointed by the same party will be more cooperative with the newly elected candidate than they would be with a newly elected candidate of the opposition party.

year).²⁷⁶ This organizational structure was created by statute, but because of many delays in the nominations, the system implemented is different from the statutory one.²⁷⁷

The discrepancy occurred because, in Brazil, terms run with the director instead of being fixed in time.²⁷⁸ To create staggered terms, the agencies' constitutive statutes established different terms of office for the first five directors.²⁷⁹ In the case of ANATEL, the terms of office for the first nominations of five directors would be three, four, five, six and seven years, respectively.²⁸⁰ In this system, if one nomination is delayed, there are two consequences. First, the intervals between the end of the term of office of one director and the nomination of his successor create a less staggered system than the one designed in the constitutive statute, which sometimes generates coinciding nominations. Second, the successor's nomination will be also delayed in a domino effect.

The first coinciding nominations occurred in ANATEL in 2002,²⁸¹ when the 2001 nomination was delayed. In November 2001, a

276. See *supra* note 262, 265 and accompanying text.

277. For details on the delays, see *infra* notes 279–96 and accompanying text

278. See, e.g., Lei No. 9.472, arts. 24–25, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (stating that the Directors of ANATEL shall serve five-year terms and the terms of the first five directors shall be three, four, five, six, and seven years, respectively); Lei No. 9.427, art. 5, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (stating that the Directors of ANATEL are appointed for four-year non-concurrent terms).

279. See, e.g., Lei No. 9.472, art. 25, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (enumerating terms of three, four, five, six, and seven years for the first five directors of ANATEL).

280. *Id.* In 1997, five directors were nominated for ANATEL: Renato Guerreiro was nominated as head of the agency for a three-year term (ending in 2000); Luis Francisco Tenório Perrone was nominated for a four-year term (ending in 2001); José Leite Pereira Filho was nominated for a five-year term (ending in 2002); Mário Leonel Neto was nominated for a six-year term (ending in 2003); and Antônio Carlos Valente da Silva was nominated for a seven-year term (ending in 2004). Under the same Cardoso Administration, some directors were re-nominated and others were replaced. In 1999, Luis Tito Cerasoli (whose term of office ended in November 2003) was nominated to replace Mário Leonel Neto. Renato Guerreiro was re-nominated in 2000 for a regular five-year term (ending in 2005). See generally *Quadro: Quem e Quem na Anatel [Who Is Who at Anatel]*, FOLHA DE SÃO PAULO, Oct. 22, 1997, at 2–6; *Guerreiro Vai Presidir ANATEL [Guerreiro Will Be the Chairman of ANATEL]*, FOLHA DE SÃO PAULO, Oct. 8, 1997, at 2–5.

281. In that year, José Leite Pereira Filho was re-nominated for a five-year term and Luiz Alberto da Silva was nominated for a five-year term (replacing Luis Francisco Tenório Perrone). Press Release, ANATEL, Presidente da República Encaminha ao Senado Nome de Luiz Schymura Para Conselho Director da Anatel [President Submits the Nomination of Luiz Schymura to Senatorial Approval] (Apr. 15, 2002), available at <http://www.anatel.gov.br>; Press Release, ANATEL, Senado Aprova Nome de José Leite Para Recondição ao Conselho Director da Anatel [Senate approves José Leite's renomination to ANATEL] (Sept. 4, 2002), available at [http://www.anatel.gov.br/Portal/documentos/biblioteca/releases/2002/release_04_09_2002\(2\).pdf](http://www.anatel.gov.br/Portal/documentos/biblioteca/releases/2002/release_04_09_2002(2).pdf).

director left ANATEL at the end of his mandate, but his successor was nominated only in April 2002.²⁸² Due to the delays in the 2001 nomination, the prospective nominations in January 2003 (the very beginning of the new presidential mandate after the end of the Cardoso Administration) were as follows: with respect to the telecommunications agency, Lula, the current Brazilian President, could nominate one director in his first year of government (2003), one director in his second year (2004), and the agency's chairman in his third year of government (2005). Contrary to the statutes, no nominations are expected in his last year of government (2006), due to the delay in the 2001 nomination. Lula's successor would then have two nominations in the first year of his presidential mandate.

To be sure, the nominations in Lula's government did not follow this pattern because there were two resignations in 2004.²⁸³ Consequently, Lula appointed the majority of directors in the Brazilian telecommunications agency in November 2004, before the end of his second year in office.²⁸⁴ However, if the resignations had not occurred, the delays in Cardoso's nominations would have reduced the number of nominations for Lula from four to three.

But ANATEL was not the only "victim" of this flawed implementation of the staggered system of nominations. In the case of ANEEL, irregular nominations also took place. In 1997, Cardoso nominated five directors for the electricity agency.²⁸⁵ According to the statute, there should be three directors nominated for a three-year term of office and another two directors nominated for a four-year term of office.²⁸⁶ The first three nominations' mandates came to

282. The director who left was Perrone, and the new director was Luiz Alberto da Silva. Press Release, ANATEL, Presidente da República Encaminha ao Senado Nome de Luiz Schymura Para Conselho Director da Anatel, *supra* note 281. Although not relevant for this analysis, it is worth noting that a third nomination also occurred in 2002 due to a resignation. Luiz Guilherme Schymura de Oliveira was nominated to complete the term of the previous head, Renato Guerreiro, who resigned in March 2002. *De surpresa, Guerreiro Demite-se da Anatel* [Unexpectedly, Guerreiro Resigns], FOLHA DE SÃO PAULO, Mar. 29, 2002, at B8.

283. The Chairman of ANATEL resigned in January 2004 and a director whose term of office would end in November resigned in June (Antonio Carlos Valente). *Vice-Presidente da Anatel Deixa o Cargo* [Vice-President of Anatel Resigns], FOLHA DE SÃO PAULO, June 5, 2004.

284. The nominations for these two resignations occurred in July 2004. They were inaugurated in November 2004. *Anatel Recebe Duas Novas Indicações* [Two Nominations for Anatel], FOLHA DE SÃO PAULO, July 1, 2004.

285. *FHC Define Nomes da Aneel* [FHC Nominates ANEEL's Directors], FOLHA DE SÃO PAULO, Nov. 28, 1997, at 1-12.

286. Lei No. 9.427, arts. 5, 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil). The directors with three-year terms were José Mario Miranda Abdo, Afonso Henriques Moreira Santos, and Eduardo Henrique Ellery Filho. The other two, Jaconias de Aguiar and Luciano Pacheco Santos, were nominated for four-year terms. *Anatel Recebe Duas Novas Indicações*, *supra* note 284.

an end in December 2000,²⁸⁷ and the chairman of ANEEL was then re-nominated for a four-year period (until December 2004).²⁸⁸ The mandates of the other two directors also ended.²⁸⁹ While a new director replaced one, the other was re-nominated.²⁹⁰ The substitution and the re-nomination, however, occurred only in May 2001.²⁹¹ In both cases, there was a four-month interval between the end of the mandates and the re-nomination and replacement.²⁹²

Similar to the case of ANATEL, these delays in the nominations increased the number of overlapping nominations (there were four nominations in 2001, instead of two) and they also had an impact on the number of nominations to which Cardoso's successor would be entitled. According to the constitutive statute, Lula should have nominated three directors in 2004 and two in 2005.²⁹³ However, due to the delays, at the end of 2004 Lula had replaced only the chairman.²⁹⁴ The other two nominations would occur four months later, in May 2005.²⁹⁵

The constitutive statutes of ANATEL and ANEEL (and the other agencies as well) state only the term of the office's duration, without defining the precise date on which it ends, thus allowing the delays in

287. The term of office of the other two ended one year after in December 2001. Sonia Carneiro & Gilson Euzébio, *Abdo na Frigideira* [Abdo in the Frying Pan], JORNAL DO BRASIL, May 17, 2001; *Aneel: FHC Nomeia Ellery e Pedrosa como Diretores* [FHC Nominates Ellery and Pedrosa as Directors], ENERGY NEWS (Federal School of Itajubá (EFEI), Itajubá, Braz.), Apr. 2001 [hereinafter EFEI Newsletter].

288. *Aneel e ANP Vão Manter Titulares* [Aneel and ANP Will Keep Their Directions], FOLHA DE SÃO PAULO, Oct. 21, 2000, at B2.

289. The directors were Afonso Henriques Moreira Santos and Eduardo Henrique Ellery Filho. EFEI Newsletter, *supra* note 287.

290. Afonso Santos was replaced by Paulo Jerônimo Bandeira de Mello Pedrosa, and Eduardo Henrique Ellery Filho was re-appointed for a new four-year term of office. *FHC Define Nomes da Aneel*, *supra* note 285; *Senado Aprova Novos Nomes para a Diretoria da ANEEL* [Senate Approves New Names for ANEEL], BOLETIM ENERGIA, No. 8 (Dec. 13–19, 2001), available at http://www.aneel.gov.br/aplicacoes/boletim_energia/documentos/newsletter-ANEEL08.htm.

291. *Indicados para Diretoria da Aneel são Sabatinados* [Congressional Hearings for Those Nominated for Aneel], O ESTADO DE SÃO PAULO, May 2, 2001; EFEI Newsletter, *supra* note 287; *Paulo Pedrosa Será Indicado a uma das Diretorias da Aneel* [Pedrosa Will Be Nominated as Director of Aneel], ENERGY NEWS (Federal School of Itajubá (EFEI), Itajubá, Braz.), Apr. 2001.

292. Due to these delays in nominations, from January to April 2001, ANEEL operated with only three directors. *Indicados para Diretoria da Aneel são Sabatinados* [Presidential Nominations to Aneel Submitted to Congressional Hearings], O ESTADO DE SÃO PAULO, May 2, 2001.

293. See Lei No. 9.427, art. 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil).

294. Medina, *supra* note 215.

295. Ironically, this structure created more modulated staggered terms than the ones designed in the constitutive statute.

nomination.²⁹⁶ In other words, the current provisions state that the term runs with the person. One possible solution to this problem is changing the statutory provision that defines the length of the directors' terms of office. The new provisions should fix the terms of office in time, defining the date on which the terms of office will end. This is the system adopted at the SEC in the United States, where a commissioner's term ends June 5th of each year.²⁹⁷ Thus, if the nomination of a director is delayed for four months, as it was for two ANEEL commissioners, the term of office still ends on June 5 of the year in which it was supposed to end. Fixing the terms of offices in time thereby avoids the irregularities that are created with delays in Brazil.

F. *Financial Autonomy: Funding and Budgetary Allocations*

Another important guarantee of independence for regulatory agencies is financial autonomy. The agencies' independence from the executive branch's policy preferences, especially those of the President, may be undermined if the latter has control of agencies' budgets. A possible solution is to grant agencies alternative sources of funding, which are not part of the Executive fiscal accounts.²⁹⁸ In the United States, for instance, IRAs normally have alternative sources of funds, which come from fees paid by the regulated industry.²⁹⁹ These alternative funds normally constitute a substantial part of the agencies' budgets.³⁰⁰

296. Lei No. 9472, art. 25, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (ANATEL); Lei No. 9.427, arts. 5, 29, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (ANEEL).

297. SEC, Current SEC Commissioners, <http://www.sec.gov/about/commissioner.shtml>.

298. See Antonio Estache & David Martimort, *Politics, Transaction Costs, and the Design of Regulatory Institutions* 23 (World Bank Policy Research, Working Paper No. 2073, 1999), available at <http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2073/wps2073.pdf> ("Relying on budgetary transfers decided by politicians is often viewed as a threat to the independence of the regulators since an easy way to reduce the effectiveness of a regulator would be to cut its budgetary allocation."); see also Johannsen, *supra* note 187, at 48 ("[I]t is generally assumed that an external source of funding is more stable than government funding . . ."); Smith, *supra* note 20, at 3 (noting that there is a "strong consensus" that "[p]roviding the agency with a reliable source of funding" is a safeguard required for agency independence).

299. The FCC, for instance, has two alternative sources of funding: (i) application processing fees and (ii) regulatory fees. The application processing fees are charges for certain types of application processing or authorization services the Commission provides to communications entities over which it has jurisdiction. These fees are considered revenues for budgetary purposes (i.e., they are collected by the exercise of government power and deposited in the U.S. Treasury where they are not available to the IRAs). In contrast, the regulatory fees are offsetting receipts for budgetary purposes. They are fees to recover the annual costs of the FCC's enforcement, policy and rulemaking, user information, and international activities.

Following the American model, all Brazilian agencies' main sources of income come from supervising fees and fines paid by regulated companies.³⁰¹ These funds are earmarked, meaning that the law forbids the use of these funds for purposes other than those related to the sectors in which these companies operate.³⁰² The alternative funding mechanism has the potential to guarantee independence if the amount collected is sufficient to cover all the agency's operational costs. There is, however, a risk: like all the expenditures made by executive branch bodies, the use of an IRA's funds has to be previously authorized by the federal budgetary appropriations.³⁰³ Consequently, despite the IRA's independent sources of income, the entity that controls these appropriations can influence the IRA's policy choices.³⁰⁴

The fees are considered offsetting receipts because they represent income that originates from market-oriented activities and the financing of regulatory expenses. These regulatory fees are deposited in an offsetting receipts account, and are available to be spent according to the terms of the legislation that established the charges. See 47 U.S.C.A. § 158 (West 2008) (setting rules for the assessment of application fees); 47 U.S.C.A. § 159 (setting rules for the assessment of regulatory fees); see also OFFICE OF MANAGEMENT & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 87 (2003), available at <http://www.whitehouse.gov/omb/budget/fy2004/pdf/spec.pdf> ("In addition to collecting taxes and other receipts by the exercise of its sovereign powers, . . . the Federal Government collects income from the public from market-oriented activities and the finances of regulatory expenses."). See generally Federal Communications Commission Fees, <http://www.fcc.gov/fees/> (last visited Feb. 17, 2008).

300. For instance, FCC regulatory fees cover almost all the operational costs of the agency. In 2002, the FCC collected \$218 million in regulatory fees, and the fees were used to cover the \$245 million of operational expenses. In 2003, the agency collected \$239 million, which was used to cover \$269 million of operational expenses. FED. COMMUNICATIONS COMM'N, FY 2003 BUDGET ESTIMATES TO CONGRESS 7, available at http://www.fcc.gov/Reports/fcc2003budget_section_1.pdf.

301. See, e.g., Lei No. 9.472, art. 47, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (authorizing ANATEL to collect regulatory fees); Lei No. 9.427, arts. 11–13, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (authorizing ANEEL to collect regulatory fees).

302. For instance, the President cannot use the fees collected from the electricity sector to invest in education or health.

303. CONSTITUIÇÃO FEDERAL art. 165, para. 5 (Braz.) (indicating that indirect administration, which includes regulatory agencies, is subject to the same rules as the direct administration, such as ministries and non-independent agencies).

304. For literature on the manipulation of agency budgets by elected authorities in order to influence or control the decision-making process, see generally MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79–84, 128–34, 258 (1955); ANTHONY DOWNS, AN ECONOMIC THEORY OF BUREAUCRACY 52–74 (1957); KENNETH MEIER, REGULATION: POLITICS, BUREAUCRACY AND ECONOMICS 26–27 (1985); and JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 214–15 (1989).

There are many scholars who claim that this type of influence exists in the United States,³⁰⁵ but nobody seems to agree on who has the “power of the purse.” Some believe that the President controls agency budgets since the Office of Management and Budget (OMB) reviews all agency budgets before sending them to Congress, as part of the President’s budget proposal.³⁰⁶ Others argue that the power of the purse rests with Congress, which is the branch that enacts appropriations bills.³⁰⁷

In contrast to the United States, the Brazilian President has substantial control over the IRAs’ budgets due to his power to interfere significantly in the federal appropriations process. That process culminates with a statute that defines the actual budget allocations for one particular fiscal year (*Lei Orçamentária Anual – LOA*).³⁰⁸ The process to formulate the LOA starts with a budget proposal that is sent to Congress by the President.³⁰⁹ This proposal is formulated by the Secretary of Federal Budget (*Secretaria do Orçamento Federal*—SOF), an executive branch department that, similar to the OMB, receives information from all agencies and offices of the executive branch and analyzes and reviews this information.³¹⁰ After review by the SOF, the IRA’s budget is incorporated in the presidential budget that is sent for congressional approval.³¹¹ The preparation of this proposal is the first moment at which the

305. These claims have been supported by case studies, theoretical models, and quantitative analysis. For a summary of this literature, see Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

306. See Moe, *supra* note 195, at 201 (noting that the president has substantial influence over independent commissions through the Office of Management and Budget); see also D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION* 165–85 (1991) (arguing that Congress has abdicated much of its fiscal responsibility to the Executive Branch); Morrison, *supra* note 184, at 252–53 (“[T]he agency’s budget must go through the Office of Management and Budget (OMB), and, with only a minor wrinkle or two, the [independent commissions] are subject to the . . . OMB’s authority. . . .” (footnote omitted)).

307. See, e.g., ROGER G. NOLL, *REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS* 34 (1971) (arguing that Congress has “enormous leverage over general agency policy” because agencies require congressional appropriations to “alter the scope of their responsibility”). For a case analysis, see Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

308. The LOA is preceded by two statutes. One establishes a plan for budgetary appropriations for a period of four years (*Plano Plurianual—PPA*) and the second defines the principles and guidelines for the public budget in one particular fiscal year (*Lei de Diretrizes Orçamentárias—LDO*). C.F. art. 165.

309. *Id.*

310. José Mattos Sultani, *Autonomia Financeira e Orçamentária das Entidades Autárquicas em Regime Especial*, at 28 (Universidade Federal do Estado do Rio de Janeiro, Institution de Economia, July 2005), available at http://www.cvm.gov.br/port/public/publ/ie_ufrj_cvm/Leonardo_Jose_Mattos_Sultani.pdf.

311. *Id.*

President can influence the agencies' budgets through the appropriations process.³¹² In 2003, for instance, the 202 million *reais* requested by the electricity regulator (ANEEL) was reduced to 162 million by a presidential proposal that was later approved by Congress.³¹³

In the 1980s, the United States faced the same problem that Brazil struggles with today. The U.S. Congress tried to reduce the discretionary interference of the OMB by asking commissions to submit their budget proposals simultaneously to the OMB and to Congress.³¹⁴ Congress has the power to change the proposal sent by OMB; submission to the President and Congress at the same time adds to this power unfiltered access to information.³¹⁵

As an attempt to give agencies more independence, this simultaneous submission could be implemented in the Brazilian system, but its effectiveness would be considerably limited. In contrast to the United States, in Brazil, congressional influence on the appropriations process is strongly limited by constitutional and statutory provisions that allow for significant presidential control over the final outcome of the bill approved by Congress.³¹⁶ First, the President's proposal will be used as law if the congressional statute is not enacted in timely fashion.³¹⁷ Second, the President may veto some of the provisions in the final statute approved by Congress.³¹⁸ Therefore, in Brazil, the President has a strong influence over the budgetary appropriations process.

In addition, the President also has control over the amount of funds that the agencies will actually receive.³¹⁹ Thus, in Brazil, there

312. *Id.*

313. *A Gestão nas Agências Reguladora—Fatos e Repercussões* [Managing Regulatory Agencies—Facts and Perceptions], at 18 (presentation of José Mário Miranda Abdo, Dir., ANEEL, before the Senate Commission on Infrastructure, June 25, 2003), available at <http://www.aneel.gov.br/arquivos/PDF/AudienciaPublicaSenado.pdf> [hereinafter Abdo].

314. Moe, *supra* note 195, at 200 n.3.

315. *Id.*

316. Argelina Cheibub Figueiredo & Fernando Limongi, *Incentivos Eleitorais, Partidos e Política Orçamentária* [Electoral Incentives, Parties, and Budgetary Policy], 45 DADOS—REVISTA CIÊNCIAS SOCIAIS 303, 313 (2002), available at <http://www.scielo.br/pdf/dados/v45n2/10790.pdf>.

317. This has been the practice, given the silence of the constitution on this matter and the fact that no budget is approved on time in Brazil. But it is important to note that the President's proposal is implemented on a monthly basis until the statute is approved. *Id.* at 314.

318. *Id.* at 315.

319. The Ministers of each sector also have this power. For instance, the Minister of Telecommunications can reduce the budget of the telecommunications agency. Since the Ministers are appointed and dismissed at the President's will, the Author is assuming here that they would manage the budget of the agency according to

is no guarantee that the resources appropriated by Congress and allocated to the agency will necessarily reach the agency in question. The President can still modify the congressional appropriations (or the part of it that is available to the agencies) after their enactment, during the budget implementation phase, according to his own discretion.³²⁰ These reductions are made through presidential decrees,³²¹ which are unilateral acts of the President not subject to any congressional control. In contrast, in the United States, the presidential power to impose delays or to cancel budget resources (both of which are called impoundments) is subject to congressional control.³²² In sum, the Brazilian President controls, determines, or administers the amount of funds the agencies will in fact receive, and can deeply affect the financial autonomy of those agencies.

The electricity agency (ANEEL) had its appropriations reduced 22% in 2002 and 50% in 2003.³²³ These reductions were determined by presidential decree.³²⁴ The President took similar action with respect to the telecommunications agency ANATEL; he reduced its budget in 2001, 2002, and 2003,³²⁵ with the most recent reduction being 25%. In fact, in 2005, six infrastructure agencies received only 16% of their appropriations for that year.³²⁶ These reductions show that the President can decrease the amounts allocated to the IRAs by

Presidential preferences. Thus, the distinction between reductions imposed by the President himself or the Minister of the sector is not relevant.

320. The LOA defines only the maximum expenditures the President and the Executive branch are authorized to make in a particular fiscal year. Thus, the President cannot surpass the limit approved by Congress, unless Congress authorizes him to do so.

321. In Portuguese, these decrees are called *Decretos de Execução Orçamentária*.

322. The Congressional Budget and Impoundment Control Act of 1974 regulates these impoundments and establishes procedures that do not allow the President to abrogate the intention of Congress. 2 U.S.C.A. §§ 601–688 (West 2008).

323. See Abdo, *supra* note 313, at 18 (This report informs that in 2002, the 174 million reais approved by the LOA was reduced to 145 million reais by a presidential decree and only 137 million was effectively transferred to ANEEL. In 2003, the 162 million reais approved in the LOA was reduced to 70 million by presidential decree. In May 2003, an additional 12 million was added to the 70 million, bringing the sum to 82 million for 2003.).

324. Decreto No. 4.708, de 28 de maio de 2003, D.O.U. de 29.5.2003. (Brazil); Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil).

325. Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil); Decreto No. 4.051, de 12 de dezembro de 2001, D.O.U. de 13.12.2001. (Brazil); Decreto No. 4.031, de 23 de novembro de 2001, D.O.U. de 26.11.2001. (Brazil); Decreto No. 3.878, de 25 de julho de 2001, D.O.U. de 27.7.2001. (Brazil); Decreto No. 3.746, de 6 de fevereiro de 2001, D.O.U. de 7.2.2001. (Brazil).

326. Laszlo Vargas, *Agências Fazem ato Contra o Governo* [Agencies Protest], FOLHA DE SÃO PAULO, May 6, 2003, at B1; Renée Pereira, *Governo Lula Corta Verbas e Asfixia Agências* [Lula's Administration Cuts the Budget and Suffocates Agencies], O ESTADO DE SÃO PAULO, July 3, 2006.

Congress to amounts originally proposed by the President or even lower amounts.

In addition to the power to reduce the allocations provided by Congress, the President can also impose limits on specific types of financial expenditures, thereby delineating financial obligations and commitments of a particular administrative office during a specific fiscal year. 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 2002.³²⁷ The agencies, as bodies of the executive branch that belong to the ministries, were also subject to these limits.³²⁸

In conclusion, alternative sources of funding do not effectively guarantee independence for IRAs in Brazil due to presidential control of the budgetary allocations process. Ultimately, IRAs do not receive the amount assigned to them by the LOA; instead, they receive the allocation approved unilaterally by the President. After the LOA's enactment, there is still much uncertainty as to the amount that will be allocated to IRAs.³²⁹ The President may use his power to unilaterally control the agencies' financial resources as an incentive for agencies to adopt his preferences, under the threat of a budget reduction.

There are at least two possible solutions to this problem. First, if budget allocations to regulatory agencies have been significantly reduced by presidential decrees with the purpose of reducing agencies' independence,³³⁰ an answer would be to limit Executive discretion in executing the budget approved by Congress. For instance, impoundments of IRAs could be subjected to congressional approval.³³¹ Second, if the President has been using reductions to produce a surplus in fiscal accounts,³³² it is necessary to prohibit

327. Decreto No. 4.691, art. 2, de 8 de maio de 2003, D.O.U. de 9.5.2003. (Brazil).

328. *Id.*

329. This is a problem for all executive offices in Brazil – not only IRAs. WORLD BANK, RELATÓRIO SOBRE A AVALIAÇÃO DO SISTEMA DE ADMINISTRAÇÃO E CONTROLE FINANCEIROS DO BRASIL [REPORT ON THE SYSTEM OF FINANCIAL ADMINISTRATION AND MANAGEMENT OF BRAZIL] (2002), available at http://www.planejamento.gov.br/arquivos_down/sof/Texto_CFAA.pdf.

330. In May 2003, representatives of the agencies suggested that reductions in their budgets were threats to agencies autonomy. *Agências Criticam o Governo por Corte de Verba* [Agencies Criticize the Government for Budgetary Cuts], FOLHA DE SÃO PAULO, May 6, 2003, at A1.

331. Luiz Antonio Ramos Veras, *Proposta para Fortalecer o Estado Regulador no Brasil* [Proposal To Strengthen the Regulatory State in Brazil] (2004) (on file with author).

332. In response to the accusation that Lula is trying to reduce the independence of the agencies, the administration argues that the budget reduction is being used to generate a fiscal surplus. In this context, it is interesting to note that the government is not reducing the budget equally among different governmental bodies.

diversion of regulatory fees to other uses by the government. Under this prohibition, the excess in regulatory fees not used to cover operational expenditures would then automatically revert to the regulated companies (this is called revolving funds). In this case, the government should still be able to make cuts in IRA spending to control fiscal deficits, but would not be allowed the use of IRA resources to produce a fiscal surplus. Both suggestions would bring the Brazilian system closer to the U.S. system (in which impoundments by the President are subject to congressional control and a revolving funds system is in place)³³³ and solve the problem regardless of actual presidential motives (fiscal surplus or reducing agencies' independence).

G. Institutional Guarantees of Independence in Brazil: A Summary

The comparison with the United States shows that Brazilian agencies could be significantly more independent than they are now. At least three different problems impair IRA independence in Brazil.³³⁴ First, some agencies simply lack relevant institutional guarantees. An example of a guarantee that could be implemented in Brazil is to have internal elections for chairmen (Part V.B.). As the U.S. experience demonstrates, internal elections for chairmen would reduce presidential influence over the agency. Another example is a partisan balance requirement within the commissions (Part V.C). Although adjustments might be necessary to make this U.S. feature functional in the Brazilian political system, this guarantee would allow for greater plurality within the commission during the term of the presidential mandate.

Second, some IRAs imported guarantees with defective designs. For instance, the terms of office for directors in Brazil could be increased (Part V.D). ANEEL and the majority of IRAs in Brazil have terms of office that coincide with the presidential mandate. The

Instead, regulatory agencies have been the governmental entities most affected by budget reductions. Romiro Ribeiro, *Consultoria de Orçamento e Fiscalização Financeira—Câmara dos Deputados* [Department of Budget and Financial Fiscalization – Chamber of Deputies], NOTA TÉCNICA NO. 12 (2004) (on file with author); *Receita Vinculada Ajuda no Superávit* [Agencies' Budget Helps the Surplus], VALOR ECONÔMICO (São Paulo), Oct 4, 2004.

333. See ASHLEY C. BROWN & ERICSON DE PAULA, THE WORLD BANK PPIAF PROJECT FOR BRAZIL POWER SECTOR: STRENGTHENING OF THE INSTITUTIONAL AND REGULATORY STRUCTURE OF THE BRAZILIAN POWER SECTOR 24–25 (2002), available at http://www.ksg.harvard.edu/hepg/brown_papers/a.brown_hepg_world.bank.regulatory.structure.brazil.power.report_12-02.pdf (resolving that Brazilian legislators should “eliminate the possibility” of the Government punishing ANEEL by “legally prohibiting diversion of regulatory fees,” and by subjecting ANEEL to “the same budget approval process to which other parts of the government are subject”).

334. The Author is not developing an argument in favor of specific reforms of the institutional design of regulatory agencies in Brazil. See *infra* Part VI.

resulting guarantee of independence is not as effective as it would be if terms of office were longer than the presidential mandate, such as those adopted by ANATEL. But even for ANATEL, the terms are equal in length to the shortest term of office for U.S. IRAs (approximately five years). Longer terms, like seven or nine years, seem to secure higher levels of independence. Another institutional design that can be improved is the system of staggered terms. While ANATEL adopted a design similar to the U.S. design, with no overlapping nominations, ANEEL has a significant number of overlapping nominations, all of which are concentrated at the beginning of the presidential mandate.

Third, some IRAs have implemented guarantees of independence that are similar to their counterparts in the United States, but that lack effectiveness either because they were not adapted to operate in the Brazilian system or because they were already ineffective in the United States. There are at least two examples of guarantees of independence transplanted from the U.S. context that proved very ineffective in the Brazilian system. The first, staggered terms of office (Part V.E), was not implemented in Brazil according to the statute's letter, thereby generating a series of nominations that did not follow the timeline established by the agencies' constitutive statutes. Both ANEEL and ANATEL suffered from delays in the nominations. The remedy could be a statutory provision defining the date at which the term of office would end, as in the United States. The second example of an ineffective transplanted guarantee of independence relates to the agencies' financial autonomy (Part V.F). Although the Brazilian system guarantees to agencies alternative sources of income, the President largely controls the federal appropriations process. As a result, the alternative sources of income have become ineffective guarantees of independence for IRAs in Brazil. Again, the solution could be based on the U.S. system: to limit the President's power in reducing agency budgets (through congressional control of impoundments), and the devolution to the regulated industry of those funds that were not used by the agency.

Finally, there are two examples of guarantees that are ineffective both in Brazil and in the United States. The first is the lack of removal power (Part V.A). Both ANEEL and ANATEL faced problems with "throwing in the towel" and "political drift." These problems occur in the United States as well. Second, the senatorial veto of presidential nominations (Part V.C) is as limited in Brazil as it is in the United States. In these two cases, Brazil needs to look for innovative solutions to increase the degree of independence of its agencies, since the U.S. model has little to offer in this aspect.

These institutional details help us understand the behavior of Brazilian IRAs in the episodes described earlier (Part III). In the rate increase cases, ANATEL resisted the government's pressure to halt

increases while ANEEL did not. In 2003, the first year of the Presidential mandate, the Lula administration managed to “convince” the directors of the electricity agency to halt rate increases that were previewed in contracts and in the regulation (Part III.A). They also tried to convince the telecommunications agency do to the same, without success (Part III.B). The fact that ANATEL was able to resist governmental pressure might be linked to the fact that ANATEL has stronger institutional guarantees of independence, being in general more independent than ANEEL.

In the fourth year of the Presidential mandate (2006), however, ANATEL was not as resistant as before. This is illustrated by the agency’s initial support of a policy to shift from pulse rates to minute rates, but subsequent failure to resist the governmental decision to postpone the implementation of the policy (Part III.C). This case should be analyzed in light of important details on the institutional design of the agency, such as: (i) lack of partisan balance requirements, which create decreasing levels of independence to all agencies in Brazil at the final years of the presidential mandate, (ii) lack of effectiveness of the staggered terms of office in Brazil, which allowed Lula to appoint the majority of ANATEL’s directors at the end of 2004, and (iii) Presidential constraints over IRA budgets, which made ANATEL operate under increasingly severe financial constraints throughout this entire period. All these measures probably combined to reduce ANATEL’s independence as the years went by.

While the lack of resistance to Presidential influence on the side of ANATEL was a surprise, the behavior of ANEEL was not. In 2005, the Minister of Energy instructed the agency to modify a draft regulation, and the agency followed the instruction promptly. This type of behavior does not deviate from the pattern seen in 2003, and can be associated with the weak guarantees of independence that ANEEL has had since its creation, combined with other Presidential measures to weaken the body such as significantly reducing the budget of the agency.

VI. LESSONS FROM THE BRAZILIAN EXPERIENCE

In the context of development reforms, Brazilian IRAs demonstrate how the adaptability and functionality of new institutions depends upon the legal, political, and institutional environment in which they will be operating. There are two types of concerns. One concern relates to the way the existing political, legal, and institutional framework might affect the functioning of the agencies, and how certain institutional designs might not operate properly when transplanted to a different environment. The Brazilian case shows that the design of institutional reforms should

take the existing framework into consideration, as opposed to adopting one-size-fits-all formulas. A second concern implicates the opposite problem: how IRAs affect the functioning of the existing legal, political, and institutional environment? This last concern suggests that instead of rushing to design institutional structures well suited to Brazil that would increase the level of independence of Brazilian IRAs, Brazil—and other developing countries—should be engaging in a more thorough discussion of the benefits and costs of bureaucratic independence in key infrastructure sectors. Independence is not always the best design choice.

As to the first concern, the Brazilian experience with regulatory agencies reflects some of the problems that plague the implementation of development reforms around the world. First, important details of the electricity and telecommunications agencies' institutional design in Brazil were largely determined by the distribution of power among different interest groups. This illustrates how groups with common interests might use the political process to affect reforms that are beneficial to them. This is often an impediment to effective institutional reforms in developing countries.³³⁵ Second, reformers used legal transplants without adapting them to the local conditions and particularities of the Brazilian social, political, and legal systems.³³⁶ In this sense, the Brazilian experience with IRAs is another example of the dangers and difficulties in using one-size-fits-all formulas in development policies.³³⁷ The most radical version of this concern proposes that development policies should be designed on the ground, as opposed to being imposed top-down: Brazil should find its own formula of bureaucratic independence instead of relying on the U.S. model. The milder version, in contrast, suggests that reformers should adapt U.S.-style agencies to Brazil and its institutional environment. Finally, some of the reformers' assumptions regarding the functioning of regulatory agencies in the United States were not accurate. A

335. See Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 109 (2004) (classifying "lack of effective political demand for reforms" and "vested supply-side interests" which render "reforms politically difficult to realize" as major impediments to development).

336. See Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (analyzing "the determinants of effective legal institutions" using data from forty-nine different countries, including Brazil).

337. See WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 100–01 (2006); see also Eberhard, *supra* note 27, at 29 ("Increasing discretion in regulatory systems can facilitate adjustment to new events. . . ."); Dani Rodrik, *Institutions for High Quality Growth: What They Are and How to Acquire Them*, 35 STUD. COMP. INT'L DEV. 3, 3 (2000) (noting that one cannot "over-emphasize best-practice 'blueprints'").

mythical, idealized view of the U.S. system has negatively affected some of the development reform policies designed in the 1960s and 1970s,³³⁸ and reformers seem to be making the same errors today.

One should not, however, rush to design independent agencies that would be suited to the Brazilian environment and elaborate an implementation strategy that could overcome the political-economic obstacles to such reforms. Before doing that, it is necessary to conduct a comprehensive debate about the benefits and costs of regulatory independence.³³⁹ It is important to emphasize that the independence of regulators comes at a cost for the government and for society. In the cases discussed earlier (Part III), the IRAs' decisions effected the macro-economy and other governmental policies. High rates for telecommunications and electricity services, for instance, may impair inflation control and undermine consumer protections. Should agencies be insulated from political influence when inflation and consumer protection are the actual reasons for efforts to exert political influence over an IRA? Should we insulate agencies from all types of political influence or only opportunistic ones? If the latter, how do we decide what is opportunistic and what is not?

On the one hand, the reason for securing the independence of regulatory agencies, as mentioned above, is that presidential control over such agencies may impair the functioning of these services by subordinating them to opportunistic political decisions. On the other hand, if infrastructure services are essential, the functioning of the political system and the operation of the executive branch to further popular interests vested in the elected president are also important. While the reasons that call for independence are mainly related to the functioning of regulated sectors, a counter-argument concerns the functioning of the executive branch in a democratic regime. Thus, before considering what kind of institutional design will guarantee independence to these agencies, one must answer some fundamental questions, such as how much independence is desirable, from whom, under what conditions, and for which purposes.

Delegation of powers to independent agencies is often interpreted as a sign of commitment because the government is predicting the possibility of acting opportunistically once reforms have been implemented and elects to tie its hands in order to avoid doing so. As mentioned in the introduction, the metaphor of Ulysses and the Sirens is often used to illustrate the rationale behind this

338. See David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1090-91 (showing that the first law and development movement was criticized for a mythical view of the U.S. legal system).

339. See *supra* notes 23-26 and accompanying text; see also Elster, *supra* note 5, at 66-71 (analyzing the complexity of establishing constitutions and analogizing constitutional courts and banks to a "double-edged suicide").

decision to delegate: knowing the danger of the Sirens beforehand, Ulysses ties himself to the mast and seals his seamen's ears with wax, to resist the temptation of luring the boat to destruction by hearing the song of the Sirens. Ironically, the analogy also illuminates the problem that the Author is trying to highlight here: it would be impossible for Ulysses to complete his trip successfully without commanding his boat. Ulysses' seamen would not be capable of taking the boat to its destiny without having a captain to coordinate their actions (e.g. rowing in the same direction at a certain pace). This is the reason why Ulysses seals their ears with wax, and asks them to tie him to the mast for a limited period of time: Ulysses is released and the seamen can unseal their ears once they have passed the region in which the Sirens sing. Similarly, a President cannot be expected to successfully govern a country and implement his policies without coordinating the acts and decisions of many different entities. A series of completely independent agencies that do what they think is best for their own sectors are like a boat without a captain; it is unlikely that the individual acts of the seamen will take the boat anywhere, let alone to its destination.

The metaphor of Ulysses and the Sirens shows that independence is important to attract private investment (Ulysses' boat would have sunk if he had not taken the precautions he did), but one cannot base a reform solely on these grounds (Ulysses' boat would not have reached its destination if he had tried to make the entire trip tied to the mast, without being able to communicate with his seamen, who had their ears sealed with wax). The difference between the myth of Ulysses and the delegation of power to IRAs is that the President constantly has the risk of hearing the Sirens. So, the President does not have an option to tie himself to the mast for a limited period of time. The question that remains, therefore, is how he can resist the temptation while at the same time being able to command the boat, and to guide it to its destiny.

There is a necessary tradeoff in the design of all guarantees of independence. If the guarantee is too weak, it will create too low a level of independence, which might impair the functioning of regulated sectors, but protect the Presidential agenda (and supposedly the interests of the majority in a democratic system). If the guarantee is too strong, it will impose on an elected government some obstacles to the implementation of its policies, but will favor a supposedly efficient functioning of infrastructural sectors. As a consequence, guaranteeing independence of regulatory agencies—and, more specifically, designing guarantees of independence—has to take into account these tradeoffs and try to find the best balance possible between these conflicting goals. To determine where Brazil should go from here, one should not ask whether IRAs are

independent or not, but rather what kind and what level of independence should be granted to them.

The utmost level of independence that could be granted to IRAs would be complete political insulation, guaranteed by an institutional design similar to the judiciary (term of office for life, independent budget, its own civil service system).³⁴⁰ Certainly, Brazil was not looking for complete insulation when it adopted the U.S.-style agencies in conjunction with the privatization reform. But even if we eliminate the judiciary-like design for IRAs, there is still a wide range of options of institutional designs between traditional bureaucracy (absolute subordination) and the judiciary (absolute independence). Which one should we choose? The response to this question requires a careful analysis of what will be gained and lost with further institutional changes and, most importantly, who will appropriate these gains and who will bear the losses. However, this calculus is beyond the scope of the Article.

VII. CONCLUSION

IRAs were implemented in Brazil to protect private investors. Their main function was to insulate regulatory decisions from presidential influence (Part II). This insulation would be guaranteed by certain institutional guarantees of independence, such as lack of removal power, financial autonomy, etc. In analyzing these institutional guarantees, some scholars have concluded that the Brazilian agencies are independent; however, evidence that the Executive branch managed to influence regulatory outcomes in both the telecommunications and electricity sectors casts doubts on these conclusions (Part III). This Article asked whether Brazilian IRAs are as independent as perceived or expected. The comparison with institutional features of U.S. agencies suggests that they are not.

The Article shows that at least three different problems impair IRA independence in Brazil (Part V). First, some agencies simply lack the appropriate institutional guarantees of independence. Second, some agencies imported guarantees with a defective design, which reduces these agencies' independence. Third, some agencies implemented guarantees that are very similar or identical to the U.S. institutional design, but these features lack effectiveness. This lack of effectiveness arises because, when incorporated in the Brazilian political and legal system, the features do not function in the same way that they do in the United States. Furthermore, some institutional features replicate in Brazil problems that already exist in the U.S. system. All these factors illustrate that the degree of

340. CONSTITUIÇÃO FEDERAL arts. 93, 95, 99 (Braz.).

independence of regulatory agencies in Brazil is not very high. In this context, the level of independence of ANEEL, from an institutional perspective, is lower than the level of independence of ANATEL. The differences in institutional design of these two agencies are associated with the political economy of the reforms in these two sectors (Part IV).

Why didn't those who previously analyzed the institutional design of regulatory agencies in Brazil perceive these problems? One possible explanation is that they were only paying attention to the existence and the general design of guarantees of independence, whereas this Article also analyzes the details of these designs and their actual functioning within the Brazilian legal and political system.³⁴¹ Another possible explanation is that purely institutional analysis cannot grasp the actual level of independence of IRAs. In fact, if the effectiveness of these institutional guarantees of independence is considered, all Brazilian agencies seem to have a low level of independence.³⁴²

The lesson that can be taken from the Brazilian experience is that development policies should not only identify the institutional reforms that will provide developing countries with the capacity to improve their conditions, but should also inquire into the adaptability and functionality of these reforms.³⁴³ The challenges to guarantee independence of Brazilian regulatory agencies echo the problems of implementing development reforms around the world. First, these challenges show that political economy is often an impediment for institutional reforms in developing countries. Second, they illustrate the need to adapt legal transplants to the local conditions and particularities of the transplanting country. Finally, they call attention to the dangers of adopting a mythical, idealized view of the transplanted legal system rather than developing the necessary critical analysis.

341. Thatcher and Gilardi recognize the existence of these different levels and have developed techniques for measuring independence of regulatory agencies in the European case. See *supra* note 191 and accompanying text.

342. For a similar distinction in the context of judicial independence, see Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* (CESifo Working Paper Series, No. 906, Apr. 2003), available at <http://ssrn.com/abstract=395403>.

343. The Article, however, does not go as far as urging reformers to redesign IRAs in Brazil so as to increase their level of independence. The Author's analysis shows that agencies are not as independent as perceived or expected, but the Author acknowledges that increasing the level of independence of regulatory agencies in Brazil could generate costs to the government and could negatively impact democracy. We should not subscribe to an agenda of institutional reforms to increase regulatory agency independence without fully assessing these tradeoffs. More work needs to be done before assuring what, if anything, needs to be done.
