ON THE WAY TO TURNING 20, the Brazilian regulatory framework created to replace direct government intervention in public goods and services, especially infrastructure, lost course. It urgently needs to be revised now because it is a major obstacle to improving the country’s infrastructure.

Those were the main conclusions of the May 8th seminar “Regulation and Economy in Brazil: The Role of Regulatory Agencies after 20 Years,” organized by the Getulio Vargas Foundation (FGV), the Brazilian Institute of Economics (IBRE), and FGV Law School in Rio de Janeiro.

The Fernando Henrique Cardoso administration (1995–2003) broke with Brazil’s long tradition of direct government intervention in the economy. The first two regulatory agencies it created in 1997 were the National Telecommunications Agency (Anatel) and the National Petroleum Agency (ANP). The ANP had been planned since November 1995, when Constitutional Amendment nº 9 eased the state monopoly of oil, allowing companies other than state-owned Petrobras to enter the market.

Several seminar participants pointed out serious regulatory flaws that had accumulated over the years, such as the capture of independent agencies by government ministries, the political game of party nominees, and delays in appointing new directors for vacant regulatory positions: As of May 21, at the National Civil Aviation Agency (ANAC) two of the five director positions were occupied; of four director position, the National Land Transportation Agency (ANTT) had three acting directors, and one of Anatel’s five director positions was vacant.

Because currently the role of regulatory agencies lacks definition, Luiz Guilherme Schymura, IBRE director and former president of Anatel (April 2002-January 2004), proposed that they simply be given a clear mandate to maintain stable rules. Government ministries would define the rules for each regulated sector, ensuring the prerogative of the federal government to formulate policies. “Agencies should have the role of providing technical support to regulated sectors and monitoring contract compliance. If the agencies had this mandate, I think it would be fantastic,” Schymura said.

According to Schymura, the original conception of regulation as established by the Cardoso administration was that the Ministry of Infrastructure would coordinate all regulatory agencies. Ideally, it would have been a more technical framework, focused on improving “efficiency in resource allocation.” But the political reality did not endorse the ideal. “The framework was not possible at the time and even today,” Schymura said, noting that as the number of ministries increased, centralized coordination of regulatory agencies was diluted.

Today, regulation is subject to constant political peddling within the party coalition supporting the government. Schymura points out that directors appointed to regulatory agencies have fixed terms that
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Luiz Guilherme Schymura

make them more attractive than minister positions, which are subject to dismissal at any time.

As long as this situation is perpetuated, Brazil will lag behind, especially in transport infrastructure. Schymura pointed out that, while in mobile telephony Brazil is on the level with rich countries and just below them in other telecommunications systems and electricity, in terms of roads, railways, ports, and airports Brazil is below poor countries.

“We need to make an effort to eliminate the [regulatory] bottleneck in transport infrastructure,” Schymura said. He pointed out that in granting concessions for infrastructure the government has to balance the low tariffs desired by society and the return on capital required by private investors. The current government had been dodging the dilemma by capping returns but providing investors with low-interest loans from the National Development Bank (BNDES). With the current fiscal tightening, that has become impossible.

Noting that a major reason for poor infrastructure was the lack of proper planning, as a result, important projects are flawed, and conducted in a hurry without the necessary licenses. Schymura believes that regulation can only help Brazil to overcome this situation if its institutions are strengthened; he pointed out that institutions take time to mature and take root.

The history

Luiz Roberto Barroso, justice of the Supreme Federal Court (STF), commented on a practice rooted in Brazilian society to seek public subsidies for personal or business projects. “We are addicted to public sector blessings,” Barroso said, stressing that this habit produces “undue interference by the public sector in private business.”

He notes Brazil’s history—“not atypical in late capitalist economies”—of government intervention in economic life based on the belief that “the government is the only one that has the capacity to invest in infrastructure.” That view prevailed in the 1940s, when the government established mining and steel companies, Companhia Vale do Rio Doce (now Vale) and Companhia Siderurgica Nacional (CSN), which were both privatized in the 1990s.

In the 1950s, the state established Petrobras and BNDES, and in the 1970s more than 300 more state-owned companies were created. “In the 1990s, there was a push for a government focused less on intervening and more on regulating economic activity,” Barroso explained, adding that regulatory agencies were created with political and financial autonomy; directors are appointed by the executive, with Senate approval, and have fixed terms.

Dissatisfaction

Joaquim Falcão, dean of the FGV Law School sees regulatory shortcomings reflected in the general dissatisfaction of society with the quality of services utilities companies provide. The dissatisfaction has resulted in a surge in lawsuits against telecommunications, electricity, and other utilities. Falcão believes that better regulation of utilities is essential for Brazil to achieve the universal access to goods and services society requires.

In the view of Elena Landau, former director of privatization for BNDES (1994–96), one problem is that regulatory agencies were created to support the privatization of loss making state-owned companies and help the fiscal adjustment. This was not a real conceptual change, which explains some of their imperfections. The Cardoso administration, for which she worked, stopped the sale of electric utility Eletrobras when the government fiscal situation normalized. Today, she sees the same fiscal concern when President Rousseff speaks of “privatization” of state-owned power distribution companies.
Joisa Dutra, coordinator of the FGV Regulation Center and former director of the National Electric Energy Agency, pointed out that the regulatory agencies were designed to “seek efficiency” and added that the current crisis of regulatory legitimacy is not unique to Brazil; other countries have been having difficulties in balancing regulatory change and legitimacy.

Regulation and policy
Carlos Ari Sundfeld, professor of administrative law at FGV São Paulo, believes that regulatory agencies in Brazil have a serious problem that needs to be fixed immediately. He agrees with Landau that when the agencies were created the government was not really sure of how active they should be: “It was important that the regulatory framework defined clearly what was regulation and what was policy, but it did not. Here lies the failure in the legislation.”

This was not a mistake, Sundfeld explains. “The vagueness of what was a policy issue was something the executive wanted,” he said. He cites examples: “Who decided in the airport concessions that first-round participants could not participate in the second round? Who decided to build hydroelectrics without reservoirs? It was not decided. One does not do [something] because no one else is doing it.” Sundfeld believes “there is a general perception that the regulatory framework is at risk,” especially because of political appointments to regulatory agency management positions.

Virtues and vices
Floriano de Azevedo Marques, law professor at the University of São Paulo (USP) and the São Paulo FGV, sees virtues and vices in regulation in the past 20 years. He diagnoses Brazilian society as suffering from the evil of immediacy—the desire for fast solutions—which is incompatible with efficient regulation.

“The current regulatory framework is not only deterring the advancement of infrastructure but also limiting access to regulated markets, favoring oligopolies.”

Carlos Ivan Simonsen Leal

On the positive side, Marques identifies the idea that whoever regulates does not operate utilities and whoever operates utilities does not regulate. Regulatory stability has won the debate in business circles. Brazil has created “a regulatory bureaucracy” that in some cases is well-structured, and transparency has become prominent, with the rise of public consultations standing out.

Brazil’s infrastructure stock as a share of GDP is one of the lowest in the world.

(% of GDP)

On the negative side, Marques sees as vices to be corrected the political peddling of regulator management positions, the fact that fiscal responsibilities override regulatory responsibilities, the belittling of agencies by ministries, excessive focus on punishment, and the urge of regulators to micromanage regulated entities.

Carlos Ivan Simonsen, FGV president, believes that allowing agencies to regulate state-owned enterprises demonstrates an absolute lack of authority. “If the enterprise belongs to government, it should follow government orders,” he added. Simonsen thinks the current regulatory framework is not only deterring the advancement of infrastructure but also limiting access to regulated markets, favoring oligopolies.

Egon Bockmann Moreira, law professor at the Federal University of Paraná (UFPR), questioned whether new initiatives are seeking to “bury” the current framework. Creation of the Planning and Logistics Corporation, in his opinion, would eliminate the need for the ANTT, the ANAC, and the National Agency of Waterway Transportation.

Mario Veiga, director of PSR, one of Brazil’s leading energy consultant has a more sectoral approach. He said that in the electricity sector “there was a great slippage,” but expressed optimism about the choice of Luiz Eduardo Barata, former president of the Electric Energy Trading Chamber, to become the Executive Secretary of the Ministry of Mines and Energy. “It signals that the government is back on the track,” he said.

IBRE researcher Armando Castelar Pinheiro was also more focused on the microeconomic effects of current regulation; he said Brazil’s infrastructure deficit has not diminished and the biggest problem is not lack of money but failures of management and regulation. “In Brazil the problem is not lack of money. We have money, but we are not able to spend it,” he said.

Pinheiro believes that an even bigger problem is that what little the country spends does not translate directly into infrastructure capacity. Projects are interrupted midway, like the construction of the new airport in Vitória in Espírito Santo state, or drag on for years, doubling the costs, like the project to divert part of the São Francisco River to supply drinking water, which was planned for completion in 2010 at a cost of R$4.5 billion; the cost is now estimated at more than R$8 billion without a drop of water yet flowing.

For three decades, Brazil has invested just over 2% of GDP in infrastructure

(investment in fixed capital as % GDP)

Source: Giambiagi and Pinheiro (2012), and Frischtak (2013).