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THE ROLE OF REGULATORY AGENCIES IN PUBLIC POLICY-MAKING ISSUES

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EXECUTIVE SUMMARY

In Brazil, the regulatory agencies have the executive task as a primary target, i.e. they provide the means to achieve the government goals. These goals are based in public policy-making that can be defined as the process by which governments translate their political vision into programs and actions to deliver outcomes, which is the desired change in the real world. In addition to this executive task, the agencies have other competencies such as rule-making, monitoring, controlling and sanctioning. Considering these competencies together, regulatory agencies can perform another action that is to play an important role in public policy-making issues. Thus, the aim of this work is to provide information on public policy-making process and its relation to regulatory agencies.

The influence of regulatory agencies in the course of the political decision-making processes is expected when related to the regulation of a specific sector. Firstly, they possess the technical expertise and have access to many exclusive pieces of information that can be considered useful for developing the "best solution" to a given problem. Secondly, they are powerful organizations that cumulate several competencies of execution and benefit from a certain acquaintance with the target sector. These premises should be considered necessary by the political decision-makers in order to ensure the proper implementation of the new laws. Thirdly, they are formally independent in order to provide credibility to the political process; therefore agencies can legitimize a preformatted solution developed by the political actors.

The first chapter will present the major players in policy-making in Brazil. The research will try to investigate to what extent regulatory agencies participate in this process and which phases they have the major influence.

The second chapter will focus on regulatory agencies. Some key issues will be discussed: the autonomy and independence of regulatory agencies and the importance of control mechanisms.

The third chapter will use the Brazilian Electricity Regulatory Agency - ANEEL as an example to illustrate the attributes of the Brazilian formally independent regulatory agencies.

In the fourth chapter the American experience will be discussed. This work will investigate the influence of regulatory agencies in the American national decisions.

The conclusion shows that the Brazilian regulatory agencies should play a more decisive role in policy-making. Thus, to accomplish this task, it is necessary to enhance the communication between the executive and legislative within agencies. The regulatory agencies should have more participation in the decision-making process, in order to improve the choice of policy instruments, understanding of law and regulatory effects and to avoid red tape.

CONTENTS

1. KEY POLICY ACTORS IN BRAZIL

The Brazilian Constitution of 1988 defines the political institutions in Brazil and the powers of the political actors in the policy-making process. This new Constitution reflects a number of principles such as decentralization, transparency, participation, social control and redistribution that produced a significant transformation in the patterns of policy-making and implementation. [1]

Policy-making in Brazil starts with an interaction between the President and members of Congress, though it is always accompanied by other political actors. The following sections describe the roles played in this balance of power by the Executive, Congress, Judiciary, Public Prosecutors and regulatory agencies.

1.1 The Executive, Congress and Parties

In Brazil Ordinary and Complementary laws may be initiated by any member of the Chamber of Deputies or Senate, the President, Ministers of the Supreme Court, the General Attorney, or by citizens. Popular initiative requires one percent of the national electorate, representing no less than 0.3 of a percent of the electors in at least five states, to launch the legislative process. The debate on proposed legislation initiated outside of Congress begins in the Chamber of Deputies.

For example a bill sponsored by a member of the Congress can be introduced in either chamber. If it is introduced in the Chamber of Deputies, it is first examined by the party leaders and then directed to the appropriate parliamentary committees for review. There are permanent technical committees in the Chamber of Deputies, including education, consumer protection, agriculture, labor, social security, transportation, economy, and finance; in the Senate - economic affairs, social affairs, foreign relations, defense, infrastructure, and the judiciary; and a joint Senate-Chamber budget committee.

All proposed legislation is first reviewed by the judiciary committee for its constitutionality. If it passes this test, it is then sent on to the specific technical committee or committees with jurisdiction in its area. Once approved in the Chamber, it must similarly be reviewed by the Senate judiciary and economic affairs committees. If approved by the full Senate, it then goes to the Planalto Palace for the President's analysis.

The President may either sign it into law, or veto it in whole or in part and an absolute majority of both houses is required to override the President's decision. A bill that originates in the Senate must also pass the Chamber of Deputies.

Scholars who analyze the Brazilian political system, especially its electoral rules and political parties, usually affirm that they provide significant obstacles for the Executive to approve its agenda, thus creating tremendous governance problems (Mainwaring and Scully, 1995; Mainwaring and Shugart, 1997; Haggard, 1995; Haggard and Kaufman, 1992; Ames, 1995a, 1995b, 2001). For these authors, the electoral rules offer strong incentives for candidates to develop direct links with their constituency groups rather than mediating such relations through political parties. Additionally, this institutional context generates incentives that lead to a personalized vote, as opposed to voting for political parties, and to a high saliency of constituency pressures in incumbents' electoral calculus (Ames, 1995; Samuels, 2001).

By contrast, a second group of authors has strongly questioned this predominant view. Rather than stressing the decentralizing effect of electoral rules, they emphasize the institutional rules and structures that centralize the legislative process itself and the powers held by the Executive (Figueiredo and Limongi, 1999, 1997, 1995; Pereira and Mueller, 2000; Meneguello, 1998). These authors attempt to explain how institutional variables internal to the decision-making process (the distribution of power inside Congress) and the institutional legislative and non-legislative powers held by the President (decree and veto powers, right to introduce new legislation, permission to request urgency time-limit to certain bills, discretionary power on the budget appropriation, etc.) work as key determinants for legislators to behave according to the preferences of party leaders.

The Brazilian political system can be characterized neither as a purely decentralized nor as a purely concentrated system (Pereira and Mueller, 2002 and 2004). While some features such as electoral rules, a multiparty system, and federalism act towards decentralizing the political system, other features such as the internal rules of the decision-making process in Congress, the constitutional powers of the President, and his capacity to selectively distribute political and financial resources (most of them locally allocated), act towards centralizing it. In fact, the electoral rules provide incentives for politicians to behave individually, while the internal rules of Congress, the President's power to legislate, and the centralization of benefits by the President cause legislator behavior to be extremely dependent on loyalty to the party and on Presidential preferences.

It is claimed that even a political system with incentives for opposing behaviors, like the Brazilian one, provides equilibrium and stability. However, in this case it is a very dynamic equilibrium that can change from one issue to another and it depends on the capacity of the President and his party leaders to offer appropriate incentives (political and economic benefits) that can ensure the best electoral returns to individual legislators. This combination of institutional rules is fundamental to understanding how it is possible for weak political parties in the electoral arena to coexist with strong political parties inside Congress (Pereira and Mueller, 2003).

Thus, there is no contradiction between party and individual behavior in the Brazilian political system at the same time. In fact, the former is one of the most important reasons to explain the latter. In other words, legislators behave according to the preferences of party leaders within Congress so as to have access to benefits that will increase their individual chance of surviving politically.

1.2 Judiciary

The judicial branch of Brazil is comprised of the Supreme Court, the Superior Court, regional federal appeals courts, electoral courts, labor courts, military courts, and

state courts. The constitution stipulates criteria for entry into judicial service (by means of a competitive examination), promotion (by seniority and merit), and mandatory retirement at the age of 70 or after 30 years of service.

The main characteristic of Judiciary when relating to policy-making is to analyze its independence from the other powers in order to have an effective policy oversight. Thus, the Constitution established that the Judiciary determines its own annual budget and that the courts appoint lower courts judges. Both of these rights removed potential instruments of control over the Judiciary from other branches of government.

Another important characteristic is the nomination of the judges of The Supreme Court. Eleven judges comprise the Supreme Court. The President nominates people for life terms, though with compulsory retirement at 70, and the Senate confirms or denies nominations. However, the composition of the Court has changed very slowly over time. This means that each President typically has the chance to appoint only a small number of judges, which makes it difficult to appoint the median voter in most issues, thus limiting the influence of the Executive.

These factors ensure, or at least helps the courts to make decisions in a non-political and unbiased manner.

1.3 Public Prosecutors

This subsection describes the role of the *Ministério Público* (MP - public prosecutors) as political actors in the policy-making process. Although several countries have public prosecutors, the MP plays a particularly important role in Brazil in shaping the outer features of public policy. This subsection describes how the political institutions give the MP the independence, legal instruments and resources that allow it to be an extremely active watchdog of the actions of the other political actors. Because the MP is already intensely motivated to protect society from the misconduct and/or oversight of the other

political actors, this has made the MP a central figure in the process of making and implementing policy. [1]

The *Ministério Público* has existed in Brazil since 1609 (Macedo Jr., 1999), although its role and institutional organization have changed over time as different Constitutions have redefined its structure. As in most countries, one of its purposes is to prosecute, in the name of the State, those who commit crimes. However, in Brazil the MP has taken on an additional role that has led it to turn much of its attention to the process of public policy-making. These changes began in 1985 when a legal instrument known as the "public civil suit" (*ação civil pública*) was created, through which the MP could take to court any person or entity doing harm to the environment, consumer rights, or the artistic, cultural, historical, tourist and landscape patrimony of the nation.

It was the 1988 Constitution, however, that amplified the scope of these public civil suits by stating that it is the institutional role of the *Ministério Público* to "promote civil inquiries and public civil suits for the protection of public and social patrimony, of the environment and of other diffuse and collective interests." This apparently innocuous article has in effect allowed the MP to take under its jurisdiction the monitoring of all public policy, since practically any act of public policy-making can be construed to affect "diffuse and collective interests."

Clearly, the establishment of a new role for the MP in the Constitution would have been innocuous had it not been accompanied by other provisions that granted the MP the instruments necessary to carry out that role. But the Constitution did in fact provide them, in terms of independence, resources and legal instruments. Whereas before the Constitution the MP was part of the Executive power, the new charter made the MP autonomous, not only in terms of insulation from interference by the other powers but also in terms of budgets, which are fixed and automatic. The Executive's only prerogative is to choose the head of the federal MP from one of its members at the start of the term, being immovable thereafter.

1.4 Regulatory agencies

The focus of this work is on agencies that possess regulatory competencies. Not all agencies are regulatory agencies: some have only executive tasks; others are simple consultative organizations for policy-makers. Not all agencies are formally independent: some are in subordinate relationships with public administration and ministries. Instead, independent Regulatory Agencies are defined as "governmental entities that possess and exercise some grant of specialized public authority, separate from that of other institutions, but (…) neither directly elected by the people, nor directly managed by elected officials" (Thatcher and Stone Sweet 2002). [2]

In addition, this work will study the most powerful and institutionalized agencies, that are those with a specific organizational model (chairperson or director – board or similar body – own secretariat), and that benefit from the broadest array of regulatory competencies, such as rule-making, monitoring and controlling and sanctioning. Regulatory agencies in Brazil don't have adjudication authority.

Brazil has created 10 regulatory agencies in important sectors of the economy such as Electricity, Oil, Transportation, Telecommunications, as well as in social regulation (Health Insurance, Health Surveillance, etc). Before the new agencies were created, the regulation of the sectors resided in specific ministries, or offices within the ministries.

The switch to autonomous agencies represented a dramatic shift in the *locus* of power since their design provided them with a high degree of independence from the Executive and Congress. Congress and the Executive gave agencies jurisdiction over decisions that were important to other political actors, including in particular the power to set tariffs and the power to grant the concessions through which the right to provide a public service is conferred to the private sector. The insulation resulted from the appointment process of the directors of agencies. Most agencies in Brazil have rules that provide the directors with stability, so that they can only be removed under very exceptional circumstances, requiring corruption or malfeasance proved in a court of law.

The President nominates directors and the Senate confirms nominations. The terms of directors are staggered and as a result policy is more stable.

It is expected that agencies play an important role in the course of the political decision-making processes, which are related to the regulation of a specific sector. First, regulatory agencies should possess the technical expertise and have access to many exclusive pieces of information that can be considered useful for developing the "best solution" to a given problem. Secondly, they are powerful organizations that cumulate several competencies of execution and benefit from a certain acquaintance with the target sector. Therefore, their agreement can be considered necessary by the political decision-makers in order to ensure the proper implementation of the new laws. Thirdly, they are formally independent in order to provide credibility to the political process; hence agencies can be included in order to legitimize a preformatted solution developed by the political actors in favor of a given reform.

The next chapters will focus on Brazilian regulatory agencies and its prerogatives to policy-making. The Brazilian Electricity Regulatory Agency– ANEEL will be used as an example. They will show that although the regulatory agencies have the characteristics necessary to be an effective actor in the policy-making process, their actions are mainly executive, in order to assure that these policies designed by the Ministries and Congress will be correctly implemented.

2. REGULATORY AGENCIES: AUTONOMY AND CONTROL

As pointed out in the previous chapter, to be effective in policy-making, it is important to assure independence and autonomy of regulatory agencies; establishing an administrative body, with high expertise and independence in relation to the political context and governmental structure. By contrast, the Constitution also created control mechanisms. Thus the regulatory agencies in Brazil are subjected to executive, legislative, judiciary and social control.

The following sections will provide more information on these topics.

2.1 Independence and Administrative Autonomy

The autonomy and independence of regulatory agencies are essential for them to adequately perform their role of regulation in the economic sector for which they were established, as the common interest cannot be subjected to constant political interventions. The main elements that assure this independence are: [3]

a) Appointment of Directors with technical background;

b) Long Directors' tenure;

c) Staggered Directors;

d) Collective decision;

e) Quarantine after completion of term;

f) Budgetary, financial and administrative autonomy;

g) Technical staff composed of civil servants;

h) Different salary rules to attract and retain well-qualified staff;

i) Appeal of decisions only to courts;

j) Transparency of the decisions.

Generally, some authors point out that the directors stability it the most important attribute to assure independence in agencies' acts and decisions. Once chosen, the directors can only be removed under very exceptional circumstances, requiring corruption or malfeasance proved in a court of law. Due to this fact the directors are not constantly subjected to political interference, which is what gives better stability for entrepreneurs.

Mueller and Pereira (2002) and Melo (2001) argue that the most important motivation for the creation of regulatory agencies in Brazil, as well as the main determinant for the specific regulatory design chosen in each sector, was the issue of credibility. Because of this, the government during the late 1990s had to signal to the market that it would not act opportunistically once investors had undertaken their investments, especially in the electricity and telecommunications sectors.

2.2 Budgetary and Financial Autonomy

Financial autonomy is regarded as the key item to ensure the autonomy of regulatory agencies and to achieve this aim, it was created what is called the "regulation taxes" (or control taxes) charged by the Brazilian Federal Regulatory Agencies. Thus, in theory, the agencies would not depend on the government budget.

However, the financial and budgetary autonomy is not respected in practice, being usually ignored by the Central Government. Although they receive revenue from general budgetary allocation by the government, these taxes have been collected and transferred to the agencies after a decree of contingency.

Unlike other countries, Brazil has a system where the President controls the budget process and may interfere in several stages of this process, which begins with a proposal made by the President to the Congress and ends with the promulgation of the Annual Budget Law.

The analysis of how a regulatory agency is affected by budget constraints is not very simple. In the particular case of Brazil, two additional factors make this examination even more difficult. In the last years, in an attempt to deal with fiscal crisis, the government

has reduced the budget execution, imposing strict limits on public expenditures in an effort to reduce the fiscal deficit. Besides that, the annual available budget of the regulatory agencies is consequently restricted.

An agency with financial autonomy shouldn't have restriction in the execution of its budget that would compromise its basic functions (such as monitoring), and the law should have a provision to prevent such occurrences. This contingency is also happening with other agencies, and has been hampering their activities and undermining the effectiveness of the regulatory regime. [4]

2.3 Legislative control

The Legislative control can be observed in articles 49 and 70 of Brazilian Constitution:

> "**Article 49**. It is exclusively the competence of the National Congress:…
>
> X - to supervise and control directly or through either of its Houses, the acts of the Executive Power, including those of the indirect administration;"
>
> **"Article 70**. Control of accounts, finances, budget, operations and property of the Union and of the agencies of the direct and indirect administration, as to lawfulness, legitimacy, economic efficiency, application of subsidies and waiver of revenues, shall be exercised by the National Congress, by means of external control and of the internal control system of each Power."

It is the duty of National Congress to verify if there is any excess in regulatory power by regulatory agencies and suspend its effectiveness when necessary. It must be stated that this is not discretionary, but duty of National Congress.

The power of regulatory agencies is not unlimited, since there can be no disruption of the separation of powers. Allowing that regulations published by regulatory agencies can

amend and repeal laws is contrary to what is provided in the "Democratic Rule of Law". The Legislative branch through this control prevents the regulatory agency to have unlimited power to create standards and rules.

Although the Legislative branch has the authority to halt the executive acts beyond the limits of its legislative delegation, is not authorized to cancel or revoke the regulatory standard even if the regulatory agency overstep its jurisdiction, but only to suspend its effects. In practice the autonomy of regulatory agencies toward the Legislative branch is quite reduced as the legislator may intervene in its legal system and even abolish these bodies.

Other forms of exercise of legislative control are: requests for information on certain subjects and convening of regulators to provide information to Parliamentary Committees of Inquiry.

2.4 Judiciary control

The Regulatory Agencies, besides the exercise of administrative function, have a decisional function, solving disputes in the administrative field among agents and consumers. Despite the fact that Regulatory Agencies have more independence than other bodies, its Directors must respect the principle of legality and other constitutional and administrative principles.

The judicial control is exercised by the bodies of the Judiciary and is a way of preserving individual rights, as it aims to ensure the application of the law in each case. According to Alexandre Santos de Aragão, due to the technical expertise given to regulatory agencies and the discretion conferred by law, the Judiciary should defer to decision of the regulatory body, because otherwise, the matter would be decided by the judiciary and not by the regulatory agency.

Judicial control can never replace the regulatory agency's technical evaluation and this control should be restricted to aspects of the legality of the act, as provided in Article

5°, XXXV of the Federal Constitution: "the law shall not exclude any injury or threat to a right from the consideration of the Judicial branch".

Unlike what is often argued, the intervention of the Judiciary to review the decisions of regulatory agencies is absolutely normal. However it is necessary that this branch be more agile and efficient, as the absence of such features may withdraw the efficacy of the regulatory framework established, since the agencies were created with the objective of improving the performance of the State. It is known that the judicial system in the country is complex, expensive and full of loopholes.

Due to the dynamism, social importance and technical character of the decisions of the regulatory agencies, the creation of specialized federal Courts in regulation could help to end the legal regulatory uncertainty. With them, specialized judges would be responsible to analyze the decisions of regulatory bodies, which would greatly reduce the chance of the courts adopting different positions regarding the administrative decision. Although it doesn't exist in the Brazilian Law, the creation of specialized Courts is a possibility provided in the Constitution and to put it into practice would be extremely useful, as well as in the regulatory agencies, experts in regulation would be responsible for reviewing each case, making the process more agile and efficient.

2.5 Executive control

The activity of Regulatory Agencies involves the implementation of public policies and guidelines set by the Legislative branch, creating standards and rules for the regulated sector. Furthermore, the agencies monitor the compliance with the rules through the processes of oversight applying penalties when appropriate.

While not subordinated to the Executive, regulatory agencies' authorities are delimited by public policies set by the central government (through, for example, decrees and normative instructions established by the ministries). This is not a hierarchical relationship, however, and once the regulatory agencies write rules, regulated entities may not appeal to the Executive.

2.6 Social control

It is a complementary type of control and it is justified due to the fact the society is one of the agents involved in the activity of regulation, as service user or consumer of goods. Thus, their interests should also be considered in the activity performed by the agencies, and as it is an interested part, is also responsible for controlling the regulatory activities.

The legislation establishes social control on the basis of public hearings, public consultation, open consultation forum and participation in boards. These mechanisms are useful tools to increase transparency, efficiency and effectiveness of regulation as well as reducing costs. [4]

The participation in these processes for ordinary people is not simple, as it requires availability of time, technical knowledge and accurate information. Thus, due to the fact that usually technical issues are treated and there is great difficulty in understanding the administrative process, the social control exercised over the decisions of the agencies is usually done through associations, represented by its specialists.

3. THE ROLE OF ANEEL IN PUBLIC POLICIES

The regulatory reforms introduced in the various infrastructure sectors of the Brazilian economy from the 1999s onwards were based in two pillars. The devising of policies was placed in the hands of the administration proper, often through a cabinet-level council. The enforcement of such policies, on the other hand, was conferred upon independent agencies – a relative novelty in Brazilian administration. In order to accomplish their task, agencies were also entrusted with some degree of rule-making power. [5]

Specific institutions were created for each of major infrastructure area. In the case of energy, the National Council for Energy Policy (CNPE), responsible for proposing national policies and specific measures to the President, was created by the Oil Law in 1999, as well as the agency responsible for oil and gas – ANP.

The regulatory agencies model is characterized in a way that there is a clear barrier between public policy formulation and economic regulation. Moreover, there is no incompatibility between the regulation activity done by agencies and the formulation of public policies by the executive. It can be seen that they can live harmoniously together, in a cooperative way.

The role of regulatory agencies is to regulate and monitor its competencies and implement the sector policies. Its function is not to fulfill the policies defined by the executive, but to attain what is set in its creation law. Agencies must help policy implementation by focusing on three main objectives that sometimes are hard to reconcile: predictability, stability and flexibility.

The regulatory process in the electrical sector is shown below:

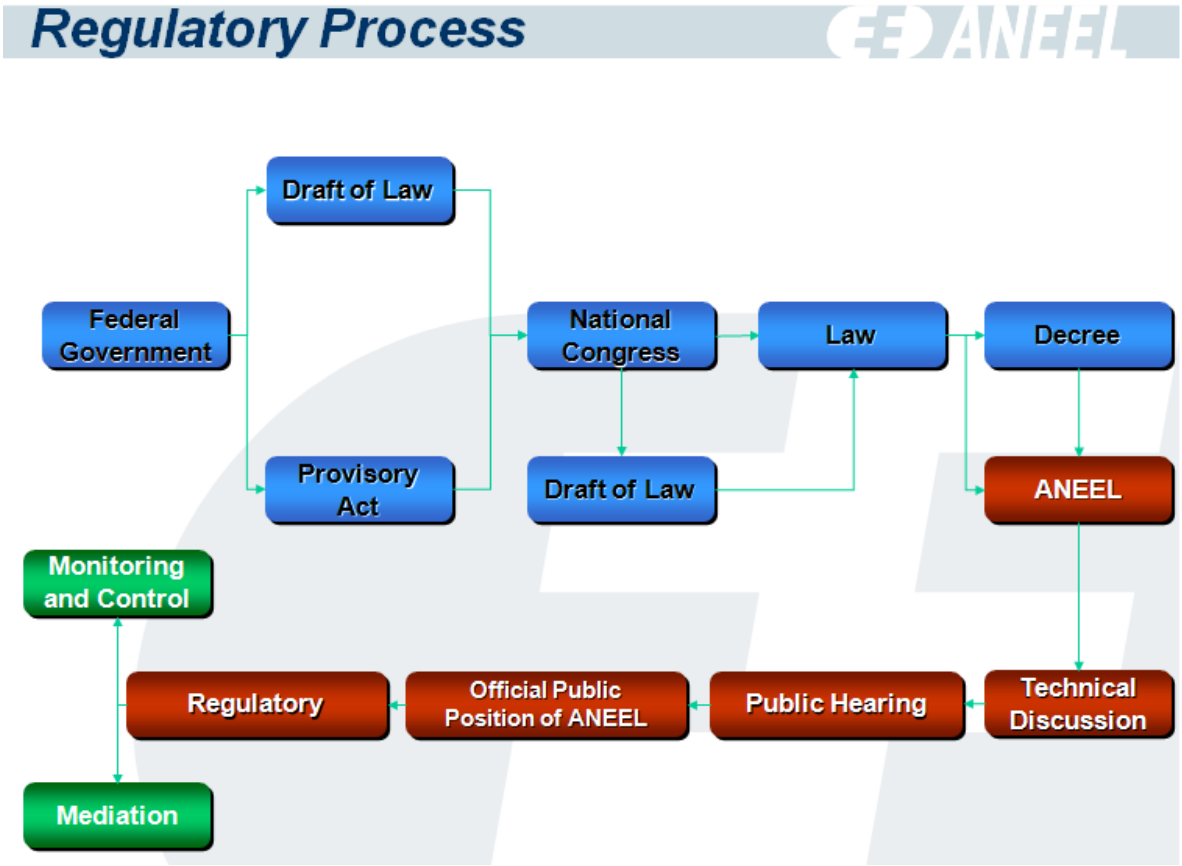

Figure 4: Regulatory process in electrical sector

There is no regulatory model without rule stability and flexibility, especially when dealing with infrastructure investments, where a great amount of resources is involved, alongside sunk costs. The entrepreneurs need an environment in which they can develop their activities and have fair profitable capital. On the other hand, consumers must benefit with productivity gains and innovation, exactly as if it is a competitive market. [6]

Thus ANEEL's mission is presented below:

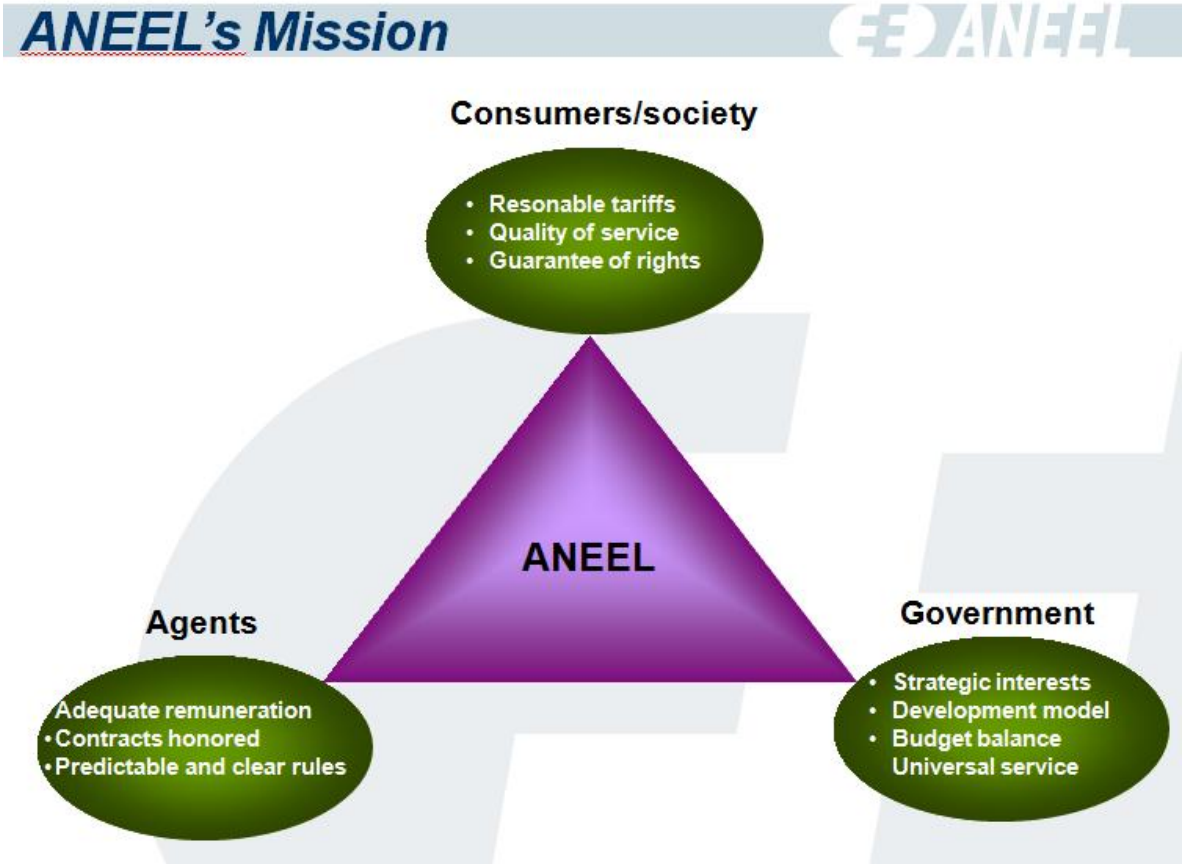

Figure 5: Aneel's Mission – Equilibrium

The next subsections will show that ANEEL has almost all responsibilities expected by formally independent regulatory agencies, i.e. rule-making, monitoring, controlling, sanctioning, and adjudicating. The last one is not developed by agencies in Brazil. An accessory activity, the Institutional Relationship, will complete this overview.

3.1 Rule-making

The normative function is probably one of the most debated aspects of regulatory agencies in Brazil. It is clear that Constitution adopted the principle of power separation, which means that the primary norms are almost only created by laws. So rule-making by regulatory agencies can only involve secondary norms, i.e., those derived of laws in order to promote effectiveness to them, always observing its limits.

ANEEL has basic function to normalize the policies and guidelines established by the Federal Government for the electrical sector. For this subsection the Governmental Program *Luz Para Todos* (Light for all) will be used as an example of ANEEL's intervening in the development of public policies.

The program *Luz para todos* was created by the Federal Government by Decree nº 4873 in 2003, with the objective of providing energy to the low-income rural population. Coordinated by the Ministry of Mines and Energy (MME), the program moved ahead to 2008 the goals initially established for 2015 of supplying electrical energy to Brazil's rural population who still did not have access to this public service. As a result, Terms of Commitment were signed between the energy distribution companies and the MME, having ANEEL as an intermediary. ANEEL is also responsible for monitoring and sanctioning the distribution companies. In 2008 the program deadline was postponed to 2010.

Below it is described an example of ANEEL's regulation over the Federal Government Program *Luz para todos Program*:

a) Resolution 223/2003 – ANEEL establishes the general conditions of elaboration of the Plans of Universal Energy Supply, including the discretion of anticipating the goals of any distribution company if there are available resources and penalties.

b) Resolution nº 83/2004 – ANEEL establishes the conditions for using intermittent power to supply energy for the population, due to *Luz para todos* Program.

c) Resolution nº 175/2005 – ANEEL establishes the conditions for revising the Plans of Universal Energy Supply, in order to postpone the goals for 2010.

d) Resolution nº 646/2006 – ANEEL authorizes the distribution company ELETROACRE to implement a renewable energy project, related to *Luz para todos* Program.

e) Resolution nº 229/2006 – ANEEL establishes the conditions for transferring private distribution nets to *Luz para todos* Program.

f) Resolution nº 238/2006 - ANEEL revises the penalties related to the program.

g) Resolution nº 359/2009 – ANEEL revises the Resolution 229/2006.

h) Resolution nº 365/2009 – ANEEL revises the Resolution 175/2005, and the goals for the distribution companies.

3.2 Monitoring and controlling

Inspection is an instrument that assures obligations by the electric sector companies. The inspection actions are permanent, according to a set annual calendar. Eventual actions are also done, destined to the inspection of great relevance facts throughout the year. This task is performed by three superintendencies: Superintendency of Economic and Financial Oversight, Superintendency of Eletric-Power Services Oversight and Superintendency of Generation-Services Oversight. The inspection reports elaborated by ANEEL are public and can be found on the Agency's electronic page.

The consumers can also contribute to monitoring while participating in the public hearings, held in the state to discuss the Distribution Company's Annual Inspection Program; participating in the annual research of the ANEEL Consumer Satisfaction Index (IASC) and registering their complaints at the ANEEL Ombudsman (toll free call) or with the state agency.

As an example of this work the inspections done by the Superintendency of Electric-Power Services Oversight are summarized below:

Year	Number of Inspections	Number of Fines
1998	4	3
1999	66	12
2000	104	10
2001	320	12
2002	101	15
2003	120	20
2004	62	13
2005	112	31
2006	103	19
2007	78	32
2008	64	35
2009	43	24

Source: ANEEL

3.3 Sanctioning

Failure to follow the rules of the electrical sector by generation, transmission and distribution companies verified in monitoring process can result in penalties such as warnings, fines, and concession repeal.

The fines applied by ANEEL until 2007 are listed below:

Year	Number of Fines	Value (R$)*
1998	4	1.075.221,70
1999	93	31.540.109,75
2000	48	26.148.099,72
2001	54	24.246.174,86
2002	170	45.364.451,03
2003	81	76.507.242,71
2004	54	35.218.874,26
2005	64	36.585.861,33
2006	57	44.493.201,30
2007	23	8.557.937,12
Total	**648**	**329.737.173,78**

* Exchange rate Real-US Dollar 03/05/2010:1.7839

3.4 Institutional Affairs

In ANEEL, the Superintendency of Institutional Affairs is responsible for the relation within other society segments including the federal and local legislative and executive power.

Among many other activities, this superintendency monitors the legislative and executive acts, especially new bills. During the discussion process of a new law ANEEL can promote a technical debate, in order to show the impacts and benefits for the electrical sector.

In November, 2009 the superintendency was monitoring approximately 500 projects held in National Congress. The main topics are: Regulatory agencies, subsidies and tariffs, energy generation, taxes, environment, transmission and distribution and consumer defense.

A legislative agenda is been developed with 102 propositions in National Congress related to electrical sector and the regulation activity. The objectives are:

- Better bill quality – Bring in technical analysis to congressmen.
- Transparency – Promote visibility to important topics.
- Strategy – Define the strategies of ANEEL actions toward legislative acts.

This agenda will be distributed to electrical sector agents, National Congress and state agencies.

4. THE NORTH AMERICAN EXPERIENCE

The regulation in USA started long before in Brazil. Despite the fact that they follow the same general constitutional framework and procedures, there are some differences regarding the power to create and enforce public policies that are investigated in this work. Also, the relationship of agencies and the government brings up some questions about the appropriate role for agencies in public policies. These topics will be studied below.

4.1 Institutional framework

The regulations in U.S. start in the Congress which defines the goals of regulatory programs, identifies the agency responsible for them and the procedures that must be followed. This means that the quality of law will determine the quality of subsequent regulations. Delegations of regulatory activity varies widely, hence there are some laws that require no subordinate regulations, while others are so broad that subordinate regulations determine their impacts. Thus congressional oversight over regulation has been quickly increasing. Since 1996, final regulations are sent to the Congress for review. [7]

The President also has constitutional authority to oversee the activities of the executive branch, but the wide range of design in regulatory bodies determines to what extent he can control their actions. In general, regulatory bodies are organized in two ways: as executive departments directly accountable to the President or as independent commissions whose offices are appointed by the President, with consent of Senate, but whose terms are defined by law.

The Courts play an important role regarding regulatory decisions. They are entitled to hear a variety of challenges to regulatory decisions, ranging from the delegation of authority to agencies by Congress, to the legality and fairness of agencies dealings with individual regulated parties.

Finally, the regulation in the U.S. is a complex mixture of federal, state, and local rules. The 50 state governments have legal and regulatory authorities in their areas of competence. There are many interactions between federal and state regulatory powers with concentration in some policy areas and decentralization in others.

The regulatory agencies are divided in two main groups: social regulations and economic regulations. Social regulations address issues related to health, environment and safety, while economic regulations deal with industry-specifics, e.g., energy. Some of these agencies are executive branch agencies, while others are independent agencies. These agencies were granted power by the Congress to determine within certain field what is to be regulated and how to get it regulated. [8]

Constitutional scholars, based on the nondelegation doctrine, often argue that it is against the US Constitution to grant so much power to regulatory agencies. On the other hand agencies claim that experts are better able to make decisions on technical issues, with less political influence. The consequences of this model will be further analyzed in section 4.3.

Courts have ruled that as long as an agency acts within rule-making authority delegated by Congress and follows the procedures in APA (The Administrative Procedure Act), they are entitled to write and enforce regulations, always subjected to judicial checks.

The APA constrains executive rulemaking in three main ways:

1. The agency can only act within the limits set by statutes.

2. The agency actions must
 a. Be reasonable (e.g., have sufficient factual support in the record)
 b. Not be arbitrary or capricious
 c. Not be an abuse of discretion.

3. The agency must follow specified procedures. In particular, it must provide notice to the public of the proposed action and take into consideration public comment before issuing a final rule.

There are two types of rule-making described by APA: formal and informal. The formal one is used by agencies responsible for economic regulation of an industry and is only required when the rule is stated to be "done on the record." It involves hearings and presentation of documents to support the rule in front of a Commission or judge. The most common process used by agencies, however, is informal rule-making, or notice and comment rule-making. For informal rule-making, the agency or department first proposes a rule or standard and invites public comment through a Notice of Proposed Rule-making (NOPR or NPRM). In order to get information from the public in advance of issuing a proposed rule, sometimes an Advanced Notice of Proposed rule-making (ANPR or ANPRM) is issued.

Besides Formal and Informal rule-making, standards and rules are sometimes issued outside the process previously described. This is the case of interpretative rules and policy statements that do not carry the force of law, but are often biding in practical effect.

The regulatory development process is shown below:

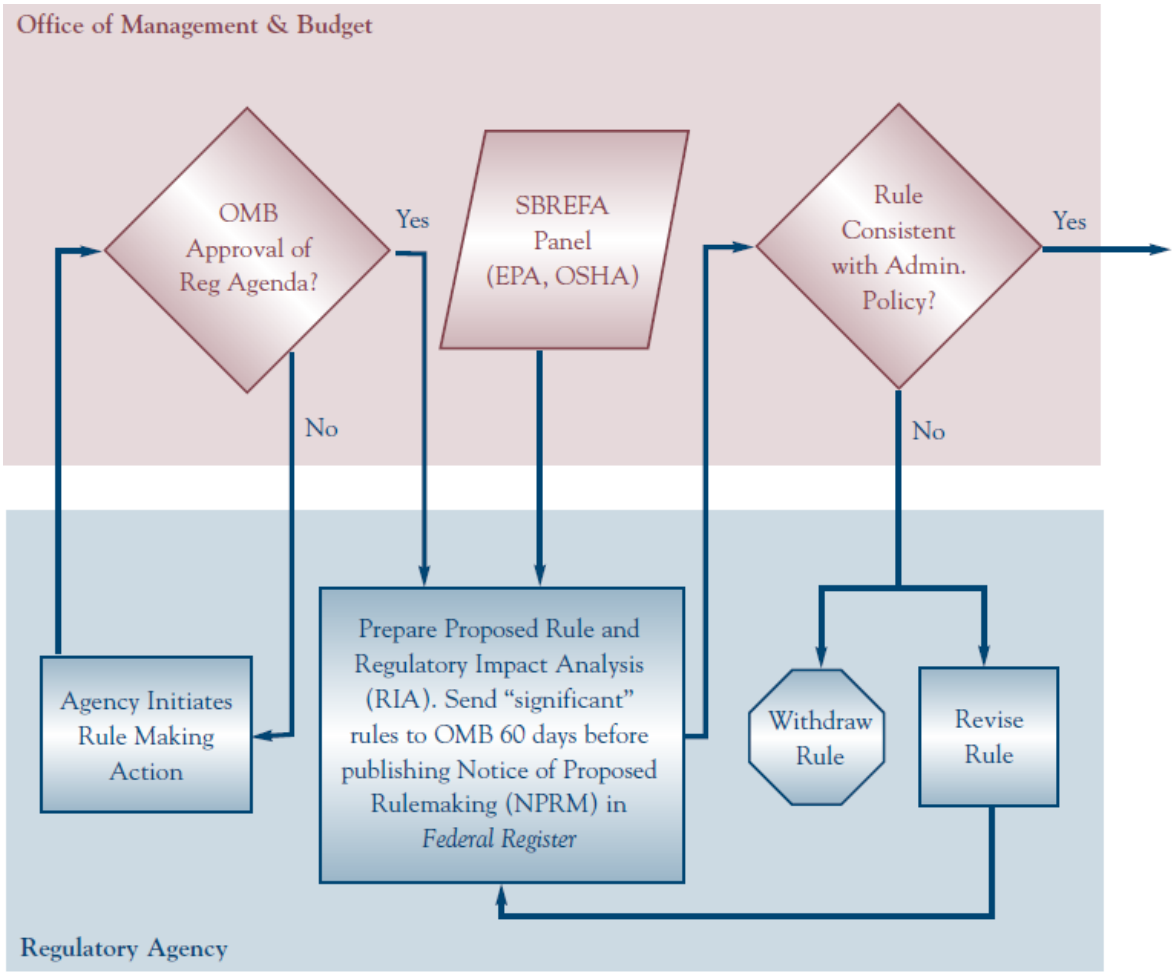

Figure 6: Initiation phase [8]

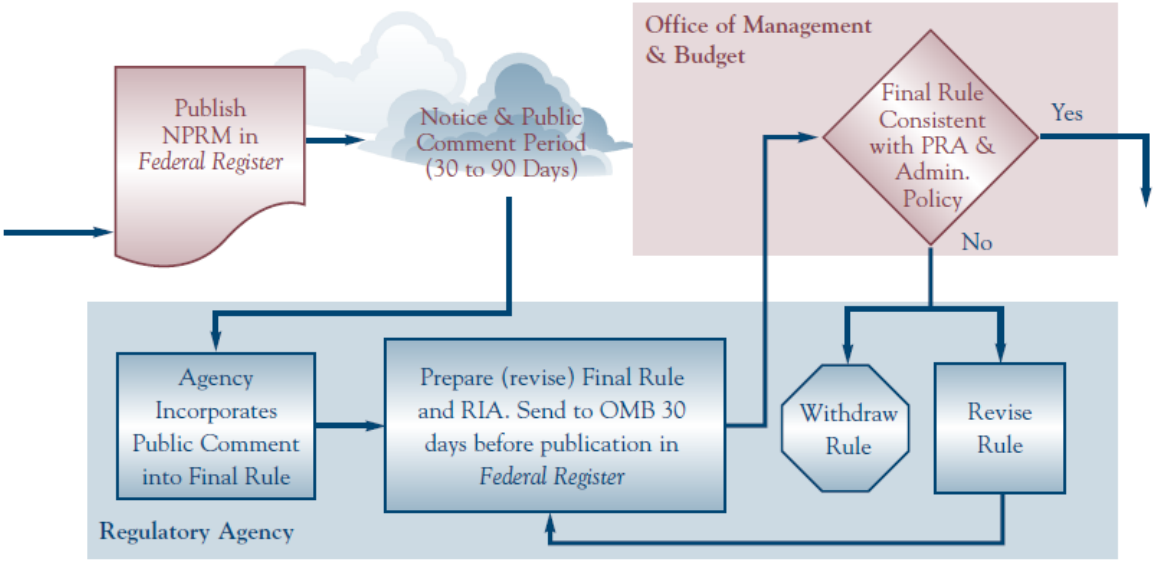

Figure 7: Notice, Comment and finalization [8]

Figure 8: Publication and possible review [8]

4.2 Control mechanisms

In the United States both the executive and the legislative carry out strong regulatory oversight, the President throughout a central management office accountable directly to him and the congress through a system of oversight committees and investigations by its organs such as Government Accountability Office. The concerns of the two branches of government may not always coincide; a congressional committee, for example, may focus on implementation of a specific regulatory law, while the President may focus on the functioning of the regulatory system as a whole, consistency with empirical tests of benefit-cost and cost-effectiveness, and its consistency with his policies.

Many steps to the procedures of issuing and reviewing regulations have been taken by Congress and Presidents, in which can be seen a competition for influence over regulatory decisions, hence contributing to create a centralized and hierarchical oversight process in the executive branch. The Office of Management and Budget (OMB) has become the most powerful of central oversight bodies in any OECD country and reflects the strong constitutional power of the President in overseeing the executive branch.

The OMB is responsible for preparation of President's budget, legislative review, information policy, financial management, and procurement policy. The Office of

Information and Regulatory Affairs (OIRA) role is to review the regulations and the impact analyses in order to identify decisions and policies that are not consistent with the President's policies, principles, and priorities; to coordinate among agencies; to discuss any inconsistencies with the regulators, and to suggest alternatives that would be consistent.

OIRA reviews the most important regulations three times: (1) at the planning stage during preparation of the annual Regulatory Plan; (2) at the proposed stage before they are published for comment in the Federal Register (the national gazette); and (3) at the final stage before publication as a finished rule. In addition, OIRA has legal authority under the Paperwork Reduction Act to review and nullify any "information collection" requirement imposed on citizens, businesses, or state and local governments. In effect, it is the President's intermediary in overseeing the regulatory apparatus.

The Congress also monitors regulatory agencies through oversight committees. Oversight hearings conducted by Congress can hear the testimony of agency representatives concerning regulatory actions. The Congress can also pass new laws with new directives that must be observed by agencies.

Some of the most important regulatory reviews are: [8]

- Paperwork Reduction Act (PRA), which established OIRA within OMB to review the paperwork and information collection burdens imposed by the federal government.

- Regulatory Flexibility Act (RFA), discussed above, which requires agencies to assess the impact of a regulation on small businesses and provides for review by the Small Business Administration Office of Advocacy.

- Small Business Regulatory Enforcement Fairness Act (SBREFA), which enforces requirements for small business impact analyses under RFA.

- Congressional Review Act (CRA), contained in SBREFA, which requires rule-issuing agencies to send all mandated documentation that is submitted to OMB to Congress, and allows Congress to overturn regulations within a specified time with a Congressional Resolution of Disapproval.

- Unfunded Mandates Reform Act (UMRA), which limits the ability of regulatory agencies to place burdens on state, local, and tribal governments.

- Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (section 638(a)), which requires OMB to report to Congress yearly on the costs and benefits of regulations and recommendations for reform.

- Truth in Regulating Act of 2000, which gives Congress the authority to request that GAO conduct an independent evaluation of economically significant rules at the proposed or final stages.

- Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, commonly known as the "Information Quality Act," which required OMB to develop government wide standards for ensuring and maximizing the quality of information disseminated by Federal agencies. Under the guidelines, agencies must follow procedures for ensuring the utility, integrity, and objectivity of information used in rulemaking and elsewhere, and offer an administrative mechanism for responding to public requests to correct poor quality information that has been or is being disseminated.

4.3 The midnight regulation phenomenon

The power granted to regulatory agencies in the U.S. has as a consequence the dispute between other administrative bodies to control the agencies. In fact, as described in the previous section, the Congress has several mechanisms to overrule the agencies actions. On the other side, the executive also has the power to use the agencies as a mechanism to

set policies. Furthermore, it can be used as a substitute of the regular process of issuing regulations.

The term midnight regulations refers to the increase in regulations promulgated at the end of presidential term, especially during transitions to an administration of the opposite party. [9] Jay Cochran's explanation for this phenomenon is what he calls the Cinderella constraint. He explains, "as the clock runs out of time on the administration's term in office, would-be Cinderellas—including the President, cabinet officers, and agency heads—work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight." [10]

This problem is a result of presidential lack of accountability during the time after the November election and before Inauguration Day. Thus, as the legislative process slows down, Presidents have ample resources to make policy changes that may not have a little chance in the regular process. Additionally, the President has an incentive to use these resources, due to the fact that he knows the new President's policy positions and the legislative priorities.

An incoming President faces a big challenge dealing with these midnight regulations. Presidents can issue executive orders, proclamations, and rules to overturn actions taken by their predecessors. They can also block the implementation of the outgoing President's orders. However, more often than not, incoming Presidents cannot alter orders set by their predecessors without paying a considerable political price or confronting serious legal obstacles.

The last four incoming U.S. Presidents have issued memoranda immediately upon taking office in order to stop the midnight regulations of his predecessor. The memos direct agencies not to send regulations to the Federal Register until they are approved by policy officials appointed by the new President and to retrieve from the Federal Register all regulations not yet published. [11] Thus, regulation is one of the few areas of domestic policy that an incoming President can immediately control.

In order to illustrate this phenomenon, a proxy normally used is the number of pages added to the federal register during transition periods, as shown below:

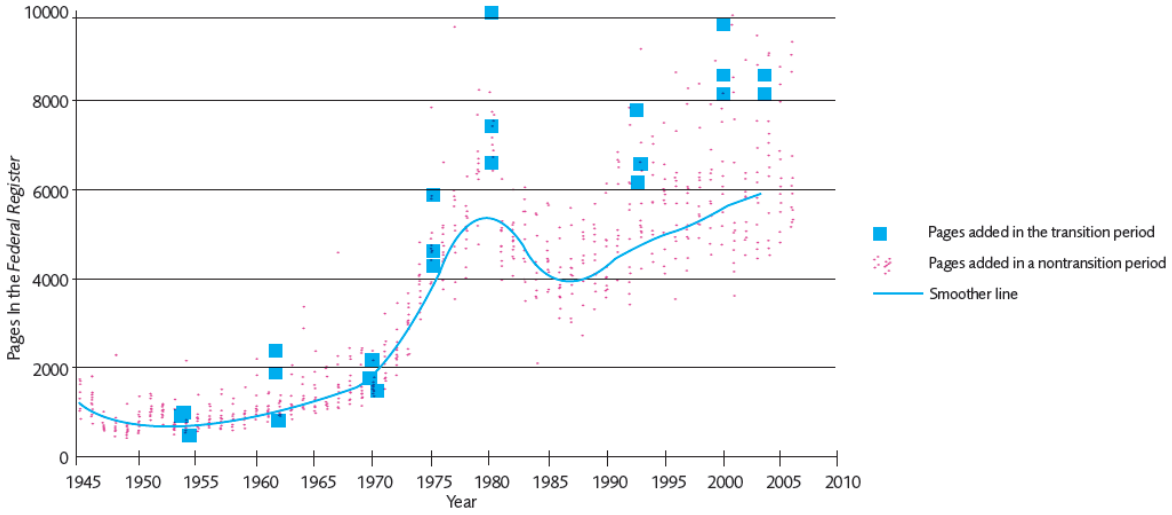

Figure 9 - Midnight phenomenon – illustrative proxy [9]

5. CONCLUSION

The main contribution of this work is to envisage that regulatory agencies' role, especially ANEEL's, can be better oriented in order to help the Executive while running formulation and development of public policies. This does not mean that the agencies should substitute the Executive responsibilities. On the contrary, they must join efforts so that macro policies, enhanced by the regulator's point of views, could be designed in favor of Brazilian community and other market agents.

The agencies can support government decisions since, using a bottom-up approach; they are closer to the sector agents. Ideally, they are meant to balance the interests of the diverse players (government, the business sector, consumers), while reassuring private investors. However, this is a challenging task in Brazil, where social participation is low. In some sectors, decision-making is often seen as paying more attention to the interests of the regulated entities than to those of consumers, and some rebalancing is necessary. Transparency, consultation and evidence-based decision-making will also help to improve the conditions of the public debate and help the country to better serve the needs of its citizens. This will also help to develop the institutional capacity for sustained long term economic growth that will increase economic resilience and maintain appropriate incentives for investments in core infrastructures.

Two main suggestions are derived by this work, using the premise that regulatory agencies should not issue public polices, but, nevertheless should contribute in the process. Firstly, there should be a better communication between Regulatory Agencies and government, especially with the Congress. The agencies could have participation in the internal committees, at least as a consultative body. Secondly, consideration should be given to the possibility of agencies participation in the councils in the executive. For example ANEEL could take part as a member of National Council for Energy Policy (CNPE). These suggestions would lead to better actions through the policy formulation process.

The aim is to provide better choice of policy instruments. With more interaction with the agencies the government will be able to choose the most efficient and effective

policy tools, whether regulatory or non-regulatory. It will also lead to a better understanding of the law and regulatory effects, that is, to what extent new laws influence regulatory acts. As a consequence, policies will be more effective and efficient.

Some actions have already been taken. For example, the Brazilian government, through the *Casa Civil* (Presidential Staff Office) and in conjunction with the Ministry of Finance and the Ministry of Planning, Budget and Management, is setting up a Programme for the Strengthening of the Institutional Capacity for Regulatory Management (PRO-REG) to contribute to the improvement of the regulatory system and increase co-ordination among the institutions that participate in the regulatory process. In addition, PRO-REG envisages the establishment of an oversight body for regulatory quality and the introduction of Regulatory Impact Analysis (RIA) as a policy tool to support decision making.

6. REFERENCES

[1] Alston, J. Lee; Melo, M. André; Mueller, Bernardo; Pereira, Carlos, Political Institutions, Policymaking Processes and Policy Outcomes in Brazil, University of Colorado, Universidade Federal de Pernambuco, Universidade de Brasília, Michigan State University, March, 2006.

[2] Maggetti, Martino; The Role of Independent Regulatory Agencies in Policy-Making: a Comparative Analysis of Six Decision-Making Processes in the Netherlands, Sweden and Switzerland; University of Lausanne, 2009.

[3] Paulo, Vicente; Alexandrino, Marcelo, Diretito Administrativo, Editora Impetus, 2003.

[4] Vasconcelos, R. A. L, Brazilian Regulatory Agencies: Future perspectives and the challenges of balancing autonomy and control, Minerva Program, George Washington University, 2009.

[5] Rocha, M. Bolivar, Institutional arrangements for the devising and implementation of public policy, A Regulação da Infra-estrutura no Brasil – Balanço e propostas, 2003.

[6] Grupo de trabalho Interministerial, Análise e avaliação do papel das agências reguladoras no atual arranjo institucional brasileiro, Presidência da República, 2003.

[7] Regulatory reform in the United States – Government capacity to assure high quality regulation, OECD, 1999.

[8] Dudley, Susan E., Mercatus policy Series – Primer on Regulation, November, 2005, Mercatus Center, George Mason University.

[9] Brito, Jerry, Mercatus policy Series – For whom the bell tolls – The midnight regulations phenomenon, November, 2005, Mercatus Center, George Mason University.

[10] Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters", working paper, Mercatus Center at George Mason University, 2001.

[11] Dudley, Susan; Fraas, Arthur; "The Future of Regulatory Oversight and Analysis," Mercatus Policy Series, No. 51, May 2009.