

Legality and discretion in public governance of state-owned banks: an analysis applied to the case of BNDES

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This article aims at evaluating the institutional design of the political delegation that shapes The Brazilian Development Bank's (BNDES) financial activities. It employs a normative framework of administrative law, concerning the types of political delegation, and studies two of them: legality and discretion. Legal governance is a type of arrangement in which policy objectives are delegated by the Congress, while discretionary public governance policy objectives are defined in the Executive branch of government. Both types have different comparative advantages in governing policies. Whereas legality favors predictability and publicity, discretion enables flexibility and less political involvement. The main claim is that, due to Brazil's institutional environment, discretionary governance has proven advantageous. BNDES has been kept from the games of political and parliamentary clientele and it has suitable operational flexibility to act in times of economic crisis. However, this configuration also has costs, including financial agenda opacity and social accountability deficits.

Keywords: governance; state-owned banks; legality; discretion; BNDES.

Legalidade ou discricionariedade na governança de bancos públicos: uma análise aplicada ao caso do BNDES

O objetivo do artigo é avaliar o desenho institucional da relação de delegação política estabelecida na atuação do BNDES. Para isso, utiliza o referencial normativo do direito administrativo, respeitante às formas de delegação política, e trabalha com dois tipos de governança dessa delegação: a legal e a discricionária. A governança legal representa um tipo de arranjo em que os objetivos de política são delegados pelo Congresso, ao passo que na governança discricionária os objetivos públicos são definidos no âmbito do Executivo. Ambos os tipos têm diferentes vantagens comparativas para governar políticas públicas. Enquanto a legalidade favorece a previsibilidade e a publicidade, a discricionariedade enseja maior flexibilidade e menor envolvimento parlamentar. O argumento desenvolvido é o de que, em razão do ambiente institucional brasileiro, a governança discricionária tem se mostrado vantajosa. O BNDES tem sido preservado dos jogos de clientela político-parlamentar e tem garantido uma flexibilidade operacional para atuar em momentos de crise econômica. Por outro lado, essa conformação também apresenta custos, tais como: a relativa opacidade de sua agenda financeira e um menor controle social.

Palavras-chave: governança; bancos públicos; legalidade; discricionariedade; BNDES.

Legalidad y discreción en la gobernanza de bancos públicos: un análisis aplicado al caso de BNDES

El objetivo de este artículo es evaluar el diseño institucional de la relación de delegación política establecida en las operaciones del BNDES. Para ello, se utiliza el derecho administrativo (como marco referencial) en relación a las formas de delegación política, y se abordan dos tipos de gobernanza: legal y discrecional. La gobernanza legal es un tipo de organización en la que los objetivos de política pública son delegados por el Congreso, mientras que en la gobernanza discrecional tales objetivos son definidos por el Ejecutivo. Los dos tipos presentan diferentes ventajas comparativas para guiar las políticas públicas. Mientras que la legalidad favorece la previsibilidad y la publicidad, la discrecionalidad implica mayor flexibilidad y menor participación política. El argumento central es que, por cuenta del entorno institucional brasileño, la gobernanza discrecional ha resultado ser ventajosa. El BNDES se ha protegido de los juegos clientelares político-parlamentarios, y ha garantizado flexibilidad operativa para actuar en tiempos de crisis económica. Por otra parte esta configuración también implica costos, tales como la relativa opacidad (una agenda financiera poco transparente) y un limitado control social.

Palabras clave: gobernanza; bancos públicos; legalidad; discreción; BNDES.

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1. INTRODUCTION

Despite the theoretical and empirical controversy about the advantages and disadvantages of state-owned banks, these institutions are still very common financial alternatives in all financial markets.¹ In the last 30 years, despite the massive wave of privatizations, state-owned banks have continued to play a key role in domestic financial systems, accounting for no less than 25% of assets in the banking sector worldwide (Luna-Martínez and Vicente, 2012:2). In developing countries, this market share is even greater, accounting for a substantial amount of local corporate financing. In China, China Development Bank's disbursements correspond to approximately 12.5% of the country's GDP (Ferraz, Além and Madeira, 2013:32). In the Brazilian case, the Brazilian Development Bank (BNDES) once accounted for as much as around 20% of all credit available, and its credit portfolio once exceeded 10% of the country's GDP (Ferraz, Além and Madeira, 2013:32).

However, while state-owned banks are still a relevant source of resources, their operation can also present institutional deficiencies which can compromise their regulatory role. The literature on law and finance usually indicates that government failures can affect how these banks operate. The unsatisfactory fulfilment of their mission is usually associated with the occurrence of three typical events: politicization of management, corruption, and low economic efficiency (La Porta et al., 2002, 1998).

Politicization of management stems from insufficient institutional guarantees, which are incapable of preserving a sphere of technical decision-making, thus resulting in the political patronage in these banks. The most serious symptom of that is corruption, when financial resources are politically appropriated for private purposes (Rudolph, 2009:21-22).

State ownership in the banking sector can also generate efficiency problems both to the banks themselves and to the economy as a whole. On the one hand, administrative management can be poorly effective, causing financial losses to these banks, in terms of profitability and default rates (Hanson, 2004:18-21). On the other hand, losses can occur to the aggregate of the economy, whether through a superposition with the operation of private financial actors, leading to a crowding out effect (La Porta et al., 2002), or through the financing of activities with no significant public return (Rudolph, 2009:4) — a leaky bucket effect. Somehow, political patronage, corruption and efficiency distortions are functions of agency costs, i.e., they are consequences of problems in the governance of delegation and control of public missions assigned to state-owned banks by political authorities (Hanson, 2004:18-25).

Bearing this in mind, this article aims at evaluating the institutional design that governs the performance of BNDES in the Brazilian public administration. To that end, it assumes the normative framework of political delegation provided by the administrative law, and compares the “law in action” of two types of them: legality and discretion.

Legal governance is a type of arrangement where political goals are delegated by Congress through laws. Discretionary governance, in turn, reveals a reverse pattern of delegation system, i.e., one where public goals are defined in the executive power. In this hypothesis, the mandate of state-owned banks is defined by means of an internal chain of command and control with typical prerogatives of government, such as appointment and dismissal.

¹ For a critical analysis of banks, see La Porta et al. (2002). For a favorable analysis, Studart (2005:26) and Yeyati, Micco and Panizza (2004).

The claim is that, in the Brazilian case, characterized by a concentration of power in the executive branch, by a great fragmentation of parties and by market failures, discretionary governance has proved advantageous. The BNDES has been spared of political-parliamentary clientelist games and has managed to secure some operational flexibility to act in times of economic crisis. On the other hand, while this configuration offers gains of institutional design, which are also present in regulatory agencies and in the Central Bank, it also contains deficiencies. Among others, the bank's agenda, as well as its financial policies, are still opaque, which can cause a decrease in public control. To sum up, this mode of governance favors a technocratic arrangement at the expense of a more participatory one.

The presentation of this argument is divided into three sections. Section 3 presents a normative contrast of both governance alternatives: legal and discretionary. Then, Section 4 describes the governance in action in BNDES and examines its advantages and disadvantages. The last Section presents final considerations.

2. METHODOLOGY AND RESEARCH DESIGN

This is a qualitative study situated at the interface between administrative law and public management, with the purpose of examining the institutional design of political delegation established in BNDES' operation. The work is founded on the normative framework of Brazilian administrative law, particularly concerning governance models, and compares two ideal types: legality and discretion.

The study is based on a case study about the governance in place in the BNDES to understand its institutional anatomy. The description and characterization of this governance were based on official documents, data provided by the bank, and the specialized literature, particularly regarding state-owned banks and financial institutions.

The analysis of institutional design was conducted by comparing the findings brought by the case study with the normative framework adopted. In this analysis, we used the hypothetical-deductive method, which is used in works dealing with the evaluation of institutions, laws and public policies.

3. TYPES OF GOVERNANCE: LEGALITY AND DISCRETION

In the governance of public policies, administrative law conforms the delegation and control systems established between the entities in charge of creating these policies and those in charge of executing them (Rose-Ackerman, 2010). Among the possibilities of delegation, legality and discretion are two ideal, symmetrical types which contain different comparative advantages (Schneider, 2001:1-79).² In the legality alternative, the entity which creates and delegates the policy, i.e., the *principal*, is Congress, while executive-branch bureaucratic entities play the *agent* role, i.e., implementing the policy. In the discretion alternative the principal-agent relationship takes place inside the executive branch.

² For a functionalist approach to administrative law which deals with legality and discretion as functional alternatives, see Sunfeld (2014:231-259).

The political authorities that command the executive-branch (*principal*) are in charge of creating the policy and they assign its execution to entities of the administration itself (*agents*).³

3.1. LEGALITY AND DISCRETION: THE DIFFERENT COMPARATIVE ADVANTAGES

Following this perspective, legal governance is characterized by the prevalence of rules over administrative decision-making. In this model, government actions are guided by legal parameters which establish in advance the means and goals of policies. Thus, government actions are bound by terms established by law and its actions acquire predictability and legal certainty (Schneider, 2001:61-79). The legal disposition of political goals has also a greater regulatory efficiency; to the extent that legal disposition provides the definition of a single standard of conduct to a broad range of similar situations, which favors a regulatory gain of scale. (Schneider, 2001:61-79).

Besides predictability and regulatory uniformity, the second comparative advantage of legal governance is to allow for a broad public monitoring and a greater participation of social groups in defining political delegation. In other words, because parliamentary proceedings are ritualized and subject to public scrutiny, they favor the diffusion of information and magnify the positions in dispute (Huber and Shipan, 2002:61-79). Thus, they enable a relative parity for the representation of interests compared with decisions made at government offices, which are marked by non-ritualized and potentially opaque political transactions.

About the forms of political participation, Huntington and Nelson (1976) observe that there is a tradeoff between scope and intensity, which can help understanding the advantages of parliamentary allocation for certain issues. According with the authors, activities involving concentrated interests tend to provoke an intense political participation, albeit restricted to a small group. On the other hand, activities associated with the interest of a larger, more diffuse group entail a smaller political intensity. In these cases, where intense mobilization is not a given, as parliamentary deliberation is subject to greater ritualization and publicity, it can allow for a wider public awareness and thus favor social participation.

The downside of parliamentary allocation and political definitions through laws is a higher transaction cost, whether to formulate the agenda or to change its terms. Parliamentary proceedings and legislative formulation tend to be complex activities, because they involve an intricate coordination of interests. Moreover, the costs of building a majority are also present when it comes to legislative change, causing agreements made through law to become stricter and less prone to constant rearrangements. The potential participation of diverse social groups and the transaction cost thereof result, therefore, in less malleability of themes agreed on. In synthesis: legal governance implies more legal certainty and opportunities of participation, but it also involves less institutional flexibility.

In the sphere of public law, the competing type of governance is the one in which the political mandate is defined within the government. In this case, the public policy agenda results from

³ Strictly speaking, in both models, delegation is mediated by law, albeit differently. In legal governance, it is the law which establishes the policy's substantive content, thus binding the action of executive-branch entities. In discretionary governance, the law is open, i.e., it is only a frame which grants executive-branch authorities the competence to establish policies (Grau, 2002:240-255; Huber and Shipan, 2002).

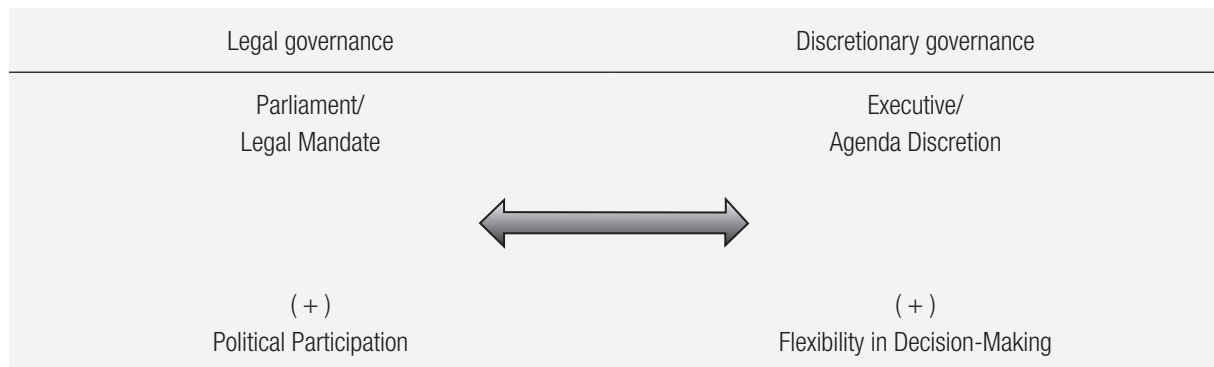
decisions internal to the executive branch. Compared with legal governance, discretionary governance has less political transaction costs, but discretionary decisions also tend to involve less social participation.

When the executive branch is the locus of decision-making, there tends to be less interests represented in the formulation of government actions. Thus, political transaction costs are potentially lower and executive decisions end up having a greater malleability, so matters can be defined and reviewed in virtue of new circumstances. In addition, certain legalization-typical problems are thus avoided, such as anticipating every possible future circumstance in a law, which, in some cases, may cause an ossification of the political agenda (Schneider, 2001:61-79). Discretionary solutions also admit a greater flexibility regarding scope, i.e., they allow for a singular treatment for specific questions. In other words, it is an alternative that favors specific adjustments for particular cases, making it more open to tailor-made outcomes (Schneider, 2001:61-79).

In synthesis, the governance types analyzed contrast two institutional alternatives. Discretionary decisions made within the executive branch are potentially more flexible, but also less participatory. The opposite is also true: legal governance tends to favor regulatory uniformness, legal certainty and participation, but it involves a more rigid outline. Legislative change is costlier than changing an administrative decision.

Figure 1 aims to illustrate the different comparative advantages of each arrangement.

FIGURE 1 LEGAL GOVERNANCE × DISCRETIONARY GOVERNANCE



Source: Elaborated by the author.

The respective comparative advantages of each governance type are reinforced by the different accountability mechanisms each arrangement is associated with.⁴ In legal governance, by assuming a political *principal* position, Congress acquires the ability to demand from the *agent* justifications for the choices made in performing its delegation. To this end, it has political resources such as calling upon administrators and, particularly, managing the public budget (Prado, 2010). In addition, in legal governance, the *agent* is more exposed to legal accountability. Since there is a mandate established

⁴ About types of accountability, i.e., political-parliamentary, legal, and management, see Mashaw (2005) and Rose-Ackerman (2010).

by law, the public *agent's* conduct can be legally questioned. Therefore, in this model, the margin of maneuver of the executive branch is smaller: administrative hands are previously tied by Congress and controlled *ex post*, whether by Congress itself or by the courts.

In the case of discretionary governance, accountability relations are established within the executive branch's transactions, between political authorities and bureaucratic managers. Among others, the main mechanisms that political authorities use to enforce their guidance are the appointment and dismissal of senior staff (Huber and Shipam, 2002). Compared to the legal model, the discretionary model favors a delegation that is exercised in government offices, with less public control, but which is also more malleable: administrative hands are less tied up. Chart 1 summarizes the different comparative advantages of each type.

CHART 1 SUMMARY OF COMPARATIVE ADVANTAGES

Legal governance	Discretionary governance
Agent-principal relationship in different branches (parliament and executive)	Agent-principal relationship in the same branch (executive)
More external controls (parliament and judiciary)	More internal controls (management)
Low flexibility	High flexibility
Pre-established discipline	Tailor-made adjustments are possible
Greater possibility of participation	Limited political participation
Greater regulatory stability	Smaller regulatory stability

Source: Elaborated by the author.

3.2. LEGALITY AND DISCRETION IN THE GOVERNANCE OF PUBLIC BANKS

The population of state-owned banks is distributed in a relatively even way between both governance types. Data of Luna-Martínez and Vicente (2012:11) indicates that 53% of these institutions have a specific, previously defined mandate, which can be understood as a mandate established *ex ante*, by law. Of these 53%, the most significant part corresponds to banks with a mandate reserved for financing agriculture, with 13%; the second group, with 9%, is dedicated to international trade, and only 4% correspond banks dedicated to infrastructure. The second type, which makes up 47%, is formed by banks with a broad mandate, which suggests that their agenda is not defined *ex ante*, therefore tending to be allocated to the discretion of executive branch. Such is the case of the BNDES.

The elements collected by Luna-Martínez and Vicente (2012:11) converge with the points indicated in the previous section. Their survey points out that banks with broad mandates have the advantage

of a greater flexibility, while banks with specific, *ex ante*-established mandates usually have a more controllable action. The following passage summarizes their conclusion:

There are pros and cons in adopting narrow versus broad mandates. On the one hand, narrow mandates encourage institutions to adhere to their original mandates and gain specialization in their target market. Monitoring and performance evaluation becomes easier in DBs with a narrow rather than a broad focus. However, institutions with narrow mandates do not have the flexibility to target various sectors, in some cases limiting their ability to manage risk through diversification. On the other hand, institutions with broad mandates provide flexibility to DBs to finance a wide range of activities and sectors deemed important by the government. However, if not properly managed, DBs might quickly lose focus and effectiveness, be subject to different and competing demands from different Ministries and other government institutions, or simply have its policy mandate crept into diffuse tasks and activities. [Luna-Martínez and Vicente, 2012:12]

Other works had already approached state-owned banks from the perspective of their governance design. In a work dedicated to describing good practices, Rudolph (2009) associates successful cases of state-owned banks to the primacy of legal governance. This is, among others, the case of the Business Development Bank of Canada (BDC), and Finland's Finnvera Plc. In both situations, Rudolph (2009) suggests that the financial operation mandate is delimited through a law defining the institutions' policy goals and funding mechanisms.

In the Canadian case, a law enacted in 1995 redefined BDC's operation scope, delimiting its policy of disbursement to financing small and medium firms. This Canadian law also set a deadline for an evaluation of its performance and a possible mandate renewal, which took place in 2002, when BDC's delegation was renewed for 10 years. According with the 1995 law, BDC's activities were to have the following purpose:

(1) The purpose of the Bank is to support Canadian entrepreneurship by providing financial and management services and by issuing securities or otherwise raising funds or capital in support of those services. (2) In carrying out its activities, the Bank must give particular consideration to the needs of small and medium-sized enterprises. [Canada, 1995]

In the case of Finnvera, the legislation (the Finnvera's Act) also establishes a mandate for the bank, attributing priority to small and medium firms. In addition, the law on state-owned financial companies establishes the financing mechanisms, determining for the bank to have its own financial sources to support its activities. The following passages of this Finnish law indicate Finnvera's mandate, as well as its funding rules:

[...] to provide financing services to promote and develop business, particularly that of small and medium-size enterprises, and to promote and develop the exports and internationalization of enterprises. In its operations, the State-owned specialized financing company shall promote the

State's regional policy goals. Operations shall focus on shortcomings in the supply of financing services. [Finland, 1998]

The company pursues financing by granting and administering credits, guarantees and other contingent liabilities, and making equity investments. The company also carries out research and surveys related to business financing and provide enterprises with development assistance, services, and advice. [Finland, 1998]

According to Rudolph (2009:3), the evaluation of these cases indicates that legal governance favors legal certainty and public control, also delimiting these banks' operation scope. Because it defines *ex ante* their fields of action, and how they can finance their operations, there are guarantees for the other private actors in the market. For those who borrow resources, the rules establish the fields of action of state-owned banks in a predictable way, thus reducing their margin of financial discretion. To financial actors, competence delimitation and public financing source restriction provide a protection against the possibilities of predatory superposition (i.e., reduction of crowding-out risk). Finally, to the general population, a legal mandate and its parliamentary monitoring favor public control over the delegation's outcomes, which can mitigate the leaky bucket effect. In the case of BDC, for instance, the rules determine that, if the institution fails to fulfill its purpose, its mandate may not be renewed.

However, the literature on state-owned banks and financial institutions also presents successful cases of discretionary governance in the terms addressed in this work. The main advantage recognized is the operational flexibility of institutions. This possibility is particularly relevant in scenarios of crisis or in more economically vulnerable environments, which demand, among other remedies, large-scale anticyclic actions. In these situations, the rapid change of state-owned banks' goals can favor the normalization of economic financing.

Evidence from the 2008-09 crisis indicates that state-owned banks played an important role in mitigating economic contraction. The survey conducted by Luna-Martínez and Vicente (2012) indicates that these agents accounted for 36% of the increase in financial resources available from 2007 to 2009, thus staying well above the offer increase provided by private banks, which accounted for only 10% of the credit increase in the period. Some of the state-owned banks with the highest disbursement increases in the period had broad mandates. It is the case of the Bulgarian Development Bank, whose disbursements grew by 275%, Ecuador's National Financial Corporation, which increased disbursements by 174%, and Ecuador's State Bank, which had a 122% variation (Luna-Martínez and Vicente, 2012:12).

In addition to these, a successful case among banks with a broad mandate and, therefore, subject to having their agendas defined by the government, is German KfW. Ferraz, Além and Madeira (2013:24-30) note that the German development bank shows similarities with the BNDES, such as exclusively state-owned stock and a multi-sector financial operation. In 2012, KfW's portfolio accounted for 12.5% of the total credit available in the German market, reaching 15.5% of the country's GDP. During the financial crisis, the German bank had an important role, and its broad mandate ensured an intervention beyond the stabilization of domestic relations: the bank ensured resources for the continent's most indebted countries, such as Greece (Ferraz, Além and Madeira, 2013:22).

4. BNDES' GOVERNANCE

The BNDES is the second most important source of corporate financing in the Brazilian financial system, only behind the self-financing of companies. In 2014, the bank accounted for 15% of companies' investment financing (gross fixed capital formation) (Coutinho, 2015). From 2001 to 2010, it accounted for an average 26% of corporate financing in the sectors of manufactures and infrastructure.

TABLE 1 INVESTMENT FINANCING SOURCES IN INDUSTRY AND INFRASTRUCTURE IN BRAZIL (2001-13)

Year	Retained Earnings	External Funding			Debentures
	(%)	BNDES (%)	(%)	Stocks (%)	(%)
Average 2001-10	45	26	14	6	9
2011	48	27	7	1	17
2012	43	25	12	2	18
2013	44	25	11	1	18

Source: The BNDES. The author's own compilation.

The anatomy of the arrangement that shapes BNDES performance indicates the prevalence of a discretionary governance founded on a broad legislative delegation, which attributes to the executive branch the power to define its actual mandate. The Brazilian financial system law, i.e., Law 4,595/1964, establishes only, on article 23, that “the Brazilian Development Bank is the main instrument of execution of investment policies of the Federal Government”. In turn, Law 1,628/1952, which authorized the creation of the bank, also stated its mandate in open terms, limiting itself to define, on article 8, that “is created, under the jurisdiction of the Ministry of Finance, the Brazilian Development Bank, which shall also act as a government agent in financial operations relating to reequipping and fomenting the national economy”.

Therefore, the concrete definition of its agenda and its sectoral priorities is decided upon by the executive branch, by means of an internal delegation between the cabinet and the bank's management (Colby, 2013:78-82). Although the BNDES is formally linked to the Ministry of Development, Industry and Trade (MDIC), its agenda is materially established by a consortium of authorities in charge of coordinating the economic policy, which involves the MDIC, but also the Ministry of Finance (Colby, 2013:78-82). The delegation is mainly based on administrative appointment mechanisms, which are regulated through the power of appointing and dismissing. BNDES' top management is appointed and dismissible by the president of Brazil at any time — dismissible “ad nutum” (at the president's discretion), according with article 14 of the bank's bylaws. Therefore, the first resource of the executive branch to guide the bank's agenda lies in choosing and appointing managers who are aligned with the government's macro-economic orientation.

The power to appoint and dismiss the high managers has ensured a convergence of goals between the *principal* and the *agent*. Since its foundation, the BNDES has shown a high degree of alignment

with the development agenda of the federal government, and three periods can be distinguished in its history: (i) the developmentalist period, from 1950 to 1980 (Monteiro Filha, 1994; Currallero, 1998; Schapiro, 2009); (ii) the financing of privatization and state reform, from the late 1980's to the 1990's (Musacchio and Lazzarini, 2011:17-40); and (iii) the reinstatement of state activism, in the 2000's (Almeida, Lima-de-Oliveira and Schneider, 2014:323-347; Trubek, Coutinho and Schapiro, 2013). During each of these periods, by means of its financial choices, the bank materialized government agendas, prioritizing now infrastructure and basic input sectors, now the acquisition of state-owned companies by private actors, now domestic companies with a competitive potential for internationalization.

By approximating the analysis lens, we can see that there are two fields of discretion constituting BNDES' mandate: firstly, discretion regarding goals and secondly discretion regarding means. Choosing a political agenda, i.e., the goals, involves an interinstitutional dialogue between the government and the bank (Colby, 2013:78-82), resulting in the formulation of its operation guidelines. These guidelines are reduced to term, and inform the Operational Policies, a document presenting BNDES' financing priorities — its agenda. The second field of discretion in this arrangement occurs in the execution of the Operational Policies; here, BNDES' managers and administrators are in charge of selecting projects to be financed pursuant to the established agenda.

4.1 COMPARATIVE ADVANTAGES AND DISADVANTAGES IN BNDES' GOVERNANCE

Regarding how it works, BNDES' discretionary governance presents comparative advantages and disadvantages. On the one hand, the political delegation carried out in the executive branch's transmission belt ensures the bank three institutional assets: insulation from parliament politics, technocratic efficiency, and operational flexibility. On the other hand, the bank has proved impervious to social control and, what is more, it shows deficiencies in the process of formulation of its financial agenda and in accountability mechanisms for results obtained. In general terms, the institutional arrangement tends to encourage BNDES' role rather as a financial actor, which is not trivial in view of the market failures in Brazil's financial system, and less as a promoter of new possibilities of economic and social development.

Concerning to its virtues, the first relevant institutional asset in its governance is the bank's insulation from the environment of party politics. Because its political delegation's institutional design concentrates the formulation of agenda on executive-branch officials, it ends up limiting the other political actors' participation in this process. The political appointment has been concentrated in the executive officers and even so these slots are handled outside the partisan nominations. In other words, the criteria of appointment favor the technocrats over the politicians.

The bank's financial autonomy also contributes to this insulation (Colby, 2013:78-85). The BNDES has relied on sources of its own at least since 1970, when it started to manage parafiscal resources (PIS-Pasep's resources). Nowadays, the 1988 Federal Constitution remained in this path, granting it access to 40% of the Workers Support Fund's (FAT) resources (article 239, paragraph 1).

Strictly speaking, FAT resources originate from tax money, as they derive from companies' contributions, but even so, the allocation of these resources by BNDES is not subject to management by the National Congress, as Arida (2005:1-4) notes. This is not a trivial finding, most of all because the Federal Constitution (article 165, paragraph 5, section 2) establishes that the investment budget

of state-owned companies and public banks should be included in the public budget document deliberated on by Congress.

However, in the “law in action” of public finance, the public budget document referring to the BNDES is limited to investments in the bank’s facilities, such as information technology and remodeling investments. The public budget does not include the allocation of FAT resources, nor does it determine its disbursement policy. In fact, BNDES’ budget scenario is similar to those of other development banks, where a parallel management of public resources also prevails. As Amsden (2001:132-135) notes, development banks’ resources are usually off-budget. This situation ensures the financial autonomy of BNDES relatively to the political parties in the Congress.

It is true that, since 2008, the BNDES has received contributions from the National Treasury, which totaled R\$530 billion in September 2015 and were provided through loan operations (Brazil, 2016:61). These operations involved public budget resources and they were approved by Congress, but by means of presidential decree (MPs), which are processed separately, i.e., not included in regular budgetary law procedures. In these votes of MPs, parliamentary involvement tends to be a passive one, limiting itself to accept the propositions presented by the executive. The work of Limongi and Figueiredo (1998:88-89) describes the differences in incentives for parliamentarians to vote a bill and a presidential decree (MPs), noting that, in the case of MPs, incentives are towards a deferent parliamentary attitude, which tends to preserve the existing legislative text. In concrete terms, this means that, although Congress is called to vote the transfer of public resources to the BNDES, this practice has not affected the bank’s disbursement policies.

The result of this institutional configuration, therefore, is the restriction of Congress’ possibilities of influencing the bank’s financial agenda, which ensures its insulation from party politics. Parliamentarians are excluded not only from defining its public policy mandate, but also from its budget allocation. The following passage by Colby summarizes well BNDES’ insulation:

While the Bank does consult with the legislative branch, offering bi-annual reports and appearing before congressional committees, there are few formalized mechanisms through which a legislator can exert influence or impose accountability. Congress cannot wield the “power of the purse” and threaten to withhold funding until a certain issue is addressed. The executive normally has to explain to Congress the purpose for which requested funds are used, but this is not true in the case of the BNDES. The executive can transfer money from the National Treasury to the BNDES without explanation or external review. The business community, despite being the Bank’s largest client base, also possesses no legitimate channel in which it can influence Bank policy. An official representative of the business community does not sit on the Diretoria, nor do they have access to a meaningful lever of power. [Colby, 2013:81-82]

Political insulation is associated with a second institutional asset of the bank: operational efficiency. The safeguards against possibilities of political appointment of employees favor an insulated financial administration which is therefore preserved from many problems suggested by the literature (Hanson, 2004:18-25). Unlike other state-owned banks, BNDES’ indicators show good economic results.

Table 2 presents some of these indicators, showing that, compared to other development banks, and even to domestic private banks, BNDES has positive results regarding return on assets and return on equity. It is also a lean entity, with less than 3 thousand employees and without a history of massive hirings of political protégés.

TABLE 2 BNDES' FINANCIAL INDICATORS COMPARED TO THOSE OF DOMESTIC PRIVATE BANKS, MULTILATERAL AGENCIES AND DEVELOPMENT BANKS FROM OTHER COUNTRIES (2014)

Indicators	BNDES	BB	Itaú	Bradesco	World Bank	IDB	KfW (Germany)	BDC (China)
ROE (%) (Return on Equity)	13,5	16,3	19,4	19,8	-2,5	2,3	4,6	16,7
ROA (%) (Return on Assets)	1,0	0,9	1,7	1,8	-0,3	0,5	0,2	1,1
Total Employees	2.881	111.628	93.175	95.520	12.335	2.000	4.383	8.732

Source: The BNDES. The authors' own compilation.

Regarding its performance, the work of control agencies has not so far suggested that the BNDES is a corrupt-laden organization. This can be seen, for example, in the Parliamentary Investigation Committee's report on the bank, in 2016 (Brazil, 2016). Despite indicating operation problems, the report does not point to diffuse corruption. While this does not mean that the bank is immune to unlawful practices, the aggregate of its operations does not indicate an operation on corrupt foundations. Research about its performance usually highlights its condition as an island of excellence in Brazilian bureaucracy. This is explained, in part, by its way of recruitment, which has long been based on public admission tests, thus favoring a Weberian configuration. In the bank's workforce, 98% of employees, including top management positions, were recruited through public admission tests (Colby, 2013:91).

In fact, there is a mutual reinforcement effect between insulation and economic results. The insulation ensured by political safeguards favors a bank management oriented towards obtaining good results. In turn, good financial results ensure the bank some political capital, which eventually reinforces its sphere of autonomy (Colby, 2013:246-247).

The third institutional asset resulting from this administrative governance model is operational flexibility. As noted earlier, this condition is a function of the lower political transaction costs informing the discretionary arrangement. BNDES' actions during the 2008-2009 financial crises are an example of that. At the height of the crisis, in a short period, the bank repositioned its programs and accounted for a nearly 30% increase in the total credit available in the economy. From 2008 to 2010, its disbursements reached over 20% of the total credit available (Puga and Borça Jr., 2011:3), thus ensuring an environment of relative economic normality in Brazilian markets.

On the other hand, while this design presents virtues, it also has disadvantages concerning two main issues: (i) limits to social participation and (ii) deficiencies in the accountability processes of both agenda setting and economic outcomes. Regarding the former, while its discretionary governance limits participation and ensures political insulation, it also reinforces the exclusion of vulnerable segments, which are potentially affected by the enterprises financed. Concerning the latter, the absence of institutional constraints in the formulation of financing agendas can favor short-term betting, to the detriment of mid- and long-term horizons.

Regarding the former problem (social participation), the absence of social interaction has been criticized by civil society organizations which have been focusing on a closer political tracking of the BNDES. A first evidence in this respect was the mobilization of the Plataforma BNDES in the early 2000's. The Plataforma is a group of NGOs which formed a consortium to monitor the bank's performance and, occasionally, protest against its criteria and policies (Spink, 2013:11-24). Along the same line, another NGO, Conectas Human Rights, presented a thorough critical work in 2014, indicating the limitations to civil society participation, and pointing, among others, the fact that social groups were not involved in the definition of financing projects (Conectas, 2014:51-70). It is worth noting, for example, that the general guidelines of Operational Policies are not subject to any social control procedure, which means that there is no possibility for social groups or movements to participate in defining financing priorities. Nor is there any determination of public hearings to allow affected groups to contest the development policies financed by the bank (Conectas, 2014:86).

It is relevant to note that BNDES' distance from social groups potentially affected by its policies is significant even compared to other regional and multilateral development banks. The World Bank, the Asian Development Bank and the IDB, for example, have internal sectors and panels to investigate human rights violations and damages suffered by local communities due to their enterprises (Fox and Brown, 1998:24). The BNDES, in turn, has only an internal ombudsman's office to clarify bank problems faced by client companies involving financial services (Conectas, 2014:92).

Theoretically, because the BNDES is not a multilateral bank, it would not require alternative control resources, as it is already subject to Brazilian courts. However, because its actions are established by intra-executive mechanisms in which discretionary decisions prevail, legal contestation of its actions is not trivial. In addition, parliamentary activity is excluded from both its mandate elaboration and its budget allocation. In this scenario, the inexistence of resources such as panels or broader ombudsman's offices within the bank or in the executive branch implies limitations to possibilities of contesting its agenda.

Therefore, although the BNDES has social and environmental protection policies in place, particularly a social policy for the meat industry, the absence of institutional channels of social control can favor a formal, yet often ineffective, monitoring of human rights violations (Conectas, 2014:79-92). A sharp evaluation of this problem is presented in a report by Repórter Brasil, an NGO that investigates slave labor and human rights violations. In its analysis of companies benefited with BNDES resources, Repórter Brasil (2011) found violation cases such as: slave labor, occupation of indigenous lands and environmental damage. The following passages of the report analyze the bank's procedures and indicate some of its problems:

Adopting a mere check list of environmental and labor laws as a socio-environmental assessment policy, a dominant practice in BNDES' operations, puts the institution a few steps behind even domestic private banks with regard to its degree of evolution in socio-environmental policies. If, on the one hand, it is necessary to acknowledge that the bank has proactive initiatives in this respect, such as its specific policies for the meat industry, for fighting slave labor, for encouraging projects to reduce greenhouse gas emissions, and the Amazon Fund, on the other hand, there is mounting evidence that all this is insufficient in view of the institution's operations as a whole. There is a lack of transparency in divulging information about the enterprises financed and of a broad dialogue with civil society, NGOs, social movements and local communities. [Repórter Brasil, 2011:2]

Repórter Brasil also recommends for the bank to create external, independent sustainability committees to assist its administration board, as already adopted by private-sector companies and public institutions both in Brazil and abroad. The bank should also consider in its socio-environmental risk assessment studies the indirect impacts of the enterprises financed both on the countryside and on cities. [Repórter Brasil, 2011:25]

In sum, the concentration of activities in internal transmission belts of the executive branch, with no public delegation procedures, makes governance impervious to social participation. Groups affected by the bank's financing projects have narrow chances of resisting financing policies or negotiating a recovery of losses. This factor is aggravated by the fact that government policies in general lack effective, institutionalized channels of interaction with civil society for the formulation of agendas. Affected groups can, at best, position themselves when policies are being implemented, but they rarely have a chance to be heard during the formulation stage.⁵ This situation has been aggravated by the weakening of mechanisms of social control over economic policies, such as the Economic and Social Development Council (CDES). From 2003 to 2006, the CDES had at least five annual full council meetings, but these were reduced to one or two in the period from 2010 (Schapiro, 2013a:33).

In addition to these questions relating to the social control, the second problem facing BNDES' governance refers to the deficiencies of accountability of both agenda setting and economic outcomes. In fact, this is a broader problem that affects the governance of industrial policies as a whole, and it is characterized by several institutional weaknesses. Among others the governance of industrial policies is absent of a ritualized process of agenda setting and also by the almost inexistence of evaluations about the measures implemented and impacts obtained (Schapiro, 2013a:20-48). According to Peres and Primi (2009:38-40), such problems have generally affected industrial policies implemented in Latin America. The authors note that, while, on the one hand, the region has seen an improvement in measure formulation, on the other, implementation and the assessment of impacts obtained are still weaknesses.

Such institutional deficiencies in the industrial policy affect BNDES' operation and are present in the negative evaluations pointed by the literature about its operation. Lazzarini and collaborators

⁵ This trace of the relationship between the State and society is highlighted by Taylor (2007:34).

(2015:237-253)⁶ suggest that the bank has been financing companies that could raise funds in the private market. The authors also show that there is a low correlation between the bank's disbursements and companies' investment decisions. This would suggest that BNDES' resources are working more as a financial relief for companies than an actual incentive for new investments or investments that otherwise would not be made.

This argument is backed by evidence relating with its credit portfolio, which presents lower risk borrowers than the national financial system's (SFN) average. This can be an indicator that the bank is financing companies with a good credit capacity which could be financed by private sources.

TABLE 3 QUALITY OF CREDIT PORTFOLIO — COMPARING BNDES AND SFN⁷ BASED ON BORROWER RISK RATING (DEC. 2014)

Borrower Risk	BNDES System (%)	SFN (all institutions) (%)	Private Financial Institutions (%)	Public Financial Institutions (%)
From AA to C	99,7	93,2	92,0	94,2
From D to G	0,2	4,2	4,9	3,7
H	0,1	2,6	3,1	2,1
Total	100	100	100	100

Source: The BNDES. Authors' own compilation.

In a similar line to that of Lazzarini and collaborators (2015), Almeida (2009:23-40) points to a distortion in BNDES financing decisions. In his analysis of the Productive Development Policy's (PDP) implementation, from 2008 to 2010, the author indicates that most of BNDES' disbursements were channeled into sectors with a low innovation capacity, in which, moreover, the country already has well-established comparative advantages. It is the case of the meatpacking and dairy sectors, which received robust support and conducted corporate concentration processes. Although innovation sectors and others with a higher degree of uncertainty have received increasing attention in recent years, they still get a smaller amount of resources compared to the commodities sector (Almeida, 2009:23-40).

With regard, particularly, to innovation financing, BNDES' trajectory suggests a detachment between its institutional learning and its operational practice (Schapiro, 2013b:156-162). Allocating resources to emerging companies and innovation projects is not a trivial task and the problems associated with this undertaking are well known: start up companies seldom have collaterals, project outcomes are uncertain, and firms' assets, usually intangible, are hard to measure. However, since the early 1990's, BNDES has developed a broad institutional capacity to support this

⁶ For an opposite conclusion, see Miterhof, Ferraz and Marques (2015).

⁷ National Financial System.

type of financing (Schapiro, 2013b:137-151; Schapiro, 2010:93-99). Nevertheless, the amount of resources for the segment remains low compared to total disbursements. This discrepancy between its institutional capacity and its financial operation confirms a general feature of Brazilian industrial policy, namely, a difference between its industrial transformation intentions and its effective implementation, which is dominantly oriented to reinforcing current comparative advantages (Schapiro, 2013a:28-34).

To a good measure, the distance between purposes and results is associated with the governance of relationships established between the executive branch and the BNDES. Like with all other industrial policy segments, institutional maladjustments in decision-making and accountability have prevailed in this delegation relationship. By institutional maladjustment, one mean the absence of procedures to formulate an industrial policy agenda, and an absence of public accountability mechanisms for both the impacts achieved and the consequences of non-achievement of established goals. In this respect, the report of the CPI (congress investigation) on the BNDES indicated as a deficiency of the bank its lack of mechanisms to evaluate the effectiveness of its disbursements:

The most important aspect in this discussion about costs and results of public policies for fomenting development implemented by the BNDESPAR is that, according with what this CPI has found, it is necessary to enhance the analysis of effectiveness of BNDESPAR's operations. Therefore, although it is well-known that the costs to society in the current model are high, it is necessary to quantify, in terms of social and economic development, the return of these policies. [Brazil, 2016:114]⁸

The low degree of institutionality of delegation mechanisms can favor a more conservative, short-term oriented financial action. The reason is that governments experience a dilemma between obtaining short- or long-term results, and, in the absence of institutional constraints on political decision-making and for explanation of choices, this dilemma is more likely to be arbitrated for the short-term (Geddes, 1994:36-42). In concrete terms, this would explain the preference for financing incumbent sectors, i.e., sectors already established, as well as the preference for larger companies, whose results are more predictable than those found in new segments.

This indication is corroborated by the BNDES' payment of dividends to the National Treasury. Data from the Federal Court of Accounts (TCU) indicate that state-owned companies and the BNDES in particular have played a relevant role in building fiscal savings, thus expressively contributing to build primary surplus. In 2009, for example, 70% of the fiscal results were funded by dividends and interests on own capital paid by state-owned companies. In 2011, 2012 and 2013, the BNDES paid the Treasury 57%, 56% and 47%, respectively, in dividends on its net profits (TCU, 2013). The likely inference in this case is that, in the absence of institutional constraints that can orient the bank's agenda, there is a strong incentive for the executive branch to promote an industrial policy focusing on short-term results and on meeting economic return parameters.

⁸ In 2014, the BNDES presented a first initiative for evaluating the impacts of its disbursements; see Pieroni, Pereira and Machado (2011:317-318).

This industrial policy orientation can also benefit the bureaucracy's choices. Firstly, because, as said earlier, the better the bank's economic results, the more its autonomy is preserved. Second, because due to its internal accountability mechanisms, an employee can be held accountable for an unsuccessful financing process, but he will not be rewarded for a decision that impacts economic development. This fact was pointed by the CPI report on the BNDES, which indicates precisely the problem of employees' remuneration being attached only to the bank's profits, and not to positive externalities generated by their financing decisions (Brazil, 2016:120). All this indirectly favors more conservative financial decisions, which tend to value predominantly solid companies and established sectors – a similar rationality to that of private banks, as Colby notes:

The accountability system incentivizes employees to issue prudent loans rather than riskier ones that may have a bigger impact on the economic development. An employee can be held accountable for a poorly performing loan years after it was approved. However, if a loan has a significant development impact years later, the employee is not sought out and rewarded. This helps guarantee the long-term financial success of the organization, but it also makes it act more like a private bank. [Colby, 2013:96]

In sum, BNDES' governance suggests advantages and disadvantages. The advantages are associated with the capacity of this institutional design, which is founded on an intra-executive political delegation, to ensure decision-making insulation and operational flexibility. In turn, the disadvantages stem from social imperviousness and a non-formal and institutionalized procedures for political delegation as well as the lack of control mechanisms over the economic achievements.

4.2 BNDES' GOVERNANCE IN THE BRAZILIAN INSTITUTIONAL ARRANGEMENT

Positioning BNDES' political delegation design within the Brazilian institutional macro environment, its features do not seem idiosyncratic. The prevalence of a discretionary governance has also marked the dynamic of regulatory agencies and the Central Bank (BC). The reason is that, in Brazil, there is what Prado (2010:7-13) points to as a dominance of the executive branch over regulation agencies.

Comparatively, in the American scenario, Congress dominance prevails, i.e., Congress acts both formally and materially as the *principal* in this political delegation relationship (Prado, 2010:5-6).⁹ Not only are regulatory mandates formally delegated through statute, but regulatory policy options are also materially controlled by the legislative branch. To that end, parliamentarians have active oversight mechanisms, both in the appointment of members and in the assessment of their performance. Confirmation hearings delimit the work agenda which regulators publicly commit to and which will guide the assessment of their regulatory choices. In the course of management, in turn, control by Congress is ensured through its competence for budget allocation. Agencies that fail to satisfy the parliament, or cannot justify their choices, can lose resources and thus weaken their capacity for

⁹ There are diverging views in this respect in the literature. See Moe (1987). Still, the predominance of the executive branch is stronger in Brazil, and the comparison seems pertinent, as Prado (2010) notes.

action. In other words, accountability towards the parliament is a real control tool, since regulatory activity is influenced by Congress actions.

In the Brazilian regulatory arrangement, in turn, the conditions for action of both agencies and the BC are different. Even though formal delegation terms are established through laws, the connection between these entities and the parliament is weak. The political *principal* in this delegation relationship is the executive branch, which presents the policy agenda, defines agencies' budgets, and places itself before the public opinion as the branch responsible for regulating the economy (Prado, 2010:7-13).

There are reasons for this executive prevalence in Brazilian regulatory governance, and they are associated with the characteristics of the political model — coalitional presidentialism (Abranches, 1998). The model, which combines presidentialism with a broad party fragmentation, has quite well-defined institutional bases, and its guarantor is the executive's disproportionate powers of agenda, veto and information. These factors make the executive branch a preponderant actor in Brazilian politics, while Congress usually drags behind. Without a power of agenda (or with only a limited one), the legislative branch is not pressed to come up with proposals and formulations, thus developing a small familiarity with technical proposition assessments (Anastasia, 2000). As a result, the legislative branch does not usually play an active role as a level of accountability (Santos and Patrício, 2002). In a worst-case scenario, attributing this role to Congress can favor undue politicization of the executive's agencies, due to the political patronage that usually characterizes government coalition building (Loureiro, Olivieri and Martes, 2010:96-103).

Therefore, in the institutional macro environment, there are advantages for discretionary governance. It has been through this institutional alternative that administrative reforms were able to reserve part of the bureaucracy to act as excellence areas — insulated from the cronyism that characterizes the executive-parliament relationship (Loureiro, Olivieri and Martes, 2010:104-108). Such is the case of various entities created over the Brazilian economic development, particularly in the economic area, such as the Central Bank, the Independent Regulatory Agencies and the BNDES itself.

However, the regulatory agencies and, particularly, the Central Bank have something to teach to BNDES' governance. In both cases, although the political delegation also occurs in the executive's internal environment, there are mechanisms which favor decision-making institutionalization, accountability and social control.

In the case of the BC and of monetary policy, the Decree 3088 of 1999 establishes a system of competences, demarcating agenda formulation, reporting and accountability procedures for the entity in charge of its execution. In this design, the National Monetary Council (CMN), an agency of the executive branch, acts as the *principal*, and the Central Bank plays the *agent* role. Under the Decree, by the 30th of June each year, the ministry of finance suggests to the CMN the inflation target to be pursued in the following year. The CMN delegates the inflation target to the BC and, over the year, the BC must submit quarterly performance reports regarding its attribution. At the end of the year, if the inflation target has not been achieved, the law foresees consequences: the BC president must submit an explanatory open letter to the ministry of finance, informing the causes of the non-fulfillment of the target, the measures that will be adopted to fulfill it, and a deadline for this to occur. Although the delegation occurs within the executive branch, the institutional design prevents the BC from becoming a mere government section, which would

make the monetary policy decision process opaque and less subject to public control. The way it is established, this design has contributed to institutionalize the monetary policy, thus favoring inflation control effectiveness.

Compared to the Central Bank, the regulatory agencies show a greater potential for social control. As expected, Congress plays no active role in controlling regulatory activities either. However, the possibility for stakeholders to participate in policy formulation has showed some potential, particularly by means of public hearings. The guarantee of social control and the use of public hearings were relevant cogs in the state reform, to the point that sectoral legislation such as the General Telecommunications Law (Art. 19, section 3, and Art. 42), and the Administrative Procedure Law (Art. 31), both enacted in this context, foresaw public consultation as a regulatory condition. Even though empirical works indicate that its functioning is still asymmetric, involving a greater participation of service providers than of users (Mattos, 2006; Oliveira, Batista and Sauerbronn, 2105:13, 14), this design presents possibilities to expand social control over the state's action.

The BC's design and the potential offered by regulatory agencies provide two inputs for evaluating BNDES' governance. Firstly, both experiences confirm the virtue of a delegation design within the executive branch. In the Brazilian institutional environment, this condition is a safeguard for insulation and operational flexibility. Second, however, in both cases, the executive delegation is accompanied by mechanisms intended to mitigate the conflict between decision-making insulation and the possibilities of social participation and public control.

In the case of the BNDES and industrial policy as a whole, establishing social participation channels and institutionalizing the procedures of policy delegation and control could improve its governance. In sum, they would represent participatory possibilities that could simultaneously enlarge the democratic possibilities over technocracy and also increase the cost of an automatic alignment between government short-term horizons, bureaucracy conservative decisions and the interests of consolidated business groups.

5. CONCLUSIONS

This article aimed to assess the institutional design of the political delegation relationship that informs BNDES' actions. To that end, it used the framework of administrative law, particularly concerning forms of political delegation, discussing two types of governance: legal and discretionary. Legal governance is a type of arrangement in which public policies are substantially defined by Congress, while in discretionary governance, public goals are defined within the executive branch. Both types have different comparative advantages for governing public policies. While legality favors predictability and a greater political debate, discretion allows for a greater flexibility and a smaller political transaction cost.

Based on these elements, we examined the governance that guides BNDES' relationships in Brazilian public administration. The present work described this arrangement as discretionary, to the extent that the political delegation relationship occurs between the executive and the BNDES through an internal transmission belt. Congress plays a supporting role in this configuration.

The main claim was that, in virtue of the Brazilian institutional environment, discretionary governance has proved advantageous. The BNDES has been spared of political-parliamentary clientelist

games and has managed to secure some operational flexibility to act in times of economic crisis. On the other hand, there are two concurring problems in this design: the absence of participation channels for civil society and the low degree of institutionality for the agenda setting and for the accountability of economic outcomes.

Finally, the article highlighted the experiences of Independent Regulatory Agencies, particularly regarding public consultations, and of the Central Bank, regarding the institutionalization of procedures for both agenda formulation and accountability of economic results. These entities seem to combine important lessons for an institutional learning that might result in an improvement of the governance that rules the BNDES.

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